

Elementary and Secondary School Emergency Relief (ESSER) Program

Use of Funds FAQs School Construction

June 17, 2021



Process for Prior Approval

Does the Department determine the process that States must use for granting prior approval to their LEAs for capital expenditures?

- No. The process an SEA uses for granting prior approval to an LEA to use ESSER funds for capital expenditures (including HVAC projects) such as minor remodeling, renovation, or construction is left to the discretion of the SEA. Neither the Department nor the Uniform Guidance specifies the process that must be used.
- An SEA has the flexibility to establish its own reasonable process that ensures that the expenditures meet the applicable statutory and regulatory requirements, including those in Subpart E of the Uniform Guidance (2 CFR Part 200).



Process for Prior Approval

Does the Department determine the process that States must use for granting prior approval to their LEAs for capital expenditures? *(continued)*

- For example, an SEA could:
 - Use or modify the current procedures that it already uses for prior approval categories for other Federal programs under the Uniform Guidance.
 - Consider getting a building expert (engineer, inspector, architect) who knows applicable State, local, and Federal requirements to assist with its review of prior approval requests. The expert could be acquired on a limited basis through procurement or perhaps an interagency agreement with another State agency, such as a Public Works office or another agency with authority over facilities.
 - Consult with other States that have facilities programs for suggestions on how to implement an efficient process for prior approvals for facilities expenditures.
 - (continued on next page)



Process for Prior Approval

Does the Department determine the process that States must use for granting prior approval to their LEAs for capital expenditures? *(continued)*

- For example, an SEA could:
 - Develop a checklist of items that an LEA seeking prior approval should provide. This could include:
 - The name of the school facility the LEA is proposing to repair, construct, or modernize.
 - The identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement.
 - Sources and amounts of funds available for the proposed project.
 - A statement signed by an appropriate independent local official that: (1) the renovation or construction project meets the applicable Federal, State, or local requirements with respect to health and safety, environmental standards, Historic Preservation, and other requirements (see FAQ B-6 and 34 CFR Part 75) and (2) any deficiency that requires renovation or construction is necessary (e.g., because it threatens the health and safety of occupants of the facility or prevents the use of the facility). An appropriate local official may include a local building inspector, a licensed architect, or a licensed structural engineer.
 - A description of the need for funds as related to COVID-19 including a cost estimate and other details needed to support the reasonableness and allowability of the expenditure under the applicable statute ARP Act and cost principles in the Uniform Guidance (e.g., the original construction date and the dates and descriptions of any other major renovations of the school facility).
 - Applicable assurances and certifications (see FAQ B-6 for applicable requirements that must be met for any renovation or construction project).



Process for Prior Approval

Does the Department determine the process that States must use for granting prior approval to their LEAs for capital expenditures? *(continued)*

- Please note that some HVAC upgrades may constitute “minor remodeling” and the Department’s applicable regulations regarding construction at 34 CFR §§ 76.600 and 75.600-75.618 would not apply.
- 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.



Prior Approval and Bidding

Is SEA prior approval required before LEA bidding is advertised?

- No. SEA prior approval is not required before LEA bidding is advertised under applicable Department requirements.
- The provisions in 34 CFR §§ 75.600-617 are “as applicable” and every provision does not apply to every project. Some have cited 34 CFR § 75.605, which states in relevant part that: “Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.”
- This provision applies to direct construction projects that require approval from the Department, not those that require approval under the Uniform Guidance from an SEA. Therefore, an LEA ESSER project that an SEA is approving and has been initiated or is already underway should not have to be rebid.



Prior Approval Timeline

When must SEA prior approval occur?

- SEA approval can come at any point in the project timeline until the point that reimbursement using ESSER funds occurs.
- As described in the response to the first question, States have the flexibility to develop or refine their own prior approval processes to ensure that an allowable expenditure is reasonable and necessary and is otherwise in line with program, Uniform Guidance, and other applicable requirements. Ideally the SEA review process is complete as soon as possible on a project's timeline, but a State may utilize this flexibility at any point in the project process.
- This continuum includes up until the point when the Federal funds are actually approved for reimbursement.



Applicability of NEPA

Is NEPA applicable to LEA construction projects funded with ESSER funds?

- No. NEPA is not applicable to LEA construction projects that are funded with ESSER funds.
- 34 CFR § 75.601 requires an applicant to submit an environmental assessment of the impact on the proposed construction that is consistent with relevant provisions of the National Environmental Policy Act (NEPA). This provision only applies to construction projects that are operated and managed by the Department and require direct approval from the Department. Due to the nature of the ESSER funds, the Department does not: have a decision-making role in planning the specific projects, or directly manage the implementation or procurement for LEA projects such as the HVAC projects, or have the power to act on any environmental effects revealed by an environmental assessment.



Applicability of NEPA

Is NEPA applicable to LEA construction projects funded with ESSER funds? (continued)

- In addition, the Department does not exercise control over the use of the funds for any individual project, as long as the project continues to meet all statutory and other applicable requirements (such as the Uniform Guidance and the Department’s administrative regulations). As a result, these types of LEA ESSER projects are not considered as a “major Federal action” under the NEPA provisions and are not subject to 34 CFR§ 75.601.
- While NEPA is not applicable, the Department highly encourages States to require some type of environmental assessment for LEA projects that involve breaking new ground such as for expanding the size of an existing facility or replacing an outdated facility. This may already be required by some State laws and is a prudent step that would help to assess any potential environmental ramifications of expanding or replacing school facilities and ensure compliance with any applicable State, local or Federal environmental requirements.



If you have questions that are not addressed in this FAQ document, please send them to your State email box, [STATE].oese@ed.gov

