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## KENTUCKY DEPARTMENT OF EDUCATION

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**MEMORANDUM No. 48** *Revisions/Corrections in Italic font*

**TO: Design Professionals and Construction Managers  
Providing Services to Kentucky's K-12 Public Schools and  
Kentucky's Finance Officers and Facility Directors**

**FROM: Chay Ritter, Director, Division of District Support  
Greg Dunbar, Manager, District Facilities Branch**

**DATE: ~~April 27, 2022~~ Original date April 27, 2021 – Reissued September 12, 2022**

**RE: Elementary and Secondary School Emergency Relief (ESSER) II Funds  
702 KAR 4:160 Capital Construction Process and FACPAC Requirements**

### **Background**

To date, there have been three major COVID-19 related relief packages that potentially impact school construction. On March 27, 2020, the Elementary and Secondary School Emergency Relief (ESSER) Fund was authorized by Section 18003 of the Coronavirus Aid, Relief and Economic Security (CARES) Act to provide emergency aid to states to combat the COVID-19 pandemic. The Kentucky Department of Education (KDE) received \$193,186,874 – 90% of which is to be distributed to local education agencies (LEAs) to support their crisis response efforts. On Dec. 27, 2020, a second ESSER Fund (ESSER II) appropriation was authorized by the enactment of the Consolidated Appropriations Act of 2021. That act includes the Coronavirus Response and Relief Supplement Appropriations (CRRSA). This supplemental appropriation provides \$928,274,720 in additional emergency aid to the Kentucky Department of Education (KDE), of which 90% goes to LEAs to combat the COVID-19 pandemic. A third relief package, the American Rescue Plan Act (ARPA), became law on March 11, 2021. The ARPA Elementary and Secondary School Emergency Relief (ESSER III) contains \$2,084,773,157 for K-12 education of which 90% goes to LEAs.

### **Authorized Uses of ESSER Funds**

ESSER funds must be budgeted and spent in accordance with applicable state and federal rules. For additional information see: [COVID-19 Guidance for Schools: Elementary and Secondary School Emergency Relief Fund II \(ESSER II\)](#) and [U.S. Department of Education ESSER Fact Sheet](#). KDE's Federal Grants webpage includes a funding matrix which identifies eligible expenditures. A copy may be found on the following page:

[KDE Federal Grants](#)

April 27, 2021 *Reissued September 12, 2022*

ESSER Funds may be used for costs dating back to March 13, 2020. The time period for obligation of ESSER funds, including the Tydings amendment period, is as follows:

ESSER I until September 30, 2022;  
ESSER II until September 30, 2023; and  
ESSER III until September 30, 2024.

As is the case with all activities charged to an ESSER grant, construction costs must be reasonable and necessary to meet the overall purpose of the program, which is “to prevent, prepare for, and respond to” the COVID-19 pandemic. Therefore, any construction activities, including renovations or remodeling, that would be necessary for an LEA to prevent, prepare for, and respond to COVID-19 would be allowable.

~~District Facilities Branch (DFB) will not make determinations regarding eligible uses of ESSER funds.~~

***Projects using ESSER funds should be submitted using the normal BG-1 process and will be reviewed by KDE for approval or disapproval. District Facilities Branch (DFB) will not make determinations regarding eligible uses of ESSER funds.***

## **702 KAR 4:160 Capital Construction Process and FACPAC Procedures**

Capital construction projects utilizing ESSER funds are subject to compliance with Kentucky’s statutes and regulatory requirements related to the capital construction and planning processes administered by DFB.

In general, a BG-1 shall be submitted for any project that requires any one or more of the following:

- Professional design services pursuant to KRS Chapter 322 (engineers) and KRS Chapter 323 (architects).
- When proposing to use a restricted fund source.
- When the project includes “Need” identified on a district’s current district facility plan (DFP).
- When Model Program Areas programmatic are modified in a school (regardless of whether or not identified on a district’s current district facility plan (DFP)).

When trying to determine if a BG-1 is required, please be aware of the distinction between capital construction vs. repair and maintenance. KRS 322.360 and 323.033 contain virtually the same definition regarding repairs and maintenance.

### **KRS 322.360 Public work required to be done under professional engineer or licensed architect.**

(1) Neither the state nor any of its political subdivisions shall engage in the construction of any public work involving engineering, unless the plans, specifications, and estimates have been prepared and the construction executed under the direct supervision of a professional engineer or a licensed architect.

(2) Subsection (1) of this section shall not apply to any public work, including a highway or capital project under KRS 56.491, that involves only maintenance or repair of the facility. **Maintenance or repair shall not include any work which alters, modifies, or changes the original characteristics of the design.**

If you have questions regarding capital construction vs. repair and maintenance, please contact the KDE staff architect assigned to the district.

<https://education.ky.gov/districts/fac/Documents/KDE%20District%20Facilities%20Branch%20Project%20Managers%20List%209%203%202019.xls>

Please note the following:

- ESSER funds are considered “unrestricted” as commonly used related to the fund sources associated with Kentucky public schools’ capital construction projects. As such, these funds can be used for work not identified as “Need” on a current district facility plan (DFP).
- Projects using ONLY ESSER funds and do not modify program areas will be considered Tier 3 in order to facilitate the timely use of these funds.
- Projects which modify programmatic areas and use ESSER funds will be considered Tier 2.
- Projects utilizing multiple fund sources including ESSER funds will be considered Tier 2 or Tier 3 on a case by case basis.
- Projects utilizing ESSER funds and/or other fund sources and proposing a new school will be considered Tier I.

When proposing ESSER funds for a capital construction project, documentation provided through KDE’s Grant Management Application and Planning (GMAP) system is required. Please follow the steps below.

1. On the FACPAC BG-1, type in “ESSER I,” “ESSER II” or “~~ESSER II~~ **ARP ESSER (ESSER III)**” under “Other Funds Available” and state the amount. **When using multiple ESSER fund sources, use a separate line for each fund source.**
2. Print the BG-1 form, have all appropriate parties sign and convert it to a PDF.
3. Attach the PDF to the FACPAC BG-1.
4. Access the GMAP website.  
[https://education.ky.gov/districts/fin/Pages/Grant-Management,-Application,-and-Planning-\(GMAP\).aspx](https://education.ky.gov/districts/fin/Pages/Grant-Management,-Application,-and-Planning-(GMAP).aspx)
5. Using the “Grant Management Application and Planning System” link and the directions available through the “KDE Resources” tab, create the following:
  - A. PDF Spending Plan “Budget” for each ESSER fund source being used for the project.
6. Attach a PDF for each “Budget” to the FACPAC BG-1.
7. Before submitting the FACPAC BG-1, confirm that the following are attached:
  - A. PDF of the BG-1.
  - B. PDF for each of the ESSER Spending Plan “Budgets.”
8. Submit the FACPAC BG-1.

### **Davis-Bacon Wage Rates**

Approved construction projects must comply with applicable Uniform Grant Guidance requirements, as well as the Department’s EDGAR regulations regarding construction at 34 CFR § 76.600. As is the case with all construction contracts using laborers and mechanics financed by federal education funds, an LEA that uses ESSER funds for construction contracts over \$2,000 must meet all Davis-Bacon prevailing wage requirements and include language in the construction contracts that all contractors or subcontractors must pay wages that are not less than those established for the locality of the project (prevailing wage rates).

Specifiers, please be aware that Article 9 of the KDE Version of AIA Document A701 Instructions to Bidders – 1997 is titled Public Works Act. Paragraph 9.2 Davis-Bacon Provisions follows:

~~April 27, 2021~~ *Reissued September 12, 2022*

**§ 9.2 Davis-Bacon Act Provisions**

Projects funded with Federal Funds shall comply with the Davis-Bacon Act (Subchapter IV of Chapter 31 of the Title 40 of the United States Code). Where the amount received from federal revenue sharing is less than 25 percent of the estimated total construction cost of a public school project, state law and not the federal applies to the wage rate and the prevailing wage scale to be used for the project (OAG 74-329). Refer to Supplementary Conditions for direction regarding application of federal rates, if included in the bidding documents, to this project. In the event both state and federal wage rates apply, the higher of the two rates shall be used to determine labor costs.

Kentucky's prevailing wage requirements were abolished in 2017, therefore, for projects utilizing ESSER funding, 9.2 shall be modified to read as follows and appropriate Supplementary Conditions provided in the bidding documents:

**“9.2 Davis-Bacon Act Provisions**

*Projects funded with Federal Funds shall comply with the Davis-Bacon Act (Subchapter IV of Chapter 31 of the Title 40 of the United States Code). Refer to Supplementary Conditions for direction regarding application of federal rates to this project.”*

Information regarding the Davis-Bacon Act can be found at the following websites:

Davis-Bacon and Related Acts U.S. Department of Labor:

<https://www.dol.gov/agencies/whd/government-contracts/construction>

Davis Bacon Compliance Principles:

[https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/DavisBaconAct\\_GroupB\\_2011b.ppt](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/DavisBaconAct_GroupB_2011b.ppt)

Wage Determinations Online:

<https://beta.sam.gov/>

Your cooperation regarding this matter is appreciated.

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ec: District Facilities Directors  
District Finance Officers  
Design Professionals  
Construction Managers  
KDE/DFB Architect Memo File