

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

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

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## **Purpose of this Document:**

The purpose of this document is to provide NC Public School Units with guidance and answer Frequently Asked Questions about fiscal requirements related to the funds provided under the Elementary and Secondary School Emergency Relief (ESSER) Funds, including ESSER I, II, and III.

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

References and hyperlinks are included in the Appendix to policies, statutes, and regulations cited.

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 the PSU board attorney(s) in making decisions.

# Frequently Asked Questions Related to ESSER Spending and Construction Projects

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## 1 Allowable Costs

### 1.1 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.

### 1.2 Can Subscription Cost be charged to ESSER projects? (ADDED 1/17/2024)

Examples of subscription costs can include Costs for E-Book services, extended warranty, service contracts, maintenance agreements and other services over time.

Subscription expenditures must align with purpose and allowable uses in accordance with federal law in preventing, preparing for, and responding to COVID-19. Please see allowable uses outlined in the State Board approved NCDPI Allotment manual and discuss with your Federal Program Administrator.

### 1.3 Can Subscription be extended after September 30, 2024? (ADDED 3/12/2024)

Yes, for ESSER III funding, to the end of the liquidation period, December 29, 2024.

The North Carolina Department of Education (NCDPI) has determined that when multi-year subscriptions or licenses become a more reasonable and prudent use of federal funds than the annual, due to cost savings of a multi-year purchase, the reasonable period for such activities is until the end of the liquidation period for ESSER funding. For example, if ESSER III funds are used to purchase a multi-year subscription, the reasonable period would be until December 29, 2024, end of the liquidation period. Therefore, multi-year subscriptions and licenses purchased with ESSER funding must be prorated to the end of the liquidation period.

For ESSER II funding, multi-year subscription and licenses must be prorated to December 29, 2023.

## 2 Procurement Requirements

### 2.1 Where are the North Carolina State Procurement laws?

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

### 2.2 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 Uniform Guidance 2 CFR §§ 200.319 and 200.320.

Note: 2 CFR § 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 2 CFR § 200.320. In addition, procurement must comply with local governments procurement policy and all state and federal procurement requirements, whichever are more stringent.

**2.3 If the project cost is more than the Covid-19 grant funding available, can the school supplement this budget with additional funds, as long as the project is completed by the required dates of the COVID-19 grants?**

Yes. Although project cost funding is split, you must follow all the regulations set forth by the Uniform Guidance AND limitations set forth by the other funding source(s).

**2.4 Do Charter Schools have to follow Federal Procurement Laws for ESSER related purchases? (ADDED 12/19/2023)**

All expenditures for ESSER related purchases must be in accordance with North Carolina and Federal Purchasing regulations, in the case of redundant regulations between state and federal regulations, the more restrictive regulation would apply. See 2.2 of this FAQ.

**2.5 Can North Carolina State Term Contracts be used for Federal ESSER Purchases? (ADDED 4/5/2024)**

The Uniform Guidance requires competitive bidding for all procurement transactions. (2 CFR § 200.319)

If the State Term Contract is based on competitive bidding, then purchasing with ESSER funds would be allowable. However, not all State Term Contracts use competitive bidding process as the basis for procurement.

To determine if a State Term Contract is based on competitive bidding, review the bidding information which is included with each State Term Contract. The information will indicate if the evaluation was based on competitive bidding or on 'Best Value'.

If the State Term Contract is either 'Best Value' or discount basis, procurement with ESSER funds would not be allowable. The procurement must be based on competitive bidding consistent with Uniform Guidance to be allowable.

**3 Period of Performance, Obligations, and Liquidations**

**3.1 Confirm ESSER funds need to be encumbered by September 30, 2024 deadline? (UPDATED 9/1/2023)**

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 NCDPI's website. In summary:

	<b>Period of Performance</b>	<b>Liquidation Period</b>
ESSER I	September 30, 2022	January 28, 2023

ESSER II	September 30, 2023	December 29, 2023
ESSER III	September 30, 2024	December 29, 2024

A PSU has until September 30, 2022, to obligate ESSER I funds, this includes 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 2 CFR § 200.344(a), ESSER and GEER funds must be liquidated within 120 calendar days of the end of the performance period. To comply with the regulation, PSUs must submit their final reports to NCDPI within 90 calendar days after the subrecipients' periods of performance.

**Added 4/12/2023.** For clarification, the extended liquidation period is not intended to give additional time for the period of performance without justification or rationale. Planning to complete a project beyond the liquidation date is not justification or rationale for extending the period of performance. This is intended for impacts due to unforeseen circumstances or delays and market impacts.

**Added 9/1/2023.** 2 CFR §200.344 increased the federal grant closeout timeline from 90 days to 120 days. Based on our interpretation, in FY 2022 NCDPI increased the liquidation period for PSU's to the 120 days. However, the revision increased the number of days for grantees, NCDPI, to submit all final reports and liquidate all financial obligations from 90 days to 120 days. See U.S. Department of Education (USED) Grant Policy Bulletin GB 21-01.

The requirement for subrecipients to submit their final reports to grantees within 90 calendar days after the subrecipients' periods of performance is still 90 days and is being re-established by NCDPI. NCDPI will have the remaining 30 days of the 120-day period to conduct state-level closeout and meet compliance requirements.

This means for all grants, whose period of performance is ending September 30, 2023 (including ESSER II programs) that the LEAs have until December 29, 2023 to liquidate all qualified encumbrances incurred as of September 30, 2023.

This change is necessary to ensure NCDPI can meet the requirements of 2 CFR §200.344 to close out grants, which includes all cash drawdowns and expenditure reporting requirements of the Federal awarding agencies, within 120 days of the period of performance.

### 3.2 How is "encumbered" defined?

The North Carolina General Statute (NCGS) defines "Encumbrance" as -

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. (NCGS § 143C-6-23(a)(3))

The US Department of Education (Department) federal regulations at **34 CFR § 76.707** govern when an obligation occurs for ESSER and all other Department grant funds.

The following table illustrates when funds are obligated for various kinds of property and services:

If the obligation is for -	The obligation is made -
(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.
(i) Credit Card Purchases	On the date the purchase is made

**3.3 Does the work need to be done by the September 30, 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 December 29, 2024. See question 5 for a definition of obligation and to identify the period of performance and liquidation dates for each ESSER grant.

Public School Units (PSU) 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.

**3.4 If our work isn't completed by the September 30, 2024 deadline can we get an extension and what would be needed in the extension request?**

Public School Units (PSU) 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 U.S. Department of Education (USED) 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 USED ESSER and GEER Use of Funds FAQ, Question E-3.b.

### **3.5 When must ESSER I, ESSER II, ARP ESSER III, GEER I, and GEER II funds be liquidated? (UPDATED 9/1/2023)**

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 2 CFR § 200.344(b). To comply with the regulation, PSUs must submit their final reports and liquidations to NCDPI within 90 calendar days after the subrecipients' periods of performance. If ESSER I and GEER I funds are properly obligated by September 30, 2022, but liquidation becomes an issue after the obligation deadline, the U.S. Department of Education (USED) may approve liquidation extension requests on a case-by-case basis, upon written request of the State Education Agency (SEA) or Governor grantee, in accordance with 2 CFR § 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 34 CFR § 76.707. Because the ESSER II and GEER II obligation period does not end until September 30, 2023, and the ARP ESSER III obligation period does not end until September 30, 2024, the USED strongly encourages States and PSUs to obligate and liquidate ESSER II, GEER II, and ARP ESSER III funds with urgency on activities that will support students' academic recovery and mental health needs.

**Added 9/1/2023.** 2 CFR §200.344 increased the federal grant closeout timeline from 90 days to 120 days. Based on our interpretation, in FY 2022 NCDPI increased the liquidation period for PSU's to the 120 days. However, the revision increased the number of days for grantees, NCDPI, to submit all final reports and liquidate all financial obligations from 90 days to 120 days. See [U.S. Department of Education \(USED\) Grant Policy Bulletin GB 21-01](#)

The requirement for subrecipients to submit their final reports to grantees within 90 calendar days after the subrecipients' periods of performance is still 90 days and is being re-established by NCDPI. NCDPI will have the remaining 30 days of the 120-day period to conduct state-level closeout and meet compliance requirements.

This means for all grants, whose period of performance is ending September 30, 2023 (including ESSER II programs) that the LEAs have until December 29, 2023 to liquidate all qualified encumbrances incurred as of September 30, 2023.

This change is necessary to ensure NCDPI can meet the requirements of 2 CFR §200.344 to close out grants, which includes all cash drawdowns and expenditure reporting requirements of the Federal awarding agencies, within 120 days of the period of performance.

### **3.6 Will NCDPI request an extension from U.S. Department of Education (USED) to allow PSUs to liquidate any remaining ESSER funds if some capital projects have not yet been completed? (UPDATED 4/5/2024)**

The provision to request a liquidation extension has been authorized. NC Department of Public Instruction (NCDPI) filed the application for liquidation extension for both ESSER I and ESSER II.

The purpose of this extension is to allow access to funds for properly obligated and appropriately encumbered expenditures, for instances where something during the liquidation period prevented the funds being expended. A couple of examples would be supply chain issues or inspection calendars not allowing for proper delivery of goods purchased or inspections to be complete prior to the liquidation deadline. If approved, the PSU would have up to 14 additional months to liquidate these funds. For information regarding liquidation extensions, please see question 3.5 and 3.6 in this FAQ.

**Added 4/5/2024.** PSUs will have the option to send NCDPI a request for a liquidation extension for ESSER III funds after the period of performance, September 30, 2024.

### **3.7 P-Card or credit card purchases.**

P-Card or credit card purchases are obligated at the time the transaction (purchase) is completed. To ensure that funds are available after September 30th for properly obligated purchases using a P-Card, the payment amount must be encumbered.

## **4 Equipment**

### **4.1 What if the equipment purchased or modified with ESSER Funds is no longer being used for its intended purpose? (UPDATED 4/5/2024)**

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. (2CFR § 200.313(c))

If equipment or supplies in the aggregate value of \$5,000 are no longer used for the original purpose or program, the PSU must follow disposition rules outlined in 2 CFR §§ 200.313(e) and 200.314(a).

**Added 4/5/2024.** In addition, OMB Standard Form 429 Attachment C must be submitted. (See question 6.16 in this FAQ for additional information)

## **5 Davis-Bacon Act**

### **5.1 Tell me about the Davis-Bacon Act (DBA)?**

- Davis-Bacon and related Acts is also known as the “Construction Wage Rate Requirements statute.”
- For construction, alteration, and/or repair, including painting and decorating, work costing over \$2,000, financed with federal funds, the laborers and mechanics must be paid not less than the prevailing wage and fringe benefits for the geographic location. (29 CFR Part 5)
- The requirement must be included in all contracts and subcontracts using federal funds.
- The requirement must be written in the contract.
- A poster is to be posted at the jobsite on the topic.
- Contractors are obligated to pay wages weekly and provide the PSU contracting officer with a weekly certification.

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

Yes.

### **5.3 How often do Davis-Bacon reports need to be submitted?**

Weekly.

### **5.4 Does Davis-Bacon require employees to be paid weekly?**

Yes.

### **5.5 Who is responsible for collecting the Davis-Bacon reports?**

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

Each 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 § 5.2 (e)). The contractor is responsible for collecting the information from subcontractors.

### **5.6 Is there a specific form for reporting Davis-Bacon Act 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 CFR Subtitle A), as to payrolls submitted in connection with contracts subject to the Davis-Bacon and related Acts.

### **5.7 What projects require Davis-Bacon compliance?**

The terms *construction, prosecution, completion, or repair* mean the following: All types of work done on a public building or work at the site thereof, including work at a facility which is deemed a part of the site of the work by laborers and mechanics employed by a construction contractor or construction subcontractor.

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

For contract language please consult with the PSU board attorney. The laws and regulations related to Davis-Bacon Act are found in the Uniform Guidance 2 CFR Part 200 Appendix II (D).

### **5.9 Where do we find the Davis-Bacon Wage Rates? (ADDED 5/11/2023)**

The Davis Bacon Prevailing Rates can be found at the Wage Determinations page on the System for Award Management website ([SAM.gov | Wage Determinations](https://sam.gov/wage-determinations)). If the WD number (Wage Determination for the area) is unknown, click on either "Public Building or Works" or "Service Contracts," under the heading "I do not know the number." On the next page, select the state, the county and the construction type, an example is at: <https://sam.gov/wage-determination/NC20230040/1>

## **6 Construction**

### **6.1 What documents are required of the General Contractor to be submitted per ESSER Requirements, beyond Prevailing Reports?**

The General Contractor (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. 2 CFR § 200.323
- Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms which are discussed in question #. 2 CFR § 200.321
- Bonding requirements. 2 CFR § 200.325
- Davis-Bacon Act requirements as noted in question 2 CFR Part 200 Appendix II (D)
- Contract Work Hours and Safety Standards Act 2 CFR Part 200 Appendix II (D)
- Debarment and Suspension responsibilities to ensure subcontractors are not on the federal suspension or debarred list 2 CFR § 180.220(c)
- All other contract terms and conditions as required by Uniform Guidance 2 CFR Part 200 Appendix II, as applicable.

## **6.2 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.

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. NCGS § 143-128.2, and § 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 the PSU board attorney to determine any submission requirements to the State related to NCGS.

## **6.3 Do ESSER funded projects have MWBE requirements?**

Yes, 2 CFR § 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.

#### **6.4 Does the Project Budget/GMP have to be reviewed by anyone (Federal or State) other than the local school district?**

Once the construction project is approved by NCDPI in the grant application, NCDPI 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 NCDPI, costs associated with the project must be necessary and reasonable. 2 CFR § 200.404.

#### **6.5 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 2 CFR § 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. 2 CFR § 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 2 CFR § 200.403(b) and § 200.420.

- CFR § 200.403(b) Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.
- 2 CFR § 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 per 2 CFR § 200.324 and time-and-materials type of contracts can be used in very limited situations per 2 CFR § 300.318j.

#### **6.6 What are the Documentation Requirements for ESSER Construction Projects?**

2 CFR § 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 2 CFR [§ 200.317](#) through § 200.327. Specifically, 2 CFR § 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 Section 5, the Davis-Bacon section of this FAQ.

**6.7 Does the construction work need to be done by the September 30, 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 Questions and Answers in Section 3 - Period of Performance, Obligations, and Liquidations

**6.8 If our construction work isn't completed by the September 30, 2024 deadline can we get an extension and what would be needed in the extension request?**

See Questions and Answers in Section 3 - Period of Performance, Obligations, and Liquidations

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

NCDPI School Planning conducts Design Reviews, but typically does not issue comments related to contractor Budget Estimates or GMP proposals.

**6.10 Is the NCDPI "Certificate of Review" required before work can begin in the field? Can work begin, at risk, ahead of receipt of the "Certificate of Review"?**

NCDPI School Planning issues a "Certificate of Review" upon completion of the Design Review process for Local Education Authorities (LEA). 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.

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

Generally, installation or replacement of a HVAC unit is considered construction.

**6.12 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 NCDPI Construction presentation and the EDGAR definition for construction to assist in determining whether a project is considered construction.

**6.13 Can ESSER funds be used for construction projects that would produce revenue, e.g., stadiums, tracks, etc.? (UPDATED 4/12/2023)**

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. 2 CFR § 200.307.

**Added 4/12/2023.** After September 30th of the grant's period of performance, there are no federal requirements for the disposition of program income, however recipients should negotiate with the US Department of Education (USED) over appropriate uses of the income. 2 CFR § 200.307(f).

**6.14 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 2 CFR § 200.307 for additional information.

### 6.15 Explain the 50-year interest requirement.

Use of federal funds for construction requires school either have title (own) of 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 (34 CFR § 75.603).

### 6.16 Explain the Federal Interest filing requirement. (REVISED 04/5/2024)

**Added 4/3/2024.** The U.S. Department of Education’s (USED) new guidance, released on 3/21/2024, directs all grantees and subgrantees to file notice of Federal Interest (NFI) for renovation, major remodeling, construction or other real property projects that use \$1 million or more in Federal funds by **January 28, 2025**. ([USED Recording and Reporting Federal Interest](#))

Public School Units (PSU)/LEAs should check with their local jurisdiction for instructions on how to record the NFI. Typically, there are six general requirements for an NFI:

1. 1. The NFI must reference the appropriate P/R Award Number, i.e., P425XXXXXXX (this can be found in Box 2 of your Grant Award Notification (GAN)).
2. 2. The description of the project should clearly describe the approved construction project, renovation, or purchase supported in part or whole by grant funds.
3. 3. The legal description should be preferably the full legal description of the property in the deed. However, Township and Range, or Map, Block, and Lot number will be accepted. A physical address may be included, but it does not constitute a sufficient legal description by itself.
4. 4. The signatory of the NFI should be the owner of the property or authorized representative. This indicates the owner’s consent to have a lien filed on the property.
5. 5. The NFI must then be notarized and embossed with a notary seal.
6. 6. The NFI must then be recorded with the applicable jurisdiction

As provided previously, please file the OMB Standard Form SF-424D with the NFI with the local jurisdiction in which the real property is located.

Projects which use less than \$1 million in Federal funds, are generally exempt from NFI filing requirements. However, filing of NFI may be required if the proportion of the “vast majority of the total value” is funded with Federal funds or the PSU/LEA is in high-risk status. Please review the [USED Recording and Reporting Federal Interest](#) for additional information.

**Note:** Regardless of the filing requirement, Federal interest exists if projects use federal funds to modify/improve or acquire real property.

**Added 4/12/2023.** Question B-6.e. of USED ESSER and GEER Use of Funds FAQ dated 12/07/2022, requires the PSU “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.” Please consult with the PSU board attorney regarding the local jurisdiction’s requirements for filing the NFI.

The LEA must record the notice of federal interest in the official real property records for the jurisdiction in which the new or renovated facility is located as soon as possible, but ideally as it receives approval from the SEA to construct or renovate the facility. For example, if ESSER funds are supporting 20 percent of the cost of the construction project, the Federal interest in the building would be recorded as 20 percent. As a reminder, the LEA is subject to the annual reporting requirements in 2 C.F.R. § 200.330 and the disposition rules in 2 C.F.R. § 200.311. In addition OMB Standard Form SF-424D (Assurances – Construction Programs) should be filed with the Notice of Federal Interest.

#### **6.17 How is the share of Federal Interest Determined? (ADDED 4/5/2024)**

For Determining the share of federal interest, see item number 14f, “Real Property Cost,” on OMB’s Standard Form (SF) 429 Attachment A. The SF-429 Attachment A and instructions can also be obtained from Grants.gov [grants.gov/forms/forms-repository/post-award-reporting-forms](https://grants.gov/forms/forms-repository/post-award-reporting-forms)):

- SF-429-A Real Property Status Report ATTACHMENT A (General Reporting)
- INSTRUCTIONS FOR THE SF-429 Real Property Status Report

**Added 4/5/2024.** In general, the amount of Federal interest is calculated using the definition of “Federal interest” in 2 CFR § 200.1: For purposes of § 200.330 or when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the (1) the percentage of Federal participation in the total cost of the real property, equipment or supplies; and (2) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs. Please note that the calculations must be based on the value of the improvement to the current fair market value of the building, not the building’s original cost.

The market value of renovations/alterations will change over time and this needs to be reflected as annual reports are filed.

#### **6.18 Can NCDPI Provide Legal Advice regarding the notice of Federal Interest (NFI) filing requirement? (ADDED 12/19/2023)**

No. The notice of Federal Interest (NFI) filing can vary by local jurisdiction and needs to be addressed by an attorney who is familiar with the local filing requirements, usually the board attorney.

#### **6.19 Is there a dollar threshold for which a Notice of Federal Interest (NFI) would be required? (REVISED 4/5/2024)**

**Added 4/5/24.** See Question 6.16 of this FAQ for new guidance regarding the dollar threshold for NFI filing requirement.

#### **6.20 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 2 CFR § 200.319 (b) allows for the selection of architecture and engineering services where price is not a selection factor. 2 CFR § 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.

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

Uniform Guidance 2 CFR § 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.

2 CFR § 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.

## **6.22 What documents are required to be remitted to NCDPI related to construction projects? (REVISED 4/5/2024)**

A Local Education Agency (LEA) must submit:

- Design documents for review. See Questions 6.9 and 6.10 of this FAQ.
- Report to NCDPI at least annually on:
  1. The non-Federal entity must submit annually an inventory listing of federally owned property (2 CFR § 200.312)
  2. The status of real property in which the Federal Government retains an interest, regardless of NFI requirement. (2 CFR § 200.330)
  3. All grantees and subgrantees that have property that was modified, improved, or acquired, in whole or in part, by Federal grant funds, must submit a Real Property Status Report OBM Standard Form 429 (SF-429) Cover Page along with other applicable SF-429 Attachments (A or C).
  4. Typically, a grantee or subgrantee will submit the cover page from and Attachment A. Attachment C. is only used when there is a real property disposition; if there is a disposition, please contact your program officer for further instructions. OMB SF-429 Cover Page and Attachments (A or C). can be found here: <https://grants.gov/forms/forms-repository/post-award-reporting-forms>

Note: Real Property is defined in 2 CFR § 200.1 as “land, improvements, structures and appurtenances, thereto, but excludes moveable machinery and equipment. Moveable equipment may include moveable HVAC equipment, mobile classrooms, building furniture, and other similar items.

## **6.23 Who signs the OMB Standard Form 424D as the “Authorized Certifying Official”? (ADDED 12/29/2023)**

An individual from the PSU who is duly authorized to do the certification or the PSU board. Please consult with the PSU board attorney for questions related to “Authorized Certifying Official.”

## **6.24 What do we need to do if the federally funded construction project/real property assets (1) need to be disposed of or (2) modify/change the use of the real property?**

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. (2 CFR § 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. See [U.S. Department of Education Frequently Asked Questions ESSER and GEER Programs updated 12/7/2022](#), 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. (2 CFR § 200.311(c))

**6.25 If an HVAC/Mechanical System project is using ESSER funds, is there any unforeseen complication from accepting a one-time rebate from the utility company for installing high-efficiency equipment as part of the project? (ADDED 5/2/2023)**

Uniform Guidance 2 CFR § 200.406 addresses rebates (and other credits). To the extent that such credits accruing to or received by the non-Federal entity relate to allowable costs, they must be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

**6.26 If a district received approval to build a new facility with ESSER funds, can the district elect to break the construction of a new facility into different phases or subcomponents and treat them as individual projects so those specific projects can be completed by the end of the period of performance?**

In other words, if a district wanted to break the construction project up and separate the project into two parts, one procurement process and contract to use ESSER funds for the foundation of the new building and the other procurement process to contract build the facility, does the foundation project itself have to be allowable under ESSER or is it enough that the foundation is for a new facility that is part of the district's effort to prevent, prepare for, and respond to the COVID-19 pandemic? Or must the individual project (the foundation) in and of itself have to be in related to the prevention, preparation for, and response to COVID-19?

If a district plans to break the construction of a new facility into different phases or subcomponents so that the project is completed by the end of the period, the ESSER funds supporting only the early phase of construction is allowable provided that, in granting prior approval for the project, it was determined that the construction project was needed to prevent, prepare for or respond to COVID-19. Therefore, any component of the project is considered as meeting the requirement to prevent, prepare for or respond to COVID-19. An LEA using ESSER funds for construction needs to ensure that it is in compliance with the requirements outlined in the Department's ESSER and GEER Use of Funds FAQs B-6, B-6a, B-6b, B-6c, B-6d, and B-6e. How the LEA has structured the contracts for the project, even if ESSER funds only support a portion of the project, such as the pouring of the building's foundation, may impact the applicability of the requirements outlined in the DOE FAQs. The contract scope of work is used to identify the project that is expected to be performed in the period of performance.

**6.27 Are Modular Classrooms and or portable buildings considered construction and or real property?**

Portable Classrooms generally require construction of a foundation, anchoring for structural safety, sidewalks and significant plumbing and electrical work. Because of the construction work, the classrooms would be considered real property and subject to the requirement for a federal interest filing.

If the building was standalone 'not attached' building such as a storage building, without any significant real property investment, it would be considered personal property, and a federal interest filing would not be required.

This is based on NCGS § 105-164.3(205) which defines the term "real property" as any one or more of the following:

- Land
- Building or structure on land.
- Permanent fixture on land
- A manufactured home or a modular home on land.

## **6.28 Is installation of a fence considered construction and real property? (Added 5/25/2023)**

A fence installation is construction and considered real property. A federal interest form would be required. See 6.16 of this FAQ.

## **6.29 If a Public School Unit (PSU) is getting funds returned in the form of liquidated damages from an allowable ESSER expense:**

This would equate that an “applicable credit” or a “reduction-of-expenditure-type transaction”. Therefore, the ESSER liquidated damages would need to be credited back to the ESSER award or to US Department of Education if it came from ESSER grants. See 2 CFR § 200.406.

If the LEA credits the funds back to an open award, then they can be used for any ESSER allowable purpose, during the period of performance.

If the LEA does not pay the contractor, the amount of the liquidated damages, then this is considered a reduction of expenditures. The funds that are not used for the project would be available for other eligible ESSER allowable purposes.

The specific question posed was: if the LEA has a ‘reduction in cost’ can the LEA draw down funds in the amount of the liquidated damage since the cost associated with the liquidated damage is a real expense to the LEA?

The cost would be assessed through the required ESSER application process to determine whether the costs associated with the liquidated damage is an eligible ESSER allowable cost.

## **6.30 Does carpeting need to be included in the requirement for a filing notice of Federal Interest when purchased with Federal funds?**

Real Property and Real Property Improvements are subject to Uniform Guidance real property reporting and federal interest filing requirements.

To answer, a determination needs to be made as to real vs personal property.

Section III of the NC Department of Revenue manual, “Classification of Real and Personal Property,” classifies installed carpeting as Real Property. The regulation does not specifically address carpet initially installed in the building versus replacement. ([https://files.nc.gov/ncdor/documents/files/Section\\_3\\_Personal\\_Property\\_Manual\\_2019\\_0.pdf](https://files.nc.gov/ncdor/documents/files/Section_3_Personal_Property_Manual_2019_0.pdf))

The North Carolina Department of Revenue provides a table of Capital Improvements vs Repair, Maintenance and Installation Services. Page 5 indicates “Initial Installation” is Capital, whereas “complete or partial replacement of ... carpet...” is repair and maintenance. (<https://www.ncdor.gov/documents/files/important-notice-additional-information-regarding-real-property-contracts-and-retail-sales-repair/open>)

The references above are intended to provide some general guidance.

A case could be made to capitalize the carpet replacement if it ‘improves’ the building or consider it ‘repair’ if it restores the facility to its previous conditions. Capitalization would depend on the situation at each facility.

Capitalized improvements to real property would be subject to real property reporting and federal interest filing requirements. Repairs and maintenance are not subject to real property reporting requirements.

## Appendix: References

### Uniform Guidance

[Code of Federal Regulations Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards](#)

### U.S. Department of Education

[EDGAR Subpart E What Conditions Must Be Met by a Grantee?](#)

[Frequently Asked Questions Elementary and Secondary School Emergency Relief Programs/Governor’s Emergency Education Relief Programs \(Updated December 7, 2022\)](#)

[Reporting and Recording Federal Interest Property Frequently Asked Questions \(Published March 21, 2024\)](#)

### Office of Management and Budget Standard Forms

[OMB Standard Form 424D Assurances – Construction Programs](#)

[OMB Standard Form 429 Real Property Reporting](#)

### NC State Board of Education

[NC State Board of Education 2020-2024 Allotment Policy Manual - Funds Related to Coronavirus/COVID-19](#)

### North Carolina General Statute

#### Public Contracts:

- [NCGS § 143-128 Requirements for certain building contracts](#)
- [NCGS§ NCGS § 143-129 Procedure for letting of public contracts](#)
- [NCGS § 143-131 When counties, cities, towns and other subdivisions may let contracts on informal bids](#)