



FIFTY STATE SURVEY

**Governmental Leasing:
*Surveys of Legislation and
Case Law in the Fifty States*
2019 Edition**

Published by:
**Association for Governmental
Leasing & Finance**
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Foreword

Since the initial Fifty State Survey was published in *The Urban Lawyer* 33 years ago, there have been many changes and improvements. Commencing with the 2019 Fifty State Survey, we will be updating one third of the state surveys each year. For the 2019 Survey, the following states have been updated: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas and Massachusetts.

Again, a special thanks again to Tara Mardikes for doing a great job!

The survey covers counties, municipalities, school districts, fire districts, health districts, states, and state higher education. In addition, for each entity a subsection on Energy Performance Contracting is included. The Energy Performance Contracting subsection does not go into detail, since these statutes tend to be extensive, but is instead designed to identify the location of the statutes of importance.

This Survey is designed as a reference work only. The authors have used their best efforts to compile and provide the most accurate information for the Survey. However, no warranty or representation is made as to the accuracy or completeness of the Survey, and consultation with local counsel is always advised. As the Survey is being published, courts are publishing decision, legislatures are enacting new laws and agencies are promulgating new regulations, all of which render outdated the material found in the Survey. The reader is urged to conduct his or her own independent research on any topic dealt with herein before advising others or relying upon such information in connection with particular states or transactions. Various states may have tax limitation efforts under way or recently completed which may also affect the treatment of lease-purchase financings in those states. As always, get a local counsel's opinion on transactions.

Please let us know of any corrections, changes or possible developments of which you may become aware in your business or practice relating to the Survey and its material.

The goal and beauty of the Survey is in the incremental improvements that will be made in the following years. This is where the members of the Association can provide valuable input in improving the Survey by taking the following actions:

1. If you see something wrong, let us know. If your firm has done its own research in a state and it is contrary to the survey, let us know.
2. If you learn something from negotiating with a lessee or their counsel that is contrary to the survey, let us know.
3. If you know of a good website in a state for information on governmental leasing on any level in that state, let us know.
4. If you are an attorney, please volunteer to review the survey for those states in which your firm is active. We will provide acknowledgement in that state's survey of your assistance.
5. If you know of an attorney who could review a state, let us know their name.

A great amount of work has been previously performed by various contributing authors to the Survey, without which the Survey could not be accomplished in its present form.

NOTICE

<p>The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.</p>

GOVERNMENTAL LEASING: A FIFTY STATE SURVEY OF LEGISLATION AND CASE LAW

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¹ The Fifty State Survey has been in existence since its was first published in the Winter of 1986. Many have helped author the Survey over the years. This year, I am pleased to continue working with Tara Spurlock Mardikes, Esq., who co-authored the 2008, 2010, 2012-2013, 2017-18 and 2019 Survey, and is primarily responsible for the expansion of the 2012-13 Survey to include states, state universities, fire districts and health districts. Thanks to Erik Schimmelbusch, of the Schimmelbusch Law Group, who worked with me on the updates to this Survey in 2002, 2004 and 2006. For the 1998 and 2000 Surveys, William O. Lamm, Attorney-at-Law, and Georgeann Becker of Becker Stowe & Bieber LLC, were responsible for the Survey and did an excellent job of co-authoring the revisions and updating of the Survey. Prior to them Tara Spurlock Mardikes, Esq., co-authored with me two of the Surveys during the 1990s. I did an extensive rewrite of the Survey in 1988, researching anew the whole Survey. Finally, Pamela Cone and Julie Van Horn co-authored with me the first Survey back in 1986 that was published in The Urban Lawyer.

The Survey is now on a three year schedule where one third of the states will be updated each year..

I. Nature of the Survey

A. *Use of the Survey*

This survey is designed as a reference work only. By the very nature of the material surveyed, one cannot provide digested “yes” and “no” answers.

The survey attempts to set forth the constitutional, statutory and judicial law relevant to lease-purchasing in each state, including in some instances attorney general opinions, letters from the attorney general and administrative regulations. In some instances, the exact language of these sources is quoted to allow the reader to draw his or her own conclusions.

The survey is no substitute for engaging legal counsel in the jurisdiction in which you intend to do business. The area of public finance is a nuanced and tricky area of law and the insight of local bond counsel is well worth the expense. As always, the requirement for a legal opinion from lessee’s counsel is advised.

B. *Types of Governmental Entities Surveyed*

The survey originally focused solely on counties, municipalities and school districts. The 2012-2013 expansion expanded the survey to cover states, state higher education, fire districts and health districts. Generally, the governmental entity covered in each section is defined in the footnotes. If there are home rule or charter counties or municipalities in a state, that too will be stated in the footnote defining the county or municipality. To the extent a statute or constitutional provision is applicable to a charter or home rule county or municipality, the survey will so state. Otherwise, the reader should pursue further research to determine applicability. Boroughs and townships are often included within a state survey when it appears that they provide the organizational equivalent to a county or municipality.

C. *Existence of Sovereign Powers*

For interest on lease-purchase agreements to be exempt from federal income taxation, the lessee under the lease-purchase agreement must be a “State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof.”² Political subdivision is defined as “any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.”³ Three sovereign powers have been identified: the power to tax; the power of eminent domain; and the police power.⁴ It is not necessary that all three of these powers be delegated to the political subdivision.⁵ However, if only an insubstantial amount of any or all of such sovereign powers is delegated, then the Internal Revenue Service has stated that political subdivision status has not been achieved.⁶

²Treas. Reg. § 1.103-1(a). It is also important that the lessee be empowered to enter into the lease-purchase agreement. In *Power Equip. Co. v. United States*, 748 F.2d 1130, 1136 (6th Cir. 1984), the court held that lease-purchase agreements not properly authorized by the lessee are not tax-exempt because the lessee was not “empowered” to enter into the lease-purchase agreements as required under Treas. Reg. § 1.103-1(b).

³Treas. Reg. § 1.103-1(b).

⁴*Commissioner v. Shamberg’s Estate*, 144 F.2d 998, 1005 (2d cir. 1944), *cert. denied*, 323 U.S. 792 (1945).

⁵144 F.2d at 1005.

⁶Rev. Rul. 164, 1977-1 C.B. 20; Rev. Rul. 165, 1977-1 C.B. 21.

The survey sets forth which sovereign powers are possessed by counties, municipalities and school districts in each state. Most municipalities qualify as political subdivisions, both as a “municipal corporation” and by possessing the requisite sovereign powers. Since the term “municipal corporation” is not defined, the existence of sovereign powers for municipalities is set out.

Sovereign power for the state is not addressed, but is often addressed for universities, if found.

D. *Authority to Lease-Purchase, Convey and Lease*

The survey attempts to set forth any potential source of authority for a governmental unit to enter into a lease-purchase agreement in a particular state. The statutory language varies from the power to “acquire,” “contract,” “purchase,” “lease,” “lease or purchase” to more explicit authority to “lease-purchase.” In some jurisdictions, there are comprehensive statutes authorizing lease-purchase agreements that have numerous limitations and restrictions, not all of which can be feasibly set forth in this survey. Other jurisdictions authorize the lease-purchase of property from not-for-profit corporations or authorities. In a few instances, no statutory authority to lease-purchase was found, but case law has construed and upheld lease-purchase agreements.

In each state, the statutory language that possibly confers authority to lease-purchase is set forth so that the reader may make his or her own determination whether such language confers authority. Identical statutory language may confer authority in one jurisdiction where Dillon’s Rule is no longer followed, but may not in another jurisdiction that strictly follows Dillon’s Rule.⁷ The survey does not attempt to make these determinations.

Included in this update of the survey is the authority, if found, of the governmental unit to convey or lease real and personal property, which is often necessary in real property financings where the governmental unit already owns the property to be improved and in refinancings. The survey is not exhaustive in setting forth such authority, but attempts to set forth the more important provisions. Such authority often has numerous public bidding and public notice provisions and the reader is advised as always to further research such authority.

This year extra effort was put into capturing the energy conservation authority with a separate subsection for each entity on this topic.

E. *Debt Limitations*

The focus of this section of the state surveys is to provide any authority that may be helpful or persuasive in structuring a valid and binding lessee-purchase agreement with respect to an “issuer’s” debt limitation. The sources of authority include constitutional or statutory debt limitations, cash basis laws, case law and in many instances attorney general opinions. In some jurisdictions a nonappropriation or

⁷Dillon’s Rule states:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, --not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . All acts beyond the scope of the powers granted are void 1 Dillon, *Law of Municipal Corporations*, 448-49 (5th Ed. 1911).

funding-out clause will be required, while in others a lease will not be considered “debt” so long as there is no acceleration of rentals. A few jurisdictions only allow for true leases.

Case law and attorney general opinions were scrutinized for any nonappropriation language or any provision that provided for annual renewals by the lessee. If such language was found, then the survey states so. Often the only available case law or attorney general opinion construes state debt limitations; to the extent that the authority is useful, it is discussed. In the absence of any case law or attorney general opinions construing lease-purchase type transactions, decisions construing multiple year service contracts and true leases are discussed. Old case law is included, even if the constitution and laws have changed rendering the opinion no longer of importance, to provide continuity.

F. *Interest Rate Limitations*

This section sets forth interest rate limitations potentially applicable to lease-purchase agreements. If specific interest rate limitations applicable to lease-purchase agreements were found, those rates only are usually set out. If no specific interest rate limitations were found applicable to lease-purchase agreements, then interest rate limitations applicable to a nongovernmental entity are set forth. If the interest rate limits on bonds issued by governmental units includes language such as “other evidences of indebtedness” or “other obligations,” then this is also set forth in the text of the survey. If interest rate limits on bonds is limited to only “bonds” or “bond and notes” then this language is usually set forth in the footnotes for general reference or omitted.

G. *Security Interest*

This section was removed from the 2002 Survey. Given the practice of the leasing industry to file UCC financing statements regardless of applicability of the Uniform Commercial Code to the transaction, it did not seem an appropriate use of Association resources to include this section.

H. *Miscellaneous*

This section of the survey, if included, covers any items of possible interest that do not logically fit with any of the other sections of the survey. It includes, for example, such items we come across, such as something on whether property lease-purchased to a governmental unit is exempt from property taxation, authorities on whether indemnities are permitted, unique statutes concerning perfection of a security interest, unique state filing requirements, validation provisions, etc. **Always review this section for any unique requirements in a state, some of the items we have set forth can result in an invalid lease, if not followed.**

II. The State Surveys (*see* the first page of this introduction or the actual surveys for the date of the last update)

Alabama	Indiana	Nebraska	Rhode Island
Alaska	Iowa	Nevada	South Carolina
Arizona	Kansas	New Hampshire	South Dakota
Arkansas	Kentucky	New Jersey	Tennessee
California	Louisiana	New Mexico	Texas
Colorado	Maine	New York	Utah
Connecticut	Maryland	North Carolina	Vermont
Delaware	Massachusetts	North Dakota	Virginia
Florida	Michigan	Ohio	Washington
Georgia	Minnesota	Oklahoma	West Virginia
Hawaii	Mississippi	Oregon	Wisconsin
Idaho	Missouri	Pennsylvania	Wyoming
Illinois	Montana		

ALABAMA 2019

Current through Act 2018-579, West Lawⁱ

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties may “acquire lands by donation or purchase,”⁴ and may “dispose” of property.⁵ Counties may enter into lease-purchase agreements with public building authorities.⁶ Counties may lease-purchase “tangible personal property.”⁷

In addition to and not as a limitation upon other powers and authority, any governmental entity shall have the power and authority to execute, perform, and authorize payments under any alternative financing contract relating to any eligible property deemed by such governmental entity to be necessary, useful, or appropriate to one or more lawful purposes of such governmental entity. Any alternative financing contract may provide financing or a source of funds for any or all costs of acquiring (by lease, purchase, lease-purchase, or otherwise), installing, equipping, and/or improving any eligible property and for any or all associated costs, fees, and expenses (including, without limitation, finance charges).⁸

Additional provisions related to said alternative financing contracts are as follows:

Alternative financing contracts⁹ may be for such term, provide for such renewal or extension options, provide for such terminating events, provide for the payment of such rentals, purchase installments, purchase price, and other amounts, and contain such other terms, provisions, and conditions as the governmental entity shall deem appropriate, and without limitation to the generality of the foregoing, may contain terms and conditions substantially similar to any one or more of the following:

(1) Provisions for the automatic renewal of the alternative financing contract for one or more successive periods unless affirmative action is taken by the governmental entity to terminate such alternative financing contract, and, if desired, specifying the nature of such affirmative action sufficient to terminate such alternative financing contract;

(2) Provisions for the payment by the governmental entity of interest at such fixed or variable rates of interest as such governmental entity shall deem appropriate or for the allocation of a portion of specified rentals or other payments to interest (which such allocation shall be deemed conclusively correct in the absence of bad faith);

(3) Provisions specifying the rights, remedies, obligations, and other liabilities of the parties in the event of a default or other failure to comply with the provisions of the alternative financing contract;

(4) Provisions designating whether the rights and/or obligations of the respective parties under the alternative financing contract shall be subject to assignment and/or delegation or specifying the terms and conditions under which such assignment and/or delegation shall be permitted; provided that, notwithstanding any other statute or law of the state to the contrary, in the absence of an express provision of an alternative financing contract prohibiting the assignment and/or delegation by the grantor party, such grantor party shall be permitted to assign its rights and/or delegate its obligations under such alternative financing contract without the consent or approval of the governmental entity;

¹Ala. Code § 11-3-11(a)(2).

²*Id.* § 11-80-1.

³*Id.* §§ 11-3-11(15).

⁴*Id.* § 11-18-1.

⁵*Id.* § 11-14-2. The power to “dispose” has been interpreted broadly, allowing counties to sell or lease unused property.

⁶Ala. Code § 11-15-8; *id.* § 11-56-9(a) (applies to cities as well as counties). See, *infra*, text accompanying notes 38-44.

⁷Ala. Code § 41-16A-4; *id.* § 41-16A-3(d), “Eligible Property. Any tangible personal property, or any interest therein, including without limitation any goods, supplies, materials, appliances, equipment, furnishings, and/or machinery, whether or not such items constitute fixtures.” *Id.*

⁸*Id.* § 41-16A-4.

⁹“Alternative financing contract” is defined as “a lease, lease-purchase, lease with option to purchase, installment-sale agreement or arrangement, or other similar agreement or arrangement.” *Id.* § 41-16A-3(a).

(5) Provisions establishing which party to the alternative financing contract will retain title to the subject property and which party to the alternative financing contract will bear the risk of loss with respect to the subject property and provisions establishing the circumstances in which title to and/or risk of loss with respect to the subject property shall be transferred (including, without limitation, provisions establishing any applicable purchase price or formula for computing such purchase price);

(6) Provisions specifying the consequences of theft, casualty loss, destruction, condemnation of, or other loss affecting the subject property (in whole or in part), which provisions may specify that in the event of such a theft, casualty loss, destruction, condemnation, or other loss the governmental entity shall be required to pay a stipulated amount to the grantor party and that, upon payment of such stipulated amount, title to that subject property (if not already held by the governmental entity) will pass to the governmental entity;

(7) Provisions requiring the governmental entity or the grantor party to maintain casualty insurance with respect to the subject property and/or to maintain liability, workmen's compensation, and/or other insurance coverages during the term of the alternative financing contract and specifying the application of the proceeds of such insurance;

(8) If required by the grantor party or its assignee, covenants precluding or limiting the right of the governmental entity to acquire property comparable to the subject property within a specified time (not to exceed five years) after early cancellation or termination of the alternative financing contract or the failure of the governmental entity to exercise all available optional renewals or extensions on the basis of a failure to appropriate funds for payment of amounts due under such alternative financing contract;

(9) Covenants of the governmental entity to indemnify, hold harmless, and/or defend the grantor party with respect to any or all of the transactions contemplated by the alternative financing contract and/or in connection with the subject property;

(10) Provisions allocating responsibility for taxes, duties, assessments, and other impositions applicable to the alternative financing contract, any transactions contemplated by the alternative financing contract and/or the subject property;

(11) At the option of the governmental entity, a stipulation that such alternative financing contract shall terminate without further monetary obligation on the part of such governmental entity at the close of any fiscal year of such governmental entity in the event sufficient funds shall not have been appropriated or otherwise lawfully set aside to permit the governmental entity to satisfy its obligations under the alternative financing contract during the next succeeding fiscal year of such governmental entity, including during any renewal term under such alternative financing contract; and

(12) Provisions concerning the disposition of the subject property in the event of the expiration, cancellation, or termination of an alternative financing contract for any reason (including, without limitation, default by the governmental entity thereunder); including, without limitation, stipulations that upon any such expiration, cancellation, or termination of an alternative financing contract under the terms of which either (A) the governmental entity does not have an option to purchase or otherwise to acquire title to the subject property or (B) at the time of cancellation or termination the governmental entity has not paid in full all amounts specified in such alternative financing contract in order to entitle the governmental entity to title to or transfer of title to the subject property, (i) such governmental entity shall no longer be entitled to claim any title or interest in the subject property as against the grantor party or any person claiming by, through or under the grantor party and the governmental entity shall, at its sole expense, deliver the subject property to the grantor party at the location specified in or pursuant to the alternative financing contract and in such condition as is specified in the alternative financing contract, (ii) in the event the governmental entity shall fail to return the subject property to the grantor party as described in clause (i), the grantor party shall have the right to take possession of the subject property, (iii) in taking possession of the subject property, a grantor party may proceed without judicial process if this can be done without breach of the peace or may proceed by action, and/or (iv) without removal, the grantor party may render subject property constituting personal property or fixtures unusable and may dispose of the same on the governmental entity's premises.¹⁰

If an alternative financing contract contains the terms contained in subdivision (a)(11) hereof, such alternative financing contract shall be deemed to obligate the governmental entity thereunder only for those sums payable during the then current fiscal year of such governmental entity, including in the case of a renewable alternative financing contract for those sums payable in the individual fiscal year renewal term, and, if and to the extent any constitutional or statutory debt limit is applicable to such governmental entity, such alternative financing contract shall not be deemed to create a debt of such governmental entity within

¹⁰*Id.* § 41-16A-5(a).

the meaning of any constitutional or statutory provision. Notwithstanding the foregoing, nothing in this section shall diminish the obligation of a governmental entity to pay all sums payable under such alternative financing contract during the then current fiscal year and to satisfy and discharge all obligations required to be performed under the alternative financing contract during the then current fiscal year of the governmental entity, including in the case of a renewable alternative financing contract those sums payable in the then applicable renewal term and those obligations required to be performed in the then applicable renewal term.¹¹

....

Unless otherwise prohibited by the constitution or statutes of the state, a governmental entity may specify that its obligations under any alternative financing contract shall be a general obligation of such governmental entity or that such obligations shall be payable solely from specified sources. A governmental entity may assign and specifically pledge for the payment of any of its alternative financing contracts constituting general obligations (as additional security therefor) or for the payment of any of its alternative financing contracts constituting limited obligations (as the sole source for the payment thereof), as the case may be, all or any portion of the funds derived from any one or more of the following sources that are not subject to previous pledges or covenants which would prevent the assignment and pledge hereby authorized, that are not required by the laws and constitution of the state to be devoted to other purposes:

(1) The proceeds from any tax (including any ad valorem tax and any occupational, privilege, license, or excise tax) that such governmental entity is authorized to levy at the time of execution of such alternative financing contract;

(2) Any payments in lieu of taxes paid or payable to such governmental entity by other governmental units or by private persons or companies pursuant to contractual arrangements or laws in effect at the time of the execution of such alternative financing contract;

(3) The portion of any tax levied and collected by any other governmental entity that shall be apportioned and paid to such governmental entity pursuant to laws in effect at the time of the execution of such alternative financing contract;

(4) The income derived from the investment of moneys lawfully held by such governmental entity; and

(5) The revenues from any revenue-producing properties owned, leased, or operated by such governmental entity, including, without limitation thereto, any water system, sewer system, electric distribution system, or other utility.

The pledge of any pledged funds for the obligations of a governmental entity under an alternative financing contract pursuant to this chapter, together with any covenants of such governmental entity relating to such pledge, shall have the force of contract between such governmental entity and the grantor party or anyone claiming by, through, or under the grantor party. To the extent necessary, such pledged funds shall constitute a trust fund or funds which shall be impressed with a lien in favor of the grantor party and any person claiming by, through, or under the grantor party. In the event that more than one pledge should be made with respect to any pledged funds, then such pledges shall take precedence in the order in which they are made unless the proceedings making such pledge shall expressly provide that such pledge shall be on a parity with or subordinate to a subsequent pledge of such pledged funds. All alternative financing contracts for which any pledge authorized by this chapter may be made shall constitute preferred claims against that portion of the pledged funds so pledged, and shall have preference over any claims for any other purpose whatsoever.¹²

The execution of and performance under an alternative financing contract by a governmental entity shall constitute the exercise of the borrowing power of the governmental entity. Alternative financing contracts shall constitute "other evidences of indebtedness" within the meaning and usage of section 8-8-7, as amended.¹³

....

The provisions of any alternative financing contract that are either permitted or required to be included therein pursuant to this chapter shall be valid and enforceable in accordance with their terms notwithstanding any other laws of the state to the contrary. Notwithstanding the foregoing, the laws of the state other than this chapter shall determine whether a particular alternative financing contract constitutes a

¹¹*Id.* § 41-16A-5(b).

¹²*Id.* § 41-16A-5(c).

¹³*Id.* § 41-16A-5(d).

lease or a sale of the subject property to the governmental entity with the retention by the grantor party of a security interest and shall determine the applicability of articles 2, 2A, and/or 9 of title 7, as amended, to such alternative financing contract.¹⁴

Alternative financing contracts or any interest therein shall be a legal and authorized investment for banks, savings and loan associations, insurance companies, fiduciaries, and trustees.¹⁵

Energy Performance Contracting

Counties may enter into “guaranteed energy cost savings contracts,” including lease-purchase agreements, pursuant to specific statutory requirements.¹⁶

Municipalities

Municipalities¹⁷ qualify as tax-exempt issuers for federal income tax purposes due to their tax,¹⁸ eminent domain¹⁹ and police powers.²⁰ All municipalities may “acquire property by purchase.”²¹ Certain municipalities may “acquire property . . . by purchase, . . . lease, and may sell, lease, . . . such property as its interest may require.”²² Municipalities may enter into lease-purchase agreements with public building authorities.²³ Municipalities, as well as counties, and school districts may acquire “tangible personal property” by lease-purchase financing.²⁴

Energy Performance Contracting

Municipalities are also granted authority to enter into “guaranteed energy cost savings contracts,” including lease-purchase agreements, pursuant to specific statutory requirements.²⁵

School Districts

School districts²⁶ may qualify as tax-exempt issuers for federal income tax purposes due to their power to condemn private property for educational purposes.²⁷ School districts have the power to “acquire, purchase, lease, receive, hold, transmit and convey the title to real and personal property for school purposes.”²⁸ Alabama provides for the incorporation of nonprofit public educational building authorities to aid school districts and educational institutions in providing services.²⁹ Public educational

¹⁴*Id.* § 41-16A-7.

¹⁵*Id.* § 41-16A-8.

¹⁶*Id.* § 41-16-140 to -144.

¹⁷Municipalities are defined as “cities” or “towns” according to population. *Id.* § 11-40-6. Municipalities are also divided into eight classes based upon population. *Id.* § 11-40-12.

¹⁸*Id.* § 11-51-1.

¹⁹Ala. Const. art. XII, § 235.

²⁰Ala. Code § 11-45-1.

²¹*Id.* § 11-40-1.

²²*Id.* § 11-43A-12 (Class 2, 3, 4, 5, 6, 7 and 8 municipalities which choose the council-manager form of government by voter petition); *id.* § 11-43A-74 (Class 2, 3, 4, 5, 6, 7 and 8 municipalities which choose the council-manager form of government by decision of the governing body).

²³*Id.* § 11-56-9(a). *See, infra*, text accompanying notes 38 to 44.

²⁴*Id.* § 41-16A-1 to -11. *See, supra*, notes 7-15 and accompanying text.

²⁵*Id.* § 41-16-140 to -144.

²⁶School districts are directed by either a city or county board of education. Ala. Code § 16-8-1 (county boards); *id.* § 16-11-2 (city boards).

²⁷Ala. Code §§ 16-11-13 (city boards), 16-8-40(a) (county boards). *See also* Priv. Ltr. Rul. 8516093 (Jan. 24, 1985), 1985 WL 292245 (governmental agency with eminent domain power is a “political subdivision” of state under I.R.C. § 103(a)).

²⁸Ala. Code § 16-8-40(a) (county boards of education); city boards of education have the power to “purchase real estate, furniture, . . . libraries, fuel and supplies for the use of schools, and to sell the same.” *Id.* § 16-11-12.

²⁹*Id.* § 16-18-2. A separate set of statutes, titled “Educational Building Authorities,” contains similar provisions, but provides less specificity. *Id.* § 16-17-1 to -19.

building authorities have the power to “acquire, receive and take by purchase” or “lease” and “to hold property of every description, real, personal or mixed.”³⁰ They are authorized to lease property to school districts for a period not to exceed the district’s current fiscal year.³¹ The lease may provide the district with successive options to renew the lease,³² and as such is exempt from constitutional debt limitations.³³ The income resulting from the lease, as well as the property of the authority, is exempt from state taxation.³⁴ School districts, as well as counties and municipalities, may lease-purchase tangible personal property.³⁵

Contracts for the purchase of personal property or contractual services shall be let for periods not greater than three years. Lease-purchase contracts for capital improvements and repairs to real property shall be let for periods not greater than 10 years and all other lease-purchase contracts shall be let for periods not greater than 10 years.³⁶

Energy Performance Contracting

School districts may enter into “guaranteed energy cost savings contracts,” including lease-purchase agreements, pursuant to specific statutory requirements.³⁷

Public Building Authorities

Alabama provides for the incorporation of public building authorities³⁸ which, when created, are political subdivisions of the state and may provide counties and municipalities with a wide range of services.³⁹ The authorities have the power to “acquire by purchase, gift, lease, devise or otherwise property of every description . . . and to hold title thereto.”⁴⁰ Counties or municipalities may convey property to the authority with or without monetary consideration.⁴¹ Counties and municipalities may enter into a “lease agreement” with the authority for a term not to exceed the county’s or municipality’s fiscal year. The lease may provide for yearly successive renewable options in the county or municipality. These options are exercised by “election” of the county or municipality as the agreement may provide. Pursuant to these provisions, the lease is not subject to constitutional debt limitations.⁴² The income resulting from the lease as well as the property of the authority is exempt from state taxation.⁴³ Bonds issued by the authority are not indebtedness to the county or municipality.⁴⁴

³⁰*Id.* § 16-18-7(5).

³¹*Id.* § 16-18-9(b).

³²*Id.*

³³*Id.* § 16-18-9(c).

³⁴*Id.* § 16-18-16.

³⁵*Id.* §§ 41-16A-1 to -11. *See, supra*, notes 7-15 and accompanying text.

³⁶*Id.* § 16-13B-7(f).

³⁷Ala. Code § 41-16-140 to -144.

³⁸*Id.* §§ 11-15-1 to -19 (applicable only to counties); *id.* §§ 11-56-1 to -22 (applies to municipalities as well as counties).

³⁹*Id.* §§ 11-15-2, 11-56-2(a).

⁴⁰*Id.* § 11-15-7(4); *see also id.* § 11-56-8(5).

⁴¹*Id.* §§ 11-15-16, 11-56-19.

⁴²*Id.* §§ 11-15-8, 11-56-9.

⁴³*Id.* §§ 11-15-17, 11-56-21. However, the tax exemption provision has been strictly construed. Purchases by a general contractor on behalf of an authority have been found subject to state use taxes. *State v. Ball-Co. Contractors, Inc.*, 372 So. 2d 331 (Ala. Ct. App. 1979) (general contractor who made purchases on behalf of public building authority incorporated under Ala. Code §§ 11-56-1 to -22 found subject to state use tax even though had the authority itself purchased the goods no tax would have applied).

⁴⁴Ala. Code § 11-56-10; Ala. Const. Art. XII, § 222.02, alternatively cited as Ala. Const. amend. 108.

Fire Districts

Fire protection districts qualify as tax-exempt issuers for purposes of federal income tax law due to their power of eminent domain.⁴⁵ Fire districts may "acquire, receive and take, by purchase, lease, . . . or otherwise . . . property of every description, real, personal or mixed."⁴⁶

Fire districts, as public corporations, are covered by the Alabama Governmental Leasing Act,⁴⁷ which is covered in the "Counties" section, above.⁴⁸

Leases by or to the district are exempt from taxation.⁴⁹

Energy Performance Contracting

Local political subdivisions may enter into "guaranteed energy cost savings contracts," including lease- purchase agreements, pursuant to specific statutory requirements.⁵⁰

Hospitals

Public hospitals, as public corporations, qualify as tax-exempt issuers for purposes of federal income tax law due to their power of eminent domain.⁵¹ Public hospitals may acquire "real and personal property of every description."⁵² Public hospitals may enter into lease-purchase agreements with Municipal Hospital Building Authorities.⁵³

Public hospital associations also qualify as tax-exempt issuers for purposes of federal income tax law due to their power of eminent domain.⁵⁴ Hospital associations are authorized "to purchase . . . or acquire . . . any property, real or personal."⁵⁵

Public hospitals and public hospital associations are covered by the Alabama Governmental Leasing Act,⁵⁶ which is covered in the "Counties" section, above.⁵⁷

Public hospitals, as public corporations, are exempt from certain taxes and fees.⁵⁸

Energy Performance Contracting

Local political subdivisions may enter into "guaranteed energy cost savings contracts," including lease- purchase agreements, pursuant to specific statutory requirements.⁵⁹

⁴⁵Ala Code § 11-89-7(a)(15).

⁴⁶*Id.* § 11-89-7 (a)(5).

⁴⁷*Id.* §§ 41-16A-1 to -11.

⁴⁸*See, supra*, notes 7-15 and accompanying text.

⁴⁹Ala. Code § 11-89-16. The exemption applies to ad valorem tax and income tax, but not other forms of state taxation. 95 Op. Att'y Gen. 00318 (Ala. 1995), 1995 WL 18097035.

⁵⁰*Id.* §§ 41-16-140 to -144.

⁵¹*Id.* § 11-95-14.

⁵²*Id.* § 11-95-7(6).

⁵³*Id.* § 22-21-130.

⁵⁴*Id.* § 22-21-53(9).

⁵⁵*Id.*

⁵⁶*Id.* §§ 41-16A-1 to -11.

⁵⁷*See, supra*, notes 7-15 and accompanying text.

⁵⁸*Id.* § 11-95-11. *See* 91 Op. Att'y Gen. 00194 (Ala. 1991), 1991 WL 11870243, for a discussion of tax exemption for public hospitals and authorities.

State Entities

The State of Alabama, its agencies, boards, commissions and departments thereof, may acquire eligible property through use of lease-purchase agreements under the Alabama Governmental Leasing Act,⁶⁰ which is covered in the "Counties" section, above.⁶¹ State department and agency "lease-sale" contracts for the procurement of materials, machinery and equipment are subject to public contract laws and must be approved in writing by the Governor or by the Director of Finance.⁶² Competitive bidding applies to all contracts for personal property involving fifteen thousand dollars or more except for that personal property which by its "very nature are impossible of award by competitive bidding."⁶³

For the acquisition of telecommunications systems, state agencies and departments (with certain exceptions, including boards of education and public colleges and universities, and the legislative and judicial branches of government) must comply with rules and regulations promulgated by the Department of Finance.⁶⁴

The Legislative Council is generally responsible for management and maintenance of state house property.⁶⁵

The Judicial Building Authority may exercise the power of eminent domain and may enter into leases and provide for the acquisition and equipping of judicial facilities.⁶⁶

Universities, colleges and junior colleges, which are public corporations pursuant to individual authorizing statutes, are covered by the Governmental Leasing Act, which is covered in the "Counties" section, above.⁶⁷ Educational institutions are authorized to enter into lease agreements with "Public Educational Building Authorities."⁶⁸ In addition, educational institutions of higher education may take equipment loans from the Alabama Higher Education Equipment Loan Authority for financing of capital equipment.⁶⁹

Energy Performance Contracting

The state and its departments and agencies and colleges and universities may enter into guaranteed energy cost savings contracts, including lease-purchase agreements, for energy cost saving measures, subject to numerous restrictions.⁷⁰

⁵⁹Ala. Code §§ 41-16-140 to -144.

⁶⁰*Id.* §§ 41-16A-1 to -11.

⁶¹*Id.*

⁶²*Id.* §§ 41-16A-9; 41-4-115.

⁶³*Id.* § 41-16-21.

⁶⁴*Id.* §§ 41-4-280 to -293.

⁶⁵*Id.* § 29-2-200.

⁶⁶*Id.* §§ 41-10-267.

⁶⁷*See, supra*, notes 7-15 and accompanying text. It appears that the State Board of Education is the contracting party, acting on behalf of the respective educational institution. Ala. Code § 41-16A-3(b).

⁶⁸*Id.* § 16-18-9.

⁶⁹*Id.* §§ 16-65-1 to -14.

⁷⁰*Id.* §§ 41-16-140 to -144. The term "government unit" as used in the act has a broad definition and includes any establishment or official of the judicial and legislative branches of the state authorized to enter into contracts. *Id.* § 41-16-141.

Debt Limitations

The State, counties and municipalities are constitutionally limited in the amount of debt which they can incur.⁷¹ An opinion by the Alabama supreme court held that a contractual obligation of a county or municipality was not debt provided that the annual amount payable under the contract was payable from current revenues even though the aggregate amount of the contract exceeded the debt limitation.⁷² Leases between public building authorities and counties, municipalities, hospital districts or school districts are also exempt from debt limitations, if structured in such a fashion.⁷³ The Alabama supreme court continued this type of analysis when, in an opinion of the justices with respect to state legislation, it stated that while a corporation may be created to build office buildings to be leased by the state for use for essential state purposes without violating state constitutional prohibitions against the creation of new debt, such office buildings must be leased to the state pursuant to “annual agreements” and may not be funded with appropriations for future years.⁷⁴

Interest Rate Limitations

All obligations of the State of Alabama, political subdivisions and public building authorities are exempt from interest rate limitations.⁷⁵

Miscellaneous

Contracts for the purchase of personal property shall not be let for periods greater than three years.⁷⁶ Contracts for the leasing of motor vehicles by local governing bodies shall be let for periods not greater than five years.⁷⁷ Lease-purchase contracts for capital improvements and repairs to real property and all other lease-purchase contracts shall be let for periods not greater than 10 years.⁷⁸

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

⁷¹Limitation of state debt: Ala. Const. art. XI, § 213 (Current with amendments ratified through December 28, 2017). Counties may not incur debt, including present obligations, in an amount exceeding 5 percent of assessed property value. Ala. Const. art. XII, § 224, *as amended by*, Ala. Const. amend. 342. Municipalities and hospital districts and fire districts as public corporations are limited to 20 percent of assessed property value with exception for temporary loans and construction or purchase of certain public works. Municipalities with populations of less than 6,000 are provided an additional 3 percent (for a total of 23 percent) for these public works. Ala. Const. art. XII, § 225, *as amended by*, Ala. Const. amend. 268.

⁷²Opinion of the Justices, 335 So. 2d 376 (Ala. 1976); *see also* Hillard v. City of Mobile, 253 Ala. 676, 47 So. 2d 162, 167 (1950); Thomas v. Alabama Municipal Electric Authority, 432 So. 2d 470 (Ala. 1983).

⁷³Ala. Code §§ 11-15-8 (county), 11-56-9 (local subdivision), 16-18-9 (educational institution). *See, supra*, text accompanying notes 38 to 44. *See* 211 Op. Att’y Gen. 36 (Ala. 1988).

⁷⁴Opinion of the Justices, 665 So.2d, 1357, 1361 (1995).

⁷⁵Ala. Code § 8-8-7. Obligations are “any bonds, warrants, other evidences of indebtedness or securities.” *Id.*

⁷⁶Ala. Code § 41-16-57(f); 211 Op. Att’y Gen. 36 (Ala. 1988).

⁷⁷*Id.*

⁷⁸*Id.*

ALASKA 2019

Current with legislation through November 1, 2018 of the 2018 Second Regular Session of the 30th Legislature, Westlaw.ⁱ

Municipalities

Municipalities¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Municipalities may “acquire, manage, control, use and dispose of real and personal property.”⁵

School Districts

School districts do not qualify as tax-exempt issuers for purposes of federal income tax law.⁶ The school districts are not separate entities as “each organized borough is a borough school district,”⁷ “each home rule and first class city in the unorganized borough is a city school district,”⁸ and “the area outside organized boroughs and outside home rule and first class cities is divided into regional educational attendance areas.”⁹ Regional educational attendance areas are funded by state money.”¹⁰

Each borough or city school district and each regional educational attendance area are operated under the management and control of a school board.¹¹ “School boards within the borough may determine their own policy separate from the borough [assembly] for the purchase of supplies and equipment.”¹² City school boards may also formulate their own purchase policy separate from that of the city council.¹³

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

¹Municipalities for purposes of this discussion include both boroughs and cities. Alaska Stat. Ann. § 29.71.800(13). First class boroughs and cities may adopt a home rule charter. Alaska Const. art. X, § 9. All unchartered cities and boroughs are general law municipalities and have powers conferred by law. Alaska Stat. Ann. § 01.10.060(4); *id* § 29.04.020.

² *Id.* § 29.35.010(6); Alaska Const. art. X, § 2.

³Alaska Stat. Ann. § 29.35.030.

⁴*Id.* § 29.35.010(7).

⁵*Id.* § 29.35.010(8).

⁶“The Legislature shall provide the state money necessary to maintain and operate the regional education attendance areas. The borough assembly for a borough school district, and the city council for a city school district, shall provide the money which must be raised from local sources to maintain and operate the district.” *Id.* § 14.12.020(c). No power of eminent domain exists. *Tunley v. Municipality of Anchorage School District*, 631 P.2d 67 (Alaska 1980).

⁷Alaska Stat. Ann. § 14.12.010(2).

⁸*Id.* § 14.12.010(1).

⁹*Id.* § 14.12.010(3).

¹⁰*Id.* § 14.12.010(3); § 14.12.020.

¹¹*Id.* § 14.12.020.

¹²*Id.* § 14.14.060(h).

¹³*Id.* § 14.14.065.

The State of Alaska provides services for areas of the state that are not within an organized borough.¹⁴

State agencies¹⁵ through the centralized authority of the commissioner of administration and the chief procurement officer,¹⁶ or the Board of Regents of the University of Alaska,¹⁷ or other specified entity

may enter into lease-purchase agreements¹⁸ for the acquisition of equipment or other personal property. The government entity is the lessee under the agreement.

(b) If a government entity enters into a lease-purchase agreement . . . that exceeds \$100,000 in payments by the state, the government entity shall provide notice to the presiding officers and finance committee chairs of the house and senate. The notice must describe the property that is the subject of the agreement and must set out the terms of the lease-purchase.¹⁹

Administrative procurement regulations provide:

Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. If the procurement is made by competitive sealed bid or competitive sealed proposal, an installment payment agreement may not be used unless provision for installment payments is included in the solicitation.²⁰

Agencies appear to acquire energy efficiency equipment under the same authority as they do for personal property generally. Agency acquisitions are generally subject to the public contracting statutes.²¹

State agencies,²² through the centralized authority of the Department of Administration, and the Board of Regents of the University of Alaska, the legislative council, or the supreme court may enter into

¹⁴Alaska Const. art. X, §§ 5, 6.

¹⁵Under the public contract law "(A)gency" means a department, institution, board, commission, division, authority, public corporation, the Alaska Pioneers' Home, the Alaska Veterans' Home, or other administrative unit of the executive branch of state government;...(it) does not include (i) the University of Alaska, (ii) the Alaska Railroad Corporation; (iii) the Alaska Housing Finance Corporation; (iv) a regional Native housing authority created under AS 18.55.996 or a regional electrical authority created under AS 18.57.020 ; (v) the Department of Transportation and Public Facilities, in regard to the repair, maintenance, and reconstruction of vessels, docking facilities, and passenger and vehicle transfer facilities of the Alaska marine highway system; (vi) the Alaska Aerospace Corporation; (vii) the Alaska Retirement Management Board; (viii) the Alaska Seafood Marketing Institute; (ix) the Alaska children's trust and the Alaska Children's Trust Board; (x) the Alaska Industrial Development and Export Authority." Alaska Stat. Ann. § 36.30.990 (1).

¹⁶Alaska Stat. Ann. § 36.30.005.

¹⁷The University of Alaska is: "the state university and constituted a body corporate. It shall have title to all real and personal property" Alaska Const. Art. 7, § 2. The university may acquire property by a lease-purchase or lease-financing agreement subject to section 36.30.085, relating to real property. Alaska Stat. Ann. § 14.40.040. *See, infra*, note 23 and accompanying text.

¹⁸"(L)ease-purchase agreement" means a lease that (A) transfers ownership of the property to the lessee by the end of the lease term; (B) contains a purchase option at a price less than the fair market value of the property on the date the option is exercisable (C) has a term, at inception, equal to 75 percent or more of the economic life of the property; or (D) contains minimum lease payments, including minimum lease payments during a renewal provided for in the agreement, whose present value at the inception of the agreement equals 90 percent or more of the fair market value at the inception of the agreement of the real property that is the subject of the agreement; the present value shall be determined by using as a discount rate the most recent Bond Buyer 20-Bond G.O. Index." Alaska Stat. Ann. § 36.30.990 (17).

¹⁹Alaska Stat. Ann. § 36.30.086 (The legislative council, the Legislative Budget and Audit Committee, the office of victims' rights, the office of the ombudsman, and the supreme court also may enter into lease-purchase agreements for the acquisition of equipment or other personal property). Third party financing arrangements are discussed in Office of Mgmt and Bgt Memo from Karen Rehfeld to Admin Serv. Dir. (Nov. 21, 2014).

https://www.omb.alaska.gov/ombfiles/forms/Third_Party_Financing_Memorandum.pdf.

²⁰Alaska Admin. Code 12.820.

²¹Alaska Stat. Ann. §§ 36.05.010 to 36.95.010.

²²*See, supra*, text accompanying note 14.

lease-purchase agreements for real property, as lessee for a period not greater than 40 years. Notice to and approval by the legislature is required except

(1) related to the refinancing of an outstanding balance owing on an existing lease-purchase agreement; or

(2) by the University of Alaska if the lease-purchase agreement is secured by student fees or university receipts as defined in AS 14.40.491.²³

The Alaska Railroad Corporation

The Alaska Railroad Corporation²⁴ may

acquire by purchase, lease, bequest, devise, gift, exchange, the satisfaction of debts, the foreclosure of mortgages, or otherwise, personal property, rights, rights-of way, franchises, easements, and other interests in land, and acquire by appropriation water rights that are located in the state, taking title to the property in the name of the corporation.²⁵

Debt Limitations

Constitutionally, no political subdivision can incur debt unless it is authorized for “capital improvements”²⁶ by the governing body of the subdivision and is ratified by a majority vote.²⁷

Restrictions on contracting debt do not apply to revenue bonds or indebtedness to be paid from special assessments.²⁸

The State may not contract debt unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question.²⁹

General lump sum appropriations for any category of expenditure provide a source of funding for leases falling within any such category regardless of whether specific allocations in the budget show an intention to reduce the availability of funds; operating expenditures and contractual obligations are governed only by the actual appropriations made in the act and any specific statutory constraints. Specific budget allocations showing an intent to deny funding are not binding.³⁰ However, in a case involving the State of Alaska and its agencies, the Alaska Supreme Court held that a lease was not

²³Alaska Stat. Ann. § 36.30.085. “University receipts” includes “(1) student fees, including tuition; (2) receipts from university auxiliary services; (3) recovery of indirect costs of university activities; (4) receipts from sales and rentals of university property; (5) federal receipts; (6) gifts, grants, and contracts; (7) receipts from sales, rentals, and the provision of services of educational activities; and (8) receipts attributable to amounts distributed from university endowments established and managed under AS 14.40.280 and from the endowment trust fund established and managed under AS 14.40.400.” Alaska Stat. Ann. § 14.40.491.

²⁴The Alaska Railroad Corporation is owned by the state, and is governed by a board of directors. Alaska Stat. Ann. §§ 42.40.010 -.020. The Alaska Railroad Corporation operates on revenue from its services and “shall . . . raise needed capital by issuing bonds of the corporation upon approval by the legislature while ensuring that borrowing by the corporation does not directly or indirectly endanger the state’s own borrowing capacity.” *Id.* § 42.40.100(6). It has the power of eminent domain. *Id.* § 42.40.385.

²⁵Alaska Stat. Ann. § 42.40.250(7).

²⁶The term “capital improvement” has been construed to mean public works or facilities in the form of real or personal property which are of a permanent character. *City of Juneau v. Hixson*, 373 P.2d 743 (Alaska 1962).

²⁷Alaska Const. art. IX, § 9. In *Norene v. Municipality of Anchorage*, 704 P.2d 199 (Alaska 1985), the court upheld a lease-purchase agreement under a charter provision similar to article IX, § 9.

²⁸Alaska Const. art. IX, § 11, Alaska Stat. Ann. § 29.47.390.

²⁹Alaska Const. art. IX, § 8.

³⁰1987 Op. (inf.) Att’y Gen. 185 (Alaska 1987).

“nonvoted debt” because the lease did not require a future legislature to appropriate funds, and therefore the lease agreement was not considered a long-term binding obligation to repay borrowed money.³¹ The lease was a tax-exempt, certificated financing.

Interest Rate Limitations

The maximum interest rate on money after it is due is 10.5 percent per year.³² The interest rate on contracts or loan commitments for \$25,000 or less can be no more than the greater of 10 percent or 5 percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made.³³

“The interest rate payable on a bond or note issued [by a municipality] shall be determined by the municipality and is not subject to the usury rate limitations of [section] 45.45.010.”³⁴

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

³¹Carr-Gottstein Properties v. State, 899 P.2d 136 (1995)(“nonvoted debt” is that which does not violate a voting requirement).

³²Alaska Stat. Ann. § 45.45.010(a).

³³*Id.* § 45.45.010(b).

³⁴*Id.* § 29.47.420.

ARIZONA 2019

Current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018), Westlawⁱ

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties may “purchase and hold lands”⁴ and may “make such contract and purchase and hold such personal property as may be necessary to the exercise of [their] powers.”⁵ Lease-purchase agreements for the acquisition of equipment are statutorily authorized.⁶ Such agreements can only be executed for a period of one fiscal year. If a longer period is needed to complete the purchase, the county must have the right at the end of each fiscal year to enter into an agreement for continuation of the agreement for succeeding one-year periods until complete payment is made. If the county does not exercise its option to continue the agreement, the seller may repossess the equipment and the contract is deemed terminated.⁷ Title remains in the seller until the payment of the full purchase price.⁸ The county may cancel the agreement at any time upon written notice to the seller.⁹

In addition to the statutory authority to lease-purchase discussed above, there is further statutory authority for counties to enter into long-term agreements for the purchase of personal property, provided they may cancel any such agreement at the end of each fiscal year, in which event the seller may repossess the property and the agreement shall be deemed terminated.¹⁰ Counties may also lease real property for public purposes under the same terms and conditions as for lease-purchases for equipment pursuant to sections 11-651 and 11-653.¹¹

Counties, cities, including charter cities, and towns of this state may construct, purchase, own, lease, either as lessor or lessee, and sell either for cash or on a deferred installment sales contract one or more health care institutions as the term is defined in § 36-401. This section shall not be construed as granting additional powers to, or limiting existing powers of, counties, cities and towns regarding the operation of health care institutions. The lease or sales agreements may contain any provision deemed necessary by the governing body in order to secure the payment thereof.¹²

County boards of supervisors may enter agreements with public or private entities to lease-purchase detention centers for juveniles who are accused or convicted of criminal offenses.¹³

Counties with a population of less than five hundred thousand persons must comply with all of the provisions of Ariz. Rev. Stat. Ann. § 11-391, as amended, including the published notice requirements, public hearing requirements and public approval requirements.¹⁴

¹Ariz. Rev. Stat. Ann. §§ 11-201.A.5.

²*Id.* § 12-1111.

³*Id.* § 11-871.

⁴*Id.* § 11-201.A.2.

⁵*Id.* § 11-201.A.3.

⁶*Id.* § 11-651.

⁷*Id.*

⁸*Id.* § 11-652.

⁹*Id.* § 11-653.

¹⁰*Id.* § 11-251(42).

¹¹*Id.* § 11-251(54). *See, supra*, notes 6-9 and accompanying text.

¹²*Id.* § 11-306.

¹³*Id.* § 8-305.

¹⁴*Id.* § 11-391. This section provides:

Incurring long-term obligations; public hearing

A. In addition to any other requirements prescribed by law, in a county with a population of less than five hundred thousand persons if the board of supervisors approves incurring any long-term obligation that is not

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸ Municipalities may “purchase or lease necessary buildings”¹⁹ and may “purchase, lease or rent land . . . for [their] purposes and uses.”²⁰ They may also “purchase, receive, hold, lease and convey property, real and personal, necessary or proper to carry out the purposes of the corporation.”²¹ Municipalities may sell and convey all or any part of their real or personal property provided certain public bidding procedures are followed.²²

Municipalities may enter into lease-purchase agreements for property to be used for municipal auditorium and convention center purposes for a period not to exceed fifty years.²³ Title to the property must vest in the lessee-city at the expiration of the term.²⁴ Such lease need not be included in the budget for the fiscal year in which it is executed; however, during the term of such lease, provision must be made in each annual budget thereafter for the levy of taxes or revenues fully sufficient to pay the rental as it becomes due in each fiscal year.²⁵ Before municipalities may enter into such leases, they must be approved by a majority of the qualified electors.²⁶

Like counties, municipalities may enter into lease agreements relating to health care institutions.²⁷

secured by the full faith and credit of the county, the board of supervisors must:

1. Publish a notice of a hearing on the proposal to incur the long-term obligation in a newspaper of general circulation in the county, issue a press release to print and electronic media and post the notice on the county's official web site. The notice must:

(a) Be published and posted at least fifteen days before the date of the hearing.

(b) Include the date, time and place of the hearing, the dollar amount of the proposed long-term obligations and the estimated total financing costs, the purpose of the proposed long-term obligations, including the project or projects that are proposed to be financed by long-term obligations, and that the board will receive:

(i) Oral comments at the hearing.

(ii) Written comments at any time before adopting the resolution of intention to incur long-term obligations, including the board's mailing address. The notice posted on the county's web site shall include an electronic link for commenting electronically.

2. Hold the public hearing, as announced in the notice, at least fifteen days before adopting the resolution for incurring the long-term obligations. At the hearing, the board shall present an analysis of the need for the project, the need to use long-term financing and any other available options to accomplish the project. Any member of the public must be allowed to speak on the issue of incurring the long-term obligations to finance the proposed project.

B. At least fifteen days after the hearing the governing body must hold a public meeting to adopt findings and, following the public comments received at and after the hearing, by roll call vote, either:

1. Adopt and enter a resolution of intention to incur long-term obligations to finance the project, stating the public need for the project, the estimated cost and the amount of the long-term obligations to be incurred.

2. Reject long-term financing of the project and abandon further proceedings.

¹⁵Municipalities for purposes of this discussion are incorporated cities and towns. Ariz. Const. art. XIII, § 1. Certain cities may be charter cities. *Id.* art. XIII, § 2; Ariz. Rev. Stat. Ann. § 9-281.A. Charter and general law cities are vested with all power of incorporated towns in addition to the powers vested in them pursuant to their charters. *Id.* § 9-499.01.

¹⁶Ariz. Rev. Stat. Ann. §§ 9-240.B.26; *Id.* § 9-244.

¹⁷*Id.* § 12-1111.

¹⁸*Id.* §§ 9-240.B.12 and 9-240.B.29.

¹⁹*Id.* § 9-240.B.1.

²⁰*Id.* § 9-401.A.

²¹*Id.* § 9-241.A.

²²*Id.* § 9-402.

²³*Id.* § 42-17109.B.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* § 11-306. *See, supra*, note 12 and accompanying text.

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax and eminent domain powers.²⁸ School districts may “acquire school furniture, apparatus, equipment, library books and supplies for the use of the schools.”²⁹ They may also enter into lease-purchase agreements for school buildings or grounds, or both, as lessor or lessee, for periods of less than fifteen years subject to voter approval for construction of school buildings.³⁰ Such agreements may be entered into for periods of fifteen to ninety-nine years if authorized by a vote of school district electors, except that if the market value of the property is less than fifty thousand dollars (or if one of certain other alternative requirements is met) an election is not required.³¹

Energy Performance Contracting

School districts may enter into a lease-purchase agreement with a qualified provider for energy cost savings measures for a period not more than the expected life of the measures or 25 years, subject to numerous provisions.³²

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³³ and eminent domain powers.³⁴ A fire district may

²⁸School districts can call elections for purposes of issuing general obligation bonds. Ariz. Const. art. IX, §§ 8, 8.1. Once an election carries the county must levy taxes for the school district to be used to retire principal and interest on school district bonds. Ariz. Rev. Stat. Ann. § 15-1022.A. Arizona courts have recognized the authority of school districts to exercise the power of eminent domain under Ariz. Rev. Stat. Ann. § 12-1111.; *Viliborghi v. Prescott School Dist. No. 1*, 55 Ariz. 230, 100 P.2d 178 (1940); *Deer Valley Unified School Dist. No. 97 v. Superior Court*, 760 P.2d 537 (Ariz. 1988).

²⁹Ariz. Rev. Stat. Ann. § 15-341.A.4.

³⁰*Id.* § 15-342.9. See also Op. Att’y Gen. (Ariz. July 31, 1989) (available at 1989 Ariz. Ag Lexis 59), WL 266992.

³¹*Id.* § 15-342.10; see also *id.* § 15-491. See also Op. Att’y Gen. (Ariz. July 31, 1989) (available at 1989 Ariz. Ag Lexis 59), WL 266992.

³²Ariz. Rev. Stat. Ann. § 15-213.01. “Energy cost savings measure” means a training program or facility alteration designed to reduce energy consumption and any related meters or other measuring devices:

- (a) Insulating the building structure or systems in the building.
- (b) Storm windows or doors, caulking or weather stripping, multiglazed windows or door systems, additional glazing, reductions in glass area, or other window and door system modifications that reduce energy consumption.
- (c) Automated or computerized energy control systems.
- (d) Heating, ventilating or air conditioning system modifications or replacements, including geothermal.
- (e) Replacing or modifying lighting fixtures to increase the energy efficiency of the lighting system without increasing the overall illumination of a facility unless an increase in illumination is necessary to conform to the applicable state or local building code for the lighting system after the proposed modifications are made.
- (f) Indoor air quality improvements to increase air quality that conform to the applicable state or local building code requirements.
- (g) Energy recovery systems.
- (h) Installing a new or retrofitting an existing day lighting system.
- (i) Procurement of low-cost utility supplies of all types, including electricity, natural gas, propane and water..
- (j) Devices that reduce water consumption and water costs or that reduce sewer charges.
- (k) Rainwater harvesting systems.
- (l) Combined heat and power systems.
- (m) Renewable and alternative energy projects and renewable energy power service agreements.
- (n) Self-generation systems.
- (o) Any additional building systems and infrastructure that produce energy, or that provide utility cost savings not specifically mentioned in this paragraph, if the improvements meet the life cycle cost requirement and enhance building system performance or occupant comfort and safety, excluding those systems that fall under § 15-213. 02.
- (p) Geothermal. *Id.*

³³*Id.* § 48-805.

³⁴*Id.* § 12-1111.

(c) construct, purchase, lease, lease-purchase or otherwise acquire the following or any interest therein and, in connection with the construction or other acquisition, purchase, lease, lease-purchase or grant a lien on any or all of its present or future property, including:

(a) Apparatus, water and rescue equipment, including ambulances and equipment related to any of the foregoing.

(b) Land, buildings, equipment and furnishings to house equipment and personnel necessary or appropriate to carry out its purposes.³⁵

Hospital Districts

Hospital districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁶ and eminent domain powers.³⁷ A hospital district may "(p)urchase, receive, have, take, hold, lease, use and enjoy property of every kind and description within the limits of the district."³⁸

State Entities

On behalf of the state, the director of the department of administration may acquire by "lease purchase . . .

real property, buildings, energy systems or energy management systems that are necessary, useful or convenient for the use of this state, but no land or building may be acquired by purchase or condemnation without prior approval of the joint committee on capital review and an appropriation of monies by the legislature for such an acquisition.

B. Any lease purchase agreement relating to land acquisition, capital projects, energy systems or energy management systems under this section shall provide that:

1. The obligation of this state to make any payment under the agreement is a current expense of the department, payable exclusively from appropriated monies, and is not a general obligation indebtedness of this state or the department.

2. If the legislature fails to appropriate monies or the department fails to allocate such monies for any periodic payment or renewal term of the agreement, the agreement terminates at the end of the current term and this state and the department are relieved of any subsequent obligation under the agreement.

3. The agreement shall be reviewed and approved by the attorney general before the agreement may take effect.

4. The agreement shall be reviewed and approved by the joint committee on capital review before the agreement takes effect.

C. The department may covenant to use its best efforts to budget, obtain, allocate and maintain sufficient appropriated monies to make payments under a lease purchase agreement, but the agreement shall acknowledge that appropriating state monies is a legislative act and is beyond the control of the department or of any other party to the agreement.

D. A lease purchase agreement under this section shall be submitted to the attorney general to review for compliance with the constitution and laws of this state. If in the attorney general's opinion the agreement so complies, the attorney general shall certify the agreement, return it to the department and transmit a copy to the joint committee on capital review. On request by the director the attorney general may give other opinions relating to the agreement.

E. A lease purchase agreement under this section shall be reviewed and approved by the joint committee on capital review before the agreement takes effect.³⁹

³⁵*Id.* § 48.805.B.2.

³⁶*Id.* § 48-1907.

³⁷*Id.* § 12-1111.

³⁸*Id.* § 48-1907.A.3.

³⁹Ariz. Rev. Stat. Ann. § 41-791.02; see also *id.* § 41-1252 (powers and duties of the joint committee on capital review). The attorney general opined that the requirement that a legislative committee approve an expenditure prior to the expenditure of

Pursuant to prescribed procedures, the state may complete lease-purchase financings of parts of “eligible municipal convention centers” upon the filing of a notice by an eligible city.⁴⁰ Most state agencies are authorized to enter into contracts and agreements through a delegation of authority from the state procurement administrator. A list of agencies having such power and the amount of their authorized expenditures can be found online on a website maintained by the State Procurement Office.⁴¹ The judicial branch and the Arizona board of regents are generally not subject to the provisions of the procurement code and may adopt similar policies and procedures for themselves.⁴²

The attorney general has opined that the department of corrections may enter into a long-term lease agreement with a private party for the acquisition of prison facilities where the department has the authority to “maintain and administer facilities” and the legislature had enacted an appropriation for that purpose, the state was not obligated to continue the agreement in event of nonappropriation and the payment under the agreement approximated actual rental value.⁴³

The director of the department of transportation may lease-purchase real property or buildings for the use of the department:⁴⁴

A. The director may acquire in the name of this state by gift, grant, purchase, lease-purchase, condemnation or any other lawful manner real property or buildings that are necessary, useful or convenient for the use of the department. The director shall not acquire land or buildings by purchase or condemnation without prior approval of the joint committee on capital review established by section 41-1251 and without an appropriation of monies by the legislature for the acquisition.

B. The director may enter into certificate of participation financing arrangements to provide financing or refinancing for real property or buildings that are necessary, useful or convenient for the use of the department.

C. A lease-purchase agreement relating to land or buildings under this section shall provide that:

1. The obligation of this state to make a payment under the agreement is a current expense of the department, is payable exclusively from appropriated monies and is not a general obligation indebtedness of this state or the department.

2. If the legislature fails to appropriate monies or the department fails to allocate the monies for any periodic payment or renewal term of the agreement, the agreement terminates at the end of the current term and this state and the department are relieved of any subsequent obligation under the agreement.

3. The attorney general and the joint committee on capital review shall review and approve the agreement before the lease-purchase agreement takes effect.

D. The attorney general shall review the agreement for compliance with the constitution and laws of this state. If in the attorney general's opinion the agreement is in compliance, the attorney general shall append the attorney general's certification to the agreement and return it to the department. On request by the director, the attorney general may give other opinions relating to the agreement.

E. The joint committee on capital review shall review and approve a lease-purchase agreement under this section before the agreement takes effect.

F. The department may covenant to use its best efforts to budget, obtain, allocate and maintain sufficient appropriated monies to make payments under a lease-purchase agreement. The agreement shall acknowledge

appropriations by the executive branch violates the separation of powers doctrine in the state constitution, Art. III. 187-107 Op. Att’y Gen. (Ariz. 1987), available at 1987 WL 121333; Op. Att’y Gen. (Ariz. 1988), available at 1988 WL 249595. An appropriation does not need to be specifically designated to fund a specific agreement if the appropriation or other authority authorized the expenditure for the purpose contemplated in the agreement. 180-114 Op. Att’y Gen. (Ariz. 1980) available at WL 264702 (construing § 41-729, repealed).

⁴⁰Ariz. Rev. Stat. Ann. § 41-791.04.

⁴¹<https://spo.az.gov/administration-policy/agency-procurement-authority>; Ariz. Admin. Code R2-7-202.

⁴²Ariz. Rev. Stat. Ann. § 41-2501 (includes exemptions for various boards and departments), § 41-724.

⁴³1983-41 Op. Att’y Gen. (Ariz. 1983), 1983 WL 42817.

⁴⁴Ariz. Rev. Stat. Ann. § 28-368.

that appropriating state monies is a legislative act and is beyond the control of the department or of any other party to the agreement.

G. For the purposes of this section, "certificate of participation financing" means an installment purchase or lease-purchase agreement that is subject to appropriations and that is structured to allow investors to receive a portion of the principal and interest payments made by the department as required by the agreement.⁴⁵

The director of the department of administration is the comptroller for the highway fund⁴⁶ and may acquire rights of ways through lease-purchase agreements subject to certain restrictions⁴⁷ and may expend monies from the equipment fund to purchase or rent equipment.⁴⁸

The Arizona board of regents may "lease-purchase . . . real or personal property or rights or interest therein."⁴⁹ Such lease-purchase agreements are subject to the following requirements:

A. Any lease-purchase agreement executed by the board relating to land acquisition, capital projects, energy systems or energy management systems shall provide that:

1. The obligation of this state to make any payment under the agreement is a current expense of the board and is not a general obligation indebtedness of this state or the board.

2. If the legislature fails to appropriate monies or the board fails to allocate monies for any periodic payment or renewal term of the agreement, the agreement terminates at the end of the current term and this state and the board are relieved of any subsequent obligation under the agreement.

3. The joint committee on capital review shall review the project before the lease-purchase agreement takes effect.

B. A lease-purchase agreement under this section shall comply with the constitution and other laws of this state.⁵⁰

The board of regents may secure indirect or third party financing for any project if the following conditions are met:

[A]1. The term of the indirect or third party financing does not exceed the earlier of forty years or the useful life of the capital improvements.

2. The project for which indirect or third party financing is secured is reviewed by the joint committee on capital review. Private entities are not required to divulge proprietary information to the committee for review.

B. For a project that is to be developed on board or institutional land, that is intended to be commercial in nature and if the majority of the project's business is anticipated to come from the nonuniversity population, the board or institution shall report on the scope, purpose and estimated cost of the project to the joint committee on capital review at least two months before the anticipated execution of an agreement. A private entity is not required to divulge proprietary information to the joint committee on capital review. The joint committee on capital review may provide recommendations to the board or a university on the reported project.⁵¹

⁴⁵*Id.*

⁴⁶*Id.* § 28-6992.

⁴⁷*Id.* §§ 28-7001, -7002.

⁴⁸*Id.* § 28-7006.D.

⁴⁹*Id.* § 15-1682. The board of regents has jurisdiction and control over the universities. *Id.* § 15-1625. It may delegate its authority for administration and governance to such institutions. *Id.* § 15-1626. Arizona universities include: Northern Arizona University, Arizona State University and the University of Arizona.

⁵⁰*Id.* § 15-1682.01.

⁵¹*Id.* § 15-1682.02. *See id.* § 15-1671 for a discussion of the capital infrastructure fund established for payment of debt service on lease-purchase and lease-to-own agreements.

The board of regents may enter into lease-to-own agreements for building renewal projects and for new facilities up to a maximum of eight hundred million dollars.⁵² The procurement code applies “to every expenditure of public monies . . . under any contract” by any “governmental unit”, with numerous exceptions.

The board of regents may adopt rules prescribing procurement policies and procedures that are similar to those prescribed in the state procurement code.⁵³

All agencies, including the governor’s office, must comply with the statute covering multiterm contracts for materials or services, which may be entered into for a period of time up to five years and which are subject to cancellation for nonappropriation.⁵⁴ State governmental units are required to use existing state contracts unless authorized by the state procurement administrator.⁵⁵

Information technology projects entered into by “budget units” with costs of twenty-five thousand dollars to one million dollars are subject to review and approval by the Department of Administration.⁵⁶ Information technology projects entered into by “budget units,” the legislative, and judicial branches of government that exceed one million dollars may be subject to review and approval by the information technology authorization committee.⁵⁷

Energy Performance Contracts

The lease-purchase of “energy management systems” is permitted.⁵⁸ The department of administration is authorized to “develop and implement a program to enter into performance contracts solely for the purpose of achieving energy savings as measured in dollars and benefits ancillary to that purpose.”⁵⁹ Subject to numerous restrictions, “(e)ach contract may be for a period of not more than the expected life of the energy savings measures implemented or twenty-five years, whichever is shorter.”⁶⁰

⁵²*Id.* § 15-1682.03.

⁵³*Id.* § 41-2501; §§ 41-2501 to 41-2673 (procurement code). Under the procurement code “contract” means all types of state agreements, regardless of what they may be called, for the procurement of materials, services, construction, construction services or the disposal of materials. “Materials” means “all property, including equipment, . . . and lease of property” but does not include a permanent interest in land or real property. “Procurement” means purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services” and includes “all functions that pertain to obtaining any materials . . .” *Id.* § 41-2503.

⁵⁴*Id.* §§ 41-2501, 41-2546; Ariz. Admin. Code R2-7-605 (requiring a cancellation clause in multi-term contracts). Agency means “any board, commission, department, officer or other administrative unit of this state, including the agency head and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head, whether created under the Constitution of Arizona or by enactment of the legislature. Agency does not include the legislature, the courts or the governor. Agency does not include a political subdivision of this state or any of the administrative units of a political subdivision, but does include any board, commission, department, officer or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of this state or any of their units. To the extent an administrative unit purports to exercise authority subject to this chapter, an administrative unit otherwise qualifying as an agency must be treated as a separate agency even if the administrative unit is located within or subordinate to another agency.” Ariz. Rev. Stat. Ann. §§ 41-1001, 41-2501.

⁵⁵Ariz. Admin. Code R2-7-607.

⁵⁶Ariz. Rev. Stat. Ann. § 18-104. “Budget unit” means department, commission, board, institution or other agency of the state receiving, expending or disbursing state funds or incurring obligations of the state including the Arizona board of regents but excluding the universities under the jurisdiction of the Arizona board of regents, the community college districts and the legislative or judicial branches. *Id.* § 18-101. “Information technology” means all computerized and auxiliary automated information processing, telecommunications and related technology, including hardware, software, vendor support and related services, equipment and projects. *Id.*

⁵⁷*Id.* § 18-121.

⁵⁸*Id.* § 41-791.02. *See, supra*, note 39 and accompanying text. The term “energy management systems” is not defined.

⁵⁹*Id.* § 34-455.

⁶⁰*Id.*

Debt Limitations

The State of Arizona, counties, cities, school districts and other municipal corporations are constitutionally limited in the amount of debt which they can incur.⁶¹ In *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Ass'n*,⁶² a lease-purchase arrangement in which the city would lease a municipal auditorium constructed on city land with title to vest in the city at the end of the lease term was held invalid as a violation of the constitutional debt limitation. The court reasoned that because the city was to receive the property at the end of the lease term, the rental payments were given as consideration not only for the use of the property but also for its ownership, making the agreement a purchase agreement. In addition, the court held that because the contract provided that upon default by the city it would remain liable for rental payments under the lease, it was obligated for the entire amount under the lease, thus creating an illegal debt.⁶³ The attorney general has held that a lease-purchase agreement may be construed as creating a debt subject to constitutional limitations if it obligates a school district for more than one year, is structured to compel automatic renewal, or does not represent the fair rental value of the property.⁶⁴

No statute may be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation made for that specific purpose.⁶⁵

A court of appeals held, in a multi-year employment contract case brought against the University of Arizona by a basketball coach, that contracts for more than one year are valid and do not violate a statutory prohibition against obligating the state for any expenditure not authorized by an appropriation where a multi-year contract includes a clause releasing the state from its obligation if funds are not appropriated in a future year.⁶⁶ The statute at issue reads as follows:

A. No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment. Any obligation incurred in contravention of this chapter shall not be binding upon the state and shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state.

B. Every person incurring, or ordering or voting for the incurrence of such obligations, and his bondsmen, shall be jointly and severally liable therefor. Every payment made in violation of the provisions of this chapter shall be deemed illegal, and every official authorizing or approving such payment, or taking part therein, and every person receiving such payment, or any part thereof, shall be jointly and severally liable to the state for the full amount so paid or received.⁶⁷

⁶¹Ariz. Const. art. IX, § 5 (state); *id.* art. IX, § 8(1) (counties, cities, towns, school districts, and municipal corporations); *id.* art. IX, § 8.1(1) (unified school districts). As special taxing districts, fire districts and hospital districts appear to be municipal corporations for purposes of the constitution. *See* Ariz. Rev. Stat. Ann. § 48-271. Fire districts are statutorily limited. *See, supra*, Fire Districts section. Hospital districts are statutorily limited. *Id.* § 48-1913.

⁶²99 Ariz. 270, 408 P.2d 818 (1965).

⁶³Municipal auditorium lease-purchase arrangements are now statutorily authorized. Ariz. Rev. Stat. Ann. § 42-17109. *See, supra*, text accompanying note 23. *See also* American-La France & Foamite Corporation v. City of Phoenix, 54 P.2d 258 (Ariz. 1936) (lessee remained liable to lessor for all rentals under the lease even if equipment returned).

⁶⁴76-6 Op. Att'y Gen. (Ariz. 1976). *See also* Duff v. Jordan, 311 P.2d 829 (Ariz. 1957) (upholding state highway construction contract which provided no obligation was to be incurred during the fiscal year in excess of funds budgeted for such year even though contract was for amount in excess of allotted amount for fiscal year); Holdren v. Peterson, 82 P.2d 1095 (Ariz. 1938) (upholding contract for voting machines as an option in the county to rent the machines year to year, if it so desires, with the proviso that if and when the rental paid amounts to a certain sum title will vest in the county).

⁶⁵Ariz. Rev. Stat. Ann. § 1-254.

⁶⁶Univ. of Arizona v. Pima County, 722 P.2d 352 (Az. Ct. App. 1986).

⁶⁷Ariz. Rev. Stat. Ann. § 35-154.

Interest Rate Limitations

“Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of 10 percent per annum unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to.”⁶⁸

Miscellaneous

Property subject to a lease-purchase agreement where the state or political subdivision is the lessee-purchaser and the property is used by the state or political subdivision during the entire taxable year exclusively for a governmental activity is exempt from property taxation.⁶⁹

Excise taxes are not applicable to property that is used for a governmental activity or “to property of a corporation that is organized by or at the direction of a county, city or town to develop, construct, improve, repair, replace or own any property, improvement, building or other facility to be used for public purposes that the county, city or town pledges to lease or lease-purchase with county or municipal special or general revenues.”⁷⁰

Ariz. Rev. Stat. Ann. § 35-501 (B) requires filing of reports 60 days after issuance of certificates of participation and “other Securities” (which is not defined) in the office of the State Treasurer and it appears that this statute does not cover lease/purchase agreements or financing contracts, so long as there are no certificates of participation issued. Note that failure to file this report does not result in invalidity. There is also a report that all governments must file with the state treasurer annually, which does include lease purchase agreements and financing contracts. It would be applicable to the state, counties, cities, towns, school districts, irrigation districts, other political subdivisions and municipal property corporations within the state.⁷¹

The Arizona attorney general has concluded that a newly consolidated school district assumes the liability for all the indebtedness, including lease-purchase agreements, of the predecessor districts.⁷²

Arizona statutes require contracts involving political subdivisions to provide notice of the following section:

The state, its political subdivisions or any department or agency of either may, within three years after its execution, cancel any contract, without penalty or further obligation, made by the state, its political subdivisions, or any of the departments or agencies of either if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract.⁷³

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁶⁸Ariz. Rev. Stat. Ann. § 44-1201.A.

⁶⁹*Id.* § 42-11102.A.2.

⁷⁰*Id.* § 42-6208.

⁷¹*Id.* § 35-501(B). See <https://aztreasury.gov/bid-reports>.

⁷²Op. Att’y Gen. (Ariz. Aug. 3, 1990) (available at 1990 Ariz. AG Lexis 75), WL 600197.

⁷³Ariz. Rev. Stat. Ann. § 38-511. (See Section 38-511 for additional provisions related to procedures for cancellation and effect.) This section does not apply to hospital districts. *Id.*

ARKANSAS 2019

The constitution and statutes are current through (1) laws passed in the 2018 Fiscal Session and the Second Extraordinary Session of the 91st Arkansas General Assembly, (2) ballot issues adopted at the November 6, 2018, general election, and (3) changes made by the Arkansas Code Revision Commission received through October 31, 2018, Westlaw.ⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Courts have construed and upheld leases of real property entered into by counties.⁵

(a) It shall be unlawful for the county court to approve any claim for the payment of rent on equipment and machinery used by the county, and it shall be unlawful for the county clerk to issue any warrant for the payment of any such claim which may have been allowed by the court, unless a written contract providing for the payment of the rent shall have been first approved by order of the court. This copy shall be delivered by the county judge to the clerk, who shall record it in the minutes of the court in the office of the clerk, to be kept with the appropriate docket provided for by § 14-23-203.

(b) The provisions of this section shall apply to all rentals of equipment and machinery by the county whether they shall be for temporary use only, or whether they shall be in the form of a rental-purchase or lease-purchase agreement or contract whereby the county rents or leases such equipment or machinery and under the terms of which agreement the county has the option to buy the equipment or machinery and to apply the rental payments on the purchase price.⁶

Amendment 78 to the Constitution of the State of Arkansas permits counties and municipalities to incur short term financing obligations for the purpose of acquiring, constructing, installing or renting real property or tangible personal property having a useful life of more than one year.⁷ Such “short term financing obligations” may mature over a period of, or have a term, not to exceed five years.⁸ The total amount of such short term financing obligations is limited.⁹ The authority conferred by Amendment 78 is in addition to authority of municipalities and counties to issue debt obligations pursuant to other provisions of the Constitution and laws of the state of Arkansas.¹⁰

The Local Government Short-Term Financing Obligations Act of 2001 is the implementing legislation for Amendment 78.¹¹ It is a complicated financing mechanism that does not lend itself to simple lease-purchase financing and it is advisable to engage Arkansas bond counsel for any financing entered into pursuant to this legislation.

¹Counties are divided into quorum court districts or townships. Ark. Code Ann. § 14-14-401.

²*Id.* § 14-14-801(b)(1).

³*Id.* § 18-15-201.

⁴*Id.* § 14-14-801(b).

⁵*See Searcy County v. Horton*, 270 Ark. 22, 603 S.W.2d 437 (Ct. App. 1980) (lease of office space over a twelve-year term entered into by a county judge was deemed ratified by the county’s payment of monthly rentals).

⁶Ark. Code Ann. § 14-23-208.

⁷Ark. Const. Amend. 78 § 2(a); Ark. Code Ann. § 14-78-103(a)(1). Ark. Code Ann. § 14-78-103(a) adds the requirement that the obligations must be issued pursuant to ordinance adopted by the legislative body specifying the principal amount of the obligations to be issued, the purpose or purposes for which the obligations are to be issued, and provisions with respect to the obligations.

⁸Ark. Const. Amend. 78 § 2(a) (as amended by Ark. Const. Amend. 89); Ark. Code Ann. § 14-78-103(a)(2).

⁹*See, infra*, note 82, and accompanying text.

¹⁰Ark. Const. Amend. 78 § 2(c).

¹¹Ark. Code Ann. §§ 14-78-101 to -110. *See* Ark. Op. Atty. Gen. No. 2003-152, 2003 WL 21514691, for a discussion of Amendment 78 and this statute.

Energy Performance Contracting

Counties (and municipalities) are authorized to enter into financing leases for the purchase of energy efficiency projects under Constitutional Amendment 89 and implementing legislation.¹² Additionally under the statutes, counties are authorized to “own, acquire, construct, reconstruct, extend, equip, improve, operate, maintain, sell, lease, contract concerning, or otherwise deal in, or dispose of, or make loans to finance the acquisition, construction, reconstruction, extension, equipment, or improvement of energy facilities.”¹³

Municipalities

Municipalities¹⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁵ eminent domain¹⁶ and police powers.¹⁷ Municipalities may “acquire and hold real estate . . . and such other real and personal property as is necessary and proper for the administration of the affairs of municipal corporations.”¹⁸ Municipalities may “sell, convey, lease, rent or let any real estate or personal property owned or controlled” by them.¹⁹ They are also authorized to “buy any real estate or personal property.”²⁰ As noted above, Amendment 78 to the Constitution of the State of Arkansas permits counties and municipalities to incur short term financing obligations for the purpose of acquiring, constructing, installing or renting real property or tangible personal property having a useful life of more than one year.²¹ Such “short term financing obligations” are defined as obligations that mature over a period of, or have a term, not to exceed five years.²² The total amount of such short term financing obligations is limited.²³

Energy Performance Contracting

Municipalities (and counties) are authorized to enter into financing leases for the purchase of energy efficiency projects under Constitutional Amendment 89 and implementing legislation.²⁴ Additionally under the statutes, municipalities are authorized to “own, acquire, construct, reconstruct, extend, equip, improve, operate, maintain, sell, lease, contract concerning, or otherwise deal in, or dispose

¹²*Id.* § 14-164-801-821 (Local Government Energy Efficiency Project Bond Act); *id.* § 804.

¹³*Id.* § 14-167-205. “Energy facilities means any real property, personal property, or mixed property of any and every kind which, in residential, commercial, industrial, or agricultural applications: (A) Reduces the amount of energy required to perform desired tasks; or (B) Utilizes renewable energy resources to supply energy needs.” *Id.* § 14-167-203(1). “Lease means to lease for such rentals, for such periods, and upon such terms and conditions as the municipality or county shall determine and the granting of such extension and purchase options for such prices and upon such terms and conditions as the municipality or county shall determine.” *Id.* § 14-167-203(7). Other restrictions apply. *See id.* Ch. 167. Arkansas Constitutional Amendment 89 authorizes governmental units to issue bonds to finance the costs of energy efficiency projects, under laws adopted by the General Assembly. This amendment postdates a 2008 attorney general’s opinion, Arkansas Attorney General’s opinion, Ark. AG Opin. No. 2008-061, June 30, 2008, 2008 Ark. AG LEXIS 112, that savings generated under energy efficiency projects are not revenues that can be pledged to a revenue bond issue, if the payments are derived from tax payments.

¹⁴Municipalities for this discussion are first and second class cities and incorporated towns. Ark. Code Ann. § 14-37-103.

¹⁵*Id.* § 26-73-103.

¹⁶*Id.* §§ 18-15-201, -301, -401.

¹⁷*Id.* §§ 14-54-103 to -105.

¹⁸*Id.* § 14-54-301.

¹⁹*Id.* § 14-54-302(a)(1).

²⁰*Id.* § 14-54-302(a)(2).

²¹Ark. Const. Amend. 78, § 2(a) (as amended by Ark. Const. Amend. 89).

²²*Id.*

²³*See, infra*, note 82 and accompanying text.

²⁴*Id.* § 14-164-801-821 (Local Government Energy Efficiency Project Bond Act); *id.* § 804.

of, or make loans to finance the acquisition, construction, reconstruction, extension, equipment, or improvement of energy facilities.”²⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ “A school district may acquire and hold real estate and other classes of property”²⁸ and school boards are charged with the power of “[b]uying, selling, renting, and leasing real property and personal property on behalf of the school district.”²⁹ School districts may enter into installment contracts or lease-purchase agreements for the purposes of, among other things, (1) purchasing school buses, (2) purchasing equipment, (3) constructing, repairing and renovating of school facilities, (4) purchasing school sites, and (5) purchasing energy conservation measures.³⁰ With the exception of acquisitions of energy conservation measures, lease-purchase agreements and installment contracts must be paid within 10 years of the date of execution.³¹ Lease-purchase agreements, together with required schedules, must be registered, on forms provided by the State Board of Education, with the treasurer of the district and the board.³² A lease-purchase agreement or installment contract entered into with a school district must have an attached schedule of the rent or installments to be paid showing (1) the payee and any assignee, (2) the school district; (3) the purpose of the purchase or payment, (4) the due date of each installment, and (5) the amount of principal and interest of each installment and the fiscal year in which the installment is to be paid.³³ The rate of interest on such installment contracts and lease-purchase agreements is limited.³⁴ A number of additional provisions apply with respect to debt limitations, security, and the form of lease-purchase and installment obligations.³⁵

A five year lease entered into by an education service cooperative, as lessee, did not violate the provisions of § 6-20-402(a)(1) relating to school district limitations on the duration of lease-purchase agreements.³⁶ The co-op was created by the Education Service Cooperative Act [§ 6-13-1001]. The Act authorizes a co-op to enter into contracts that commit their funds and extend their indebtedness beyond one fiscal year and such entities are not limited by the provisions of the school district limitation on indebtedness.

²⁵*Id.* § 14-167-205. *See, supra*, note 13 and accompanying text.

²⁶Ark. Const. art. XIV, § 3 (the constitutional provision relating to school taxes was amended on November 5, 1996, and applies to taxes due in 1997 and thereafter).

²⁷Ark. Code Ann. § 6-13-103.

²⁸*Id.* § 6-13-102.

²⁹*Id.* § 6-13-620(6)(E).

³⁰*Id.* § 6-20-402(a)(2).

³¹*Id.* § 6-20-402(b)(1)(A). Lease-purchase agreements and installment contracts for the acquisition of certain energy conservation measures are permitted to have a 20 year term; provided that no financing shall exceed the reasonably expected useful life of the energy facilities or equipment. *Id.* § 6-20-402(b)(1)(B). Section 6-20-405 authorizes school districts to enter into installment contracts or lease-purchase contracts for energy conservation measures. Regulations, Ark. Admin. Code 203.00.8-4.00 (energy conservation measures). A 2008 Arkansas Attorney General’s opinion, Ark. AG Opin. No. 2008-061, June 30, 2008, 2008 Ark. AG LEXIS 112, provided that savings generated under energy efficiency projects are not revenues that can be pledged to a revenue bond issue, if the payments are derived from tax payments. Arkansas Constitutional Amendment 89 subsequently authorized government units to issue bonds to finance the costs of energy efficiency projects, under laws adopted by the General Assembly. One can also use the leasing provisions under constitutional Amendment 78 for cities and counties, but with a maximum term of 5 years, this isn’t realistic for these projects. It appears that Amendment 78 is not applicable to school districts.

³²*Id.* § 6-20-402(b)(1)(E).

³³*Id.* § 6-20-402(b)(2)(A).

³⁴*See, infra*, note 82 and accompanying text.

³⁵*See id.* §§ 6-20-402, -405.

³⁶*Ozarks Unlimited Resources Cooperative, Inc. v. Daniels*, 969 S.W.2d 169 (Ark. 1998).

Pursuant to the Arkansas Public Schools Academic Facilities Financing Act of 2007, school districts can lease purchase property pursuant to a program with the Commission for Arkansas Public School Academic Facilities and Transportation.³⁷

Energy Performance Contracting

A school district may enter into installment contracts or short-term lease-purchase agreements for the installation or purchase of energy conservation measures, subject to numerous restrictions.³⁸

Fire Districts

Fire districts³⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.⁴⁰ Fire protection district boards “may in general make all contracts in the conduct of the affairs of the district as may best serve the public interest.”⁴¹

Suburban improvement districts organized to provide fire protection services may enter into agreements for acquiring equipment:

Fire departments are authorized and empowered to enter into loans, lease-purchase agreements, and other extensions of credit from lenders and are empowered to pledge and assign services agreements to lenders in order to collateralize and secure repayment of loans, lease-purchase agreements, and other extensions of credit that might be advanced by lenders to fire departments for the purpose of acquiring, improving, accessing, or otherwise gaining the use of fire equipment.

(2)(A) Fire departments may additionally grant to lenders all mortgages, security interests, and other liens to secure and collateralize repayment of credit extended by lenders to fire departments.

(B) Notwithstanding any other applicable statute, rule, or regulation, the pledging and collateral assignment of services agreements, the encumbering of all other fire department assets, and the execution of all other debt-evidencing and debt-securing documents shall occur by means of a resolution which is duly adopted by the governing board or body of the fire department.⁴²

Qualified fire protection districts may “(e)xecute contracts and other instruments for and in behalf of the district;” and may use certain dedicated tax fund moneys from the state

... for the purchase and improvement of, or for pledging as security for a period of not more than ten (10) years in the financing of the purchase and improvement of, fire fighting equipment and initial capital construction or improvements of fire departments.

³⁷Ark. Code Ann. §§ 6-20-2601 to -2623.

³⁸*Id.* § 6-20-402. *See, supra*, notes 30 and accompanying text.

³⁹Fire districts for this discussion are “fire protection districts outside of cities and towns” and “cover only territory within the county, or within the defined district, outside the corporate limits of cities and towns.” Ark. Code Ann. § 14-284-201. Fire districts also include suburban improvement districts organized to provide fire protection services. These districts operate under the same statutory framework as those organized to provide hospitals. *Id.* § 14-92-219.

⁴⁰*Id.* § 14-284-201; § 14-284-211.

⁴¹*Id.* § 14-284-116. Purchases of equipment costing more than \$10,000 must be publicly bid. *Id.*

⁴²*Id.* § 14-272-302 (b); Fire department “means any fire protection district, improvement district, subordinate service district, other governmental entity or volunteer, not-for-profit, rural, or other organization, or entity of any nature that is involved in the provision of firefighting services;” Firefighting equipment “means all equipment, vehicles, improvements, and other real and personal property of every nature that might be used by a fire department in connection with the supplying of firefighting services, specifically including, without limitation, all fire trucks, lines, hoses, pumps, ladders, fire houses, office facilities, storage facilities, and other improvements of every nature;” Lenders “means those parties who extend funds or credit to fire departments for the purpose of acquiring, upgrading, leasing, accessing, or otherwise gaining the use and enjoyment of firefighting equipment, specifically including, without limitation, banks, savings associations, commercial lenders, indenture trustees, other lenders, or other parties of whatever nature who extend credit or financing to others.” *Id.* § 14-272-301.

(2) Municipalities, fire departments, and districts must expend or allocate for expenditure all funds received under the provisions of this subchapter on or before the expiration of twelve (12) months from the date of receipt.

(3) Any excess or surplus funds which are not expended or allocated for expenditure within such twelve-month period shall be remitted to the fund no later than sixty (60) days following the expiration of such twelve-month period.

(b) Equipment funded under this section shall be used by the municipalities and departments located in fire protection districts which have been duly formed or established under the provisions of § 14-284-201 et seq. [relating to fire protection districts outside of cities and towns]⁴³

Hospital Districts

Suburban improvement districts may be formed to acquire and equip hospitals.⁴⁴ Suburban improvement districts qualify as tax-exempt issuers for federal income tax law due to their tax⁴⁵ and eminent domain⁴⁶ powers. Suburban improvement districts may “acquire and purchase equipment and machinery incident to the operation and maintenance of the facilities [authorized in the subchapter] and shall be further authorized to do any and all other actions which shall be deemed necessary in order to purchase, construct, accept as a gift, operate, and maintain any and all improvements and facilities authorized in this subchapter.”⁴⁷ Such districts are authorized to sell any land that may be acquired.⁴⁸

State Entities

State agencies, boards and commissions, with some exceptions, may “purchase” or sell lands subject to numerous procedural requirements.⁴⁹ The Arkansas Building Authority Division of the Department of Finance and Administration is authorized to “(a)cquire, construct, and equip buildings or by purchase, exchange, barter, gift, long-term lease, or other means, buildings and facilities to house state agencies.”⁵⁰

(a) For the express purpose of providing adequate office facilities, the Arkansas Building Authority Council, acting as the primary lessor, is authorized to enter into lease-purchase agreements to obtain facilities for state agencies. Each lease-purchase agreement shall contain a provision whereby the agreement shall be cancelled at the close of each fiscal biennium, if necessary, if funds for the payment of the rent under the lease-purchase agreement will not be available.

(b) (1) The director shall make the final determination regarding the location or construction of facilities with the advice and consent of the appropriate state agency.

(2) All agreements and other matters concerning the buying, trading, selling, renting, renovating, or acquiring of any real or personal property as authorized by this section shall be matters of public record and available for public inspection.

(c) The General Accounting and Budgetary Procedures Law, § 19-4-101 et seq., the Arkansas Procurement Law, § 19-11-201 et seq., the Revenue Stabilization Law, § 19-5-101 et seq., and other applicable fiscal laws of this state shall be strictly complied with regarding this section.⁵¹

⁴³*Id.* § 14-284-404.

⁴⁴*Id.* § 14-92-219.

⁴⁵*Id.* § 14-92-228.

⁴⁶*Id.* § 14-92-222.

⁴⁷*Id.* § 14-92-220.

⁴⁸*Id.* § 14-92-223.

⁴⁹*Id.* § 22-6-601. This section does not apply to the State Highway Commission, the Arkansas State Game and Fish Commission, the Arkansas Natural Heritage Commission, the State Parks, Recreation, and Travel Commission, the Department of Higher Education, and institutions of higher education.

⁵⁰*Id.* § 22-3-1404.

⁵¹*Id.* § 22-2-115.

Provisions regarding appropriations state the following:

(a) No obligations will be paid from appropriated funds until the General Assembly shall have made an appropriation for that purpose; nor shall any state agency enter into any contract which would contemplate that payments under the contracts would be made beyond the expiration of the biennial period unless the General Assembly, prior to the expiration of the biennial period, makes an appropriation for that purpose, or in the case of multiyear contracts for commodities or services, a determination in writing has been made prior to use that:

(1) Estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(2) Such a contract would serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(b) In no event shall any obligations be incurred unless there are sufficient funds or an approved federal grant on hand, or estimated to become available, to meet the obligations when they become due.⁵²

Additional provisions provide:

(a) No state agency for which regular operating appropriations are made on a fiscal-year basis shall incur any obligations under the appropriations unless there are funds on hand or an approved federal grant, or estimated to become available, during the fiscal year for the payment of the obligation; nor shall any agency create any obligation in one (1) fiscal year which will make it necessary to use the revenues of the following fiscal year in order to meet the obligation except in the case of multiyear contracts for commodities or services and as provided in § 19-4-707.

(b) In the event an agency had bank funds which are not required by law to be deposited in the State Treasury, the agency shall have the authority to create additional obligations to the extent of the bank funds on hand, or which are estimated to become available during the fiscal period. However, the agency shall not create any obligations, in the aggregate, which would make the total of such obligations exceed the total of all funds available to the agency during the fiscal period, except in the case of multiyear contracts for commodities or services and as provided in § 19-4-707.⁵³

The State Procurement Code⁵⁴ applies to every expenditure of public funds by an agency⁵⁵ under any contract.⁵⁶ There are numerous exempt commodities and services,⁵⁷ including capital improvements valued at less than twenty thousand dollars (\$20,000),⁵⁸ contracts awarded by the Arkansas State Highway and Transportation Department for the construction, reconstruction, and maintenance of roads and bridges in the state highway system,⁵⁹ and contracts awarded by agencies for the construction of buildings and facilities and for major repairs.⁶⁰

⁵²*Id.* § 19-4-704.

⁵³*Id.* § 19-4-705.

⁵⁴*Id.* §§ 19-11-101 to -1408.

⁵⁵“State agency” means any agency, institution, authority, department, board, commission, bureau, council, or other agency of the state supported by appropriation of state or federal funds, except an exempt agency pursuant to subdivision (13) of this section.” *Id.* § 19-11-203 (30). “Exempt agencies” means the constitutional departments of the state, the elected constitutional offices of the state, the General Assembly, including the Legislative Council and the Legislative Joint Auditing Committee and supporting agencies and bureaus thereof, the Supreme Court, the Court of Appeals, circuit courts, prosecuting attorneys, and the Administrative Office of the Courts.” *Id.* § 19-11-203 (13).

⁵⁶“Contract” means all types of state agreements, regardless of what they may be called, including lease. Ark. Code Ann § 19-11-203(5). “Procurement” includes leasing. *Id.* § 19-11-203(20)(A).

⁵⁷*Id.* § 19-11-203(14). “Commodities” means all property, including, but not limited to, equipment, . . . supplies, . . . but excluding leases on real property, real property, or a permanent interest in real property, exempt commodities and services, and capital improvements. *Id.* § 19-11-203(4).

⁵⁸*Id.* § 19-11-203(14)(Y).

⁵⁹*Id.* § 19-11-203(14)(F).

⁶⁰*Id.* § 19-11-203(14)(E) (These contract exemptions shall not extend to the procurement of any commodities not otherwise exempt that are to be furnished by the agency under any such contract).

The Department of Finance and Administration rules and regulations of the financial management guide describes capital leases as follows:⁶¹

A lease agreement that meets one or more of the following four criteria is a capital lease:

- The lease transfers ownership of the property to the lessee by the end of the lease term.
- The lease contains a bargain purchase option. A bargain purchase option exists when the lessee can either buy the property at a minimal amount or renew the lease at very low rental payments relative to market rates.
- The lease term is equal to 75% or more of the life of the leased asset. (For example, the lease term is six years and the estimated remaining useful life is eight years). The life of a used leased asset will be calculated using 75% of the suggested useful life in the State's capital assets policy.
- The present value of rental and other minimum lease payments equals or exceeds 90% of the fair value amount of the leased asset (for example, the present value of the rental and other minimum lease payments equals \$9,000, and the fair value is \$10,000). Instructions on how to calculate the present value of minimum lease payments follow the example below. The fair value is the amount at which the asset could have been purchased.

The last two criteria are not applicable when the beginning of the lease term falls within the last 25% of the total estimated remaining useful life of the leased property.

The lease is accounted for as an operating lease if it does not meet the State's capitalization threshold or does not meet the criteria of a capital lease.

Provisions for leasing of equipment by state agencies are contained in the state procurement code section covering multiyear contracts.⁶²

(a) Specified Period. Unless otherwise provided by law, a contract for commodities or services may be entered into for periods of not more than seven (7) years if funds for the first fiscal year of the contemplated contract are available at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability and appropriation of funds therefor.

(b) Determination Prior to Use. Prior to the utilization of a multi-year contract, it shall be determined in writing that:

- (1) Estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- (2) Such a contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement; and
- (3) In the event of termination for any reason, the contract provides for cessation of services and/or surrender by the state of the commodities and repayment to the state of any accrued equity.

(c) Termination Due to Unavailability of Funds in Succeeding Years. Original terms of such multiyear contracts shall terminate on the last day of the current biennium, and any renewals by the state based upon continuing appropriation shall not exceed the next succeeding biennium. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a multi-year contract, the contract for such subsequent year shall be terminated and the contractor may be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the commodities or services delivered under the contract. The cost of termination may be paid from:

- (1) Appropriations currently available for performance of the contract;
- (2) Appropriations currently available for procurement of similar commodities or services and not otherwise obligated; or

⁶¹Ark. Admin. Code 006.09.1 R1-19-11-238 (Oct. 9, 2014).

⁶²Ark. Code Ann. § 19-11-238; *See* Ark. Admin. Code 016.14.1-601 (am. June, 2012) (relating to procedures applicable to the Dept. of Human Services).

(3) Appropriations made specifically for the payment of such termination costs.

Administrative rules for the department of human services provide for multiyear contracts as follows:

A. The original term of a multi-year contract shall terminate no later than the last day of the current period of legislative appropriation. Any renewals shall not exceed the next succeeding period of legislative appropriation.

B. Unless otherwise provided by law, a contract for goods or services may continue for a total period of not more than seven years.

C. Determination Prior to Use. Prior to the utilization of a multi-year contract, it shall be determined in writing that:

1. Estimated requirements cover the period of the contract and are reasonably firm and continuing;
2. Such a contract will serve the best interest of the State by encouraging effective competition or otherwise promoting economies in State procurement;
3. In the event of termination for any reason, the contract provides for cessation of services or surrender by the State of the goods (commodities) and repayment to the State of any accrued equity.

D. Termination Due to Unavailability of Funds in Succeeding Years. Original terms of such multi-year contracts shall terminate on the last day of the current period of legislative appropriation and any renewals by the State based upon continuing appropriation shall not exceed the next succeeding period of legislative appropriation. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a multi-year contract, the contract for such subsequent year shall be terminated and the contractor may be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the goods or services delivered under the contract. The cost of termination may be paid from:

1. Appropriations currently available for performance of the contract
2. Appropriations currently available for procurement of similar commodities or services and not otherwise obligated
3. Appropriations made specifically for the payment of such termination costs.⁶³

Renewals of multiyear contracts by the department of human services are provided for in the rules as follows:

A. Contracts for goods or services are sometimes procured with the option to renew for additional time periods. If a renewal is desired, the division must make a request in writing with its Assistant Director or Director's signature. The renewal option must be requested at least thirty days prior to the expiration of the contract. Renewals may require the approval of OSP or Arkansas Building Authority. The renewal is a mutual agreement between the Department and the vendor. Once the vendor accepts the terms for renewal, a written addendum is added to the contract. No contract can be extended once all the renewals authorized in the procurement have been depleted.

B. A contract that is procured without a renewal option cannot be renewed in any instance. Offers by the original vendor to renew the contract cannot be accepted.⁶⁴

Office of State Procurement leases containing an option to purchase are subject to competitive bidding:

Lease. All contracts for the lease of a commodity which exceed a cost of seventy-five thousand dollars (\$75,000) during the initial period of the contract shall be awarded on the basis of competitive sealed bids. All contracts for the lease of a commodity that do not exceed seventy-five thousand

⁶³*Id.* 016.14.1-601, subsection XVI.

⁶⁴*Id.* subsection XVII.

dollars (\$75,000) during the initial period of the contract but contain an option to purchase a commodity costing more than fifty thousand dollars (\$50,000) shall be awarded on the basis of competitive sealed bids. No lease duration including renewals can extend beyond a seven-year period. The term “lease” shall include rent.⁶⁵

No contract greater than ninety (90) days for the lease of commodities on state contract shall be approved unless the State Procurement Director determines in writing that it is in the best interest of the state and states the reasons therefore.⁶⁶

The State Procurement Director has exclusive jurisdiction over the procurement of passenger motor vehicles and trucks and new and used school buses for state agencies, among other items.⁶⁷ The Department of Transportation and various public institutions of higher education may elect to have an “agency procurement official” for commodities and technical services that are not within the exclusive jurisdiction of the State Procurement Director.⁶⁸ Approvals by the Office of State Procurement of contracts administered by such official are not generally required.⁶⁹

Contracts for procuring “information technology products and services” in an amount exceeding \$100,000 must be submitted to the Department of Finance for review.⁷⁰ Relating to acquisition of information technology products and services, regulations provide:

Agencies must submit to the Department of Finance and Administration Office of Intergovernmental Services State Technology Planning (STP) any bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase for Information Technology products or services where the total projected contract amount, including any amendments or possible extensions, is one hundred thousand dollars (\$100,000) or more. In addition, any bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase that includes Information Technology products or services as part of the purchase, where that part is anticipated to have a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000.00) or more must be submitted to STP for approval.

STP will provide approval through the state's financial management system. STP shall have ten (10) business days from receipt of the documents to complete the necessary reviews. If the STP review is not completed within the time frame allowed, the agency and STP must mutually agree to an extension of the review process.⁷¹

The department of corrections may purchase equipment and procure tools “upon a self-liquidating basis” for a period not exceeding ten years and in an aggregate amount not to exceed \$500,000.⁷²

The Board of Trustees of the University of Arkansas and the boards of trustees of Arkansas Tech University and the University of Central Arkansas have the power of eminent domain.⁷³ These institutions of higher education with the addition of Henderson State University, Arkansas State University and Southern Arkansas University are “authorized to transfer and simultaneously enter into a lease agreement concerning any property,”⁷⁴ and repurchase it.⁷⁵ Such leases are subject to approval of the Building Authority Division of the Department of Finance and Administration.⁷⁶ Additional limitations apply.⁷⁷

⁶⁵*Id.* 006.27.2 R2:19-11-229.

⁶⁶*Id.* 006.27.2 R4:19-11-22.

⁶⁷Ark. Code Ann. § 19-11-222. See Ark. Admin. Code 006.09.03 (State Vehicle Fleet Management Guide).

⁶⁸*Id.* § 19-11-220(a).

⁶⁹*Id.* § 19-11-220(b).

⁷⁰*Id.* § 19-11-269.

⁷¹Ark. Admin. Code 006.27.2 R1:19-11-269 (2016).

⁷²Ark. Code Ann. § 12-30-214.

⁷³Ark. Code Ann. § 6-62-201.

⁷⁴*Id.* § 6-62-602.

⁷⁵*Id.* § 6-62-612.

⁷⁶*Id.* § 6-62-606.

⁷⁷See *id.* §§ 6-62-601 to 6-62-613.

The Board of Trustees of the University of Arkansas is authorized to negotiate leases and enter into contracts with private and public agencies or organizations for the establishment of research and development facilities.⁷⁸

Energy performance contracting

State agencies may enter into lease-purchase contracts for energy saving measures with qualified providers for a maximum term of twenty years, subject to statutory restrictions.⁷⁹

Debt Limitations

The state, counties and municipalities are constitutionally limited in the amount of debt which they can incur.⁸⁰ Statutory limitations are imposed on school districts.⁸¹ In *Dailey v. City of Little Rock*,⁸² suit was brought challenging a lease-purchase agreement for garbage trucks on the basis that the agreement violated the constitutional debt limit. The city had an annual option to renew; however, the opinion is not clear if this renewal was based on annual appropriations. The court held that the plaintiff had not shown that the obligation exceeded revenues and thus dismissal of the complaint was affirmed. The attorney general has advised that lease-purchase agreements containing nonappropriation clauses would not violate the constitutional debt limit.⁸³

⁷⁸*Id.* § 6-64-908.

⁷⁹*Id.* § 19-11-1203, § 19-11-1206; Ark Const. Amendment 89, § 4 (relating to energy efficiency project bonds which are defined in section 5 of the Amendment to include “financing leases.”). *See, supra*, note 13 and accompanying text. For a discussion of energy management performance contracts entered into by the state *see* Op. Att’y Gen. No. 99-352 (Ark. 2000), available on Westlaw 635104.

⁸⁰Ark. Const. Art. XVI, §§ 1, 12; *id.* Amendments 20, 8 (amended by Ark. Const. Amend. 90)(state); Ark. Const. Amend. 78 § 2(a)(2) (as amended by Ark. Const. Amend. 89)(counties and municipalities). The aggregate principal amount of short-term financing obligations incurred by a municipality or a county shall not exceed five percent of the assessed value of taxable property located within the municipality, or two and one half percent of the assessed value of taxable property located within the county, as determined by the last tax assessment completed before the last obligation was incurred by the city or county. *Id.* The total annual principal and interest payments in each fiscal year on all outstanding short-term financing obligations of a municipality or county shall be charged against and paid from the general revenues for such fiscal year, which may include road revenues. *Id.* *See also* Ark. Const. art. XII, § 4 (1874) (as amended by Ark. Const. amend. X, § 1 (1925)). Counties and municipalities may not “make . . . any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made.” *Id.* art. XVI, § 1. “Neither the state nor any city, county, town or other municipality in this state shall ever lend its credit for any purpose whatever; nor shall any county, city or town or municipality ever issue any interest bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the state shall never issue any interest-bearing treasury warrants or scrip.” *Id.*

⁸¹Ark. Code Ann. § 6-20-402(a)(1)(A). “The amount of obligations incurred for a school district for any school fiscal year shall not be in excess of revenue receipts of the district for that year. . . .” *See id.* § 6-2--402, which contains a number of detailed requirements and with respect to debt limitations applicable to obligations entered into by school districts. *See also, id.* § 6-20-1201.

⁸²227 Ark. 537, 299 S.W.2d 825 (1957). In *Searcy County v. Horton*, 270 Ark. 22, 603 S.W.2d 437 (Ct. App. 1980), a challenge to a twelve-year lease of office space as a violation of the constitutional debt limit was rejected. The court stated that because “[u]nder the lease the county became obligated to pay rental only currently as the office space is available for use, there is no showing such obligation would exceed revenues for any fiscal year.” 603 S.W.2d at 438. The opinion does not indicate whether the lease contained a nonappropriation clause. In *Incorporated Town of Ozark v. Ozark Water Co.*, 190 Ark. 872, 81 S.W.2d 920 (1935), a fifty-year contract providing for the installation of water hydrants at a price of \$40 per year for each hydrant installed was upheld. It was asserted that the contract was in violation of the constitutional debt limitation, as an attempt to impose a contractual obligation on the town in excess of the revenues for the year. 81 S.W.2d at 921. The contract provided that the town was to pay rental for service furnished by the company as the town elected. The court interpreted the contract as granting the town an annual option to determine the amount of services to be furnished. *Id.* Because of this option the town could not be compelled to accept the use of any hydrants, and thus its obligation extended for only one year’s rental as it exercised the option. *Id.*

⁸³84 Op. Att’y Gen. 190 (Ark. 1984); 84 Op. Att’y Gen. 104 (Ark. 1984); 80 Op. Att’y Gen. 170 (Ark. 1980).

In *Government Service Automation, Inc. v. Faulkner County*,⁸⁴ the County entered into a five-year contract for computer equipment and services. The contract provided that the County had the right to “opt out” of the contract annually if it could not afford to renew the agreement. The federal district court held that since the County is obligated for only a year at a time, the contract did not violate the provisions of art. XII of the Arkansas Constitution precluding public contracts in excess of the revenue for the fiscal year in which the contract was made.⁸⁵

In the decision of *Hall v. Pulaski County*,⁸⁶ a lower court in Arkansas declared a lease-purchase agreement between Pulaski County, Arkansas, and Continental Telephone Company of Arkansas, Inc. (“Contel”), void and ordered that Contel refund all interest payments to Pulaski County. The court held that the lease-purchase agreement violated article XVI, section 1, of the Arkansas Constitution.⁸⁷ That section provides, “nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness.”⁸⁸ Exceptions exist in the Arkansas Constitution, but voter approval is required for such exceptions. The court’s analysis of the case under article XVI, section 1, is whether any evidence of indebtedness was created, and, if so, whether any interest was paid thereon. The court held that the payments that Pulaski County is obligated to pay in any current fiscal year constitute “indebtedness,” whether or not there is any binding obligation for payments in future fiscal years. On the issue of whether or not interest was being paid on the evidence of indebtedness, the court determined that the obligation in the lease-purchase agreement to pay “administrative costs” amounted to the payment of interest. The court noted a payment schedule that stated “balance due on loan,” “principal” and “administrative costs.” Also, the “administrative costs” column progressively decreased, while the “principal” column increased.

The court went on to state that assuming that contracts containing a contingent future liability cannot create a current indebtedness, it would be difficult to find this lease-purchase agreement in compliance with such a rule. The court applied a standard that the county’s option not to renew must be “absolutely optional” for the agreement to be a contingent future liability. After analyzing the contractual provisions the court stated, “In essence, the contract provides that the county may terminate the agreement only if it has no funds to appropriate, through no fault of its own, for a telephone system.” It was conceded by counsel to Contel that if the county terminated the agreement to obtain a telephone system elsewhere at a lower price, Contel would consider the county in default. Default remedies under the agreement extended beyond the fiscal year in which the default occurred, although counsel to Contel argued that such remedies were not intended to extend beyond the fiscal year of default. The court stated that these unlimited default remedies destroyed the optional nature of the agreement. The court in *Hall* seemed agreeable to severing a provision of the contract to the extent that it does not materially alter the terms originally negotiated. The court’s discussion of whether the lease-purchase agreement was a valid future contingent obligation was not determinative of this decision. Another interesting aspect of this case is that the suit was brought by a taxpayer.

In *Brown v. City of Stuttgart*,⁸⁹ a test case of an older repealed law authorizing lease-purchase financing,⁹⁰ the Arkansas Supreme Court held that a tax-exempt lease agreement constituted an interest

⁸⁴929 F. Supp. 338 (E.D. Ark. 1995).

⁸⁵*But see, infra*, notes 89 and 91 concerning *Brown v. City of Stuttgart*, and accompanying text.

⁸⁶Opin. No. 86-212 (4th Div. Chancery Ct. Pulaski County, Ark. Apr. 23, 1987).

⁸⁷The court followed the Arkansas Supreme Court decision that held that this section was applicable to revenue bonds. *City of Hot Springs v. Creviston*, 705 S.W.2d 415 (Ark. 1986). *See also* 84 Op. Att’y Gen. (Ark. 1984) (attorney general raised this as a possible problem under a repealed section of the Arkansas Constitution).

⁸⁸Notice that school districts are omitted. *See* Op. Att’y Gen. 067 (Ark. 1990) (discussing revenue backed lease-purchase financing as an exception to the constitutional limitation).

⁸⁹847 S.W.2d 710 (Ark. 1993).

⁹⁰At the time of this decision, the law (Local Government Lease Agreements and Purchase Contracts) was codified at Ark. Code Ann. §§ 14-76-101 to 108 (West 1998). The law was repealed in 1995.

bearing evidence of indebtedness in violation of the Arkansas Constitution, article XVI, section 1. The agreement's nonappropriation provisions were held insufficient to cause the payments to be treated as lease payments rather than payments of indebtedness. To the court the lease payment schedule was clearly an amortization schedule. The court declined to address the constitutionality of the act authorizing lease-purchase financing.

A subsequent opinion of the attorney general suggests that a taxable lease-purchase financing in which there are no interest payments, but instead rental payments, might satisfy the *Brown* ruling.⁹¹

In *Dean Leasing, Inc. v. Van Buren County*,⁹² an Arkansas court of appeals held that a county judge could not be held liable as guarantor on a lease-purchase agreement which was invalid for failure of the county to comply with statutory purchasing procedures. The court failed to address whether the structure of the agreement violated any constitutional limitation or provisions as discussed in *Hall v. Pulaski*.

The attorney general reviewed the issue of whether ordinary copier leases are "short-term financing obligations" under Amendment 78 and implementing legislation. She concluded that the law is unclear, and that review of the actual contract would be required, but it is unlikely that application to such copier leases would be contemplated.⁹³

Interest Rate Limitations

Under Amendment 89 to the Constitution of the State of Arkansas adopted by the voters in the November, 2010 general election, there is no maximum interest rate on loans made to governmental units except as may be established by the general assembly.⁹⁴

The rate of interest on installment contracts and lease-purchase agreements entered into by school districts under Ark. Code Ann. § 6-20-402 shall not exceed the maximum interest rate for school bonds, as determined under § 6-20-1206.⁹⁵

In *Stacy v. St. Charles Custom Kitchens*,⁹⁶ the Tennessee contract rate of interest, which exceeded Arkansas' maximum contract rate of interest, was held applicable to a contract executed in Tennessee by a Tennessee company and an Arkansas resident. Both states were found to have substantial connections with the contract; however, Tennessee law was held applicable because its application would validate the contract and because the Arkansas resident failed to show a cloak of usury surrounding the contract, i.e.,

⁹¹Op. Att'y Gen. 93-074 (Ark. 1993). *But see*, Bell v. Itek, 555 S.W.2d 1 (1977); Op. Att'y Gen. 93-291 (Ark. 1993) (purported leases may be construed as sales contracts subject to defense of usury).

⁹²A court may find interest built into a lease if it finds a time price differential structured into the agreement, despite the absence of separately stated interest rates or payments. 88 Op. Att'y Gen. 105 (Ark. 1988).

⁹³Op. Att'y Gen 2016-128 (Ark. 2017).

⁹⁴Ark. Const. Amend. 89 §1, effective Jan. 1, 2011. Limitations apply to any federally insured depository institution having its main office in the State of Arkansas: "The maximum lawful rate of interest, discount points, finance charges, or other similar charges that may be charged, taken, received, or reserved from time to time in any loan or financing transaction by or to any federally insured depository institution having its main office in this State shall be the maximum rate of interest that was applicable to federally insured depository institutions under 12 U.S.C. § 1831u effective on March 1, 2009." *Id.* § 2.

⁹⁵Ark Code Ann. § 6-20-402(h). Ark Code Ann. § 6-20-1206 provides "that the State Board of Education may establish a maximum rate of interest at which school bonds may be sold under the conditions stated in subsection (a) of this section : (1) If the state board establishes a maximum rate of interest under subsection (b) of this section, bonds issued under this section shall not bear interest at a rate exceeding the maximum rate established by the state board; (2) A bond issued under this section may be sold at a discount, but in no event shall a school district be required to pay more than the maximum rate of interest established by the state board."

⁹⁶683 S.W.2d 225 (Ark. 1985).

an attempt to avoid the usury law by substituting the law of a state with no substantial connection with the contract. “Arkansas usury law does not apply to a Tennessee contract.”⁹⁷

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁹⁷*Id.* at 227.

CALIFORNIA 2019

Current through Ch. 1016 of 2018 reg. sess. Laws, ch. 8 of 2015-2016 2nd ex. sess., and all propositions on 2018 Ballot, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase . . . and hold land,”⁵ may “make contracts and purchase and hold personal property”⁶ and may “manage, sell, lease or otherwise dispose of its property as the interests of its inhabitants require.”⁷ Counties “may purchase, . . . lease or otherwise acquire water rights or real or personal property necessary for use of the county for any county buildings, public pleasure grounds, public parks, botanical gardens, harbors, historical monuments, and other public purposes, or upon which to sink wells to obtain water”⁸ Lease-purchase agreements entered into by counties have been upheld by the courts.⁹

Counties may employ a purchasing agent¹⁰ to purchase “materials, supplies, furnishings, equipment, livestock and other personal property,”¹¹ to rent “furnishings, equipment and livestock,”¹² and to contract for services and public works projects.¹³ Also by statute,

[t]he county purchasing agent, with the approval of the board of supervisors and after publishing notice . . . pursuant to section 6061 may . . . sell to a purchaser any personal property owned by or to be owned by the county, provided the purchaser agrees to lease the equipment back to the county for use by the county The approval by the board . . . shall be given only if the board . . . finds, by resolution, that the sale and leaseback is the most economical means for providing such personal property to the county.¹⁴

[T]he board of supervisors of a county, by a four-fifths vote of the board, may sell or lease all or any part of county-owned property without compliance with [public bidding requirements] if the county repurchases or leases back the property as part of the same transaction. By a four-fifths vote of the board of supervisors, the County may pledge specified revenues as security for the payment of obligations incurred in the repurchase or leaseback of the property¹⁵

Counties may “acquire land for and . . . lease, sublease, . . . furnish, refurnish or repair buildings for municipal or superior courts and for convention and exhibition halls, trade and industrial centers, auditoriums, opera houses, music halls and centers, motion picture and television museums, and related facilities”¹⁶ The county may “lease . . . any real property owned by the county . . . to any person,

¹Counties may adopt a charter. Cal. Const. art. XI, § 3(a).

²Cal. Gov’t Code §§ 23004(e), 25202.

³*Id.* § 25350.5.

⁴Cal. Const. art. XI, § 7.

⁵Cal. Gov’t Code § 23004(b).

⁶*Id.* § 23004(c).

⁷*Id.* § 23004(d).

⁸*Id.* § 25353. In addition, counties may “purchase, acquire, construct, equip, and maintain all necessary tanks, reservoirs, pumps, apparatus, motor vehicles, and other machinery necessary or proper to facilitate the performance of the work in the county.” *Id.* § 25352.

⁹*See, infra*, notes 138 to 147 and accompanying text.

¹⁰Cal. Gov’t Code § 25500.

¹¹*Id.* § 25501(a).

¹²*Id.* § 25501(b).

¹³*Id.* § 25501(c).

¹⁴*Id.* § 25504.5.

¹⁵*Id.* § 25536(c).

¹⁶*Id.* § 25351.3(a).

firm, corporation or nonprofit association . . . , with the person, firm, corporation or nonprofit association . . . to lease the real property, as improved, back to the county”¹⁷

Counties may delegate to a purchasing agent, its authority “to lease real property for use by the county for a term not to exceed three years and for a rental not to exceed seven thousand five hundred dollars (\$7,500) per month”; and “to amend real property leases for improvements or alterations . . . not to exceed seven thousand five hundred dollars (\$7,500) provided that the amendment does not exceed the term of the lease and that no more than two amendments . . . are made within a 12-month period.”¹⁸

In addition, a county would qualify as a “local agency” for purposes of a statute allowing “public leasebacks” with a “public leaseback corporation.”¹⁹ Such public leasebacks, the terms of which exceed five years, must be approved by an ordinance of the local agency (the county), and the ordinance is subject to referendum.²⁰ The Public Leaseback Law only applies where the lease payments made by the public agency are used to support debt issued by the nonprofit corporation lessor, such as lease revenue bonds issued by a nonprofit corporation. The statute only applies to real property transactions. It should be noted that the use of a certificates of participation structure to market the lease with the county, rather than lease revenue bonds issued by the corporation, is not covered by the Public Leaseback Law, due to the extremely precise drafting of the statute, making it applicable solely to the nonprofit corporation lease revenue bond structure so widely used in California prior to the introduction of the certificates of participation alternative.

Orange County may guaranty the payment of certificates of participation or lease revenue bonds with moneys credited to the Motor Vehicle License Fee Account in the Transportation Tax Fund.²¹

Energy Performance Contracting

Subject to numerous requirements, a county, as a “public agency,” may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings or sales of energy produced by the financed facility.²²

¹⁷*Id.* § 25351.3(c). Additional statutory provisions exist relating to the power to sell, lease and leaseback. *See id.* §§ 25351, 25371, 25521 (requiring prior notice and consent from a city prior to leasing of property by the county in said city unless city waives notification by resolution).

¹⁸*Id.* § 25350.51.

¹⁹*Id.* §§ 54240 to 54245. Section 54240 provides:

“As used in this article:

(a) “Local agency” means any county, city, city and county, (San Francisco is the only “city and county” in the State of California) public district, public entity or authority or other public or municipal corporation other than the federal government or any federal department or agency, this state, an adjoining state, any state department or agency or any school district in the state.

(b) “Public leaseback” means any lease, sublease, contract or other agreement involving land or buildings, structures, or other facilities which are permanently attached to land, where the agreement is made directly or indirectly between the local agency and a public leaseback corporation, if the proceeds of the agreement provided by the local agency will be used in whole or in part by such public leaseback corporation for payment of principal of or interest on its bonds, notes or other evidences of indebtedness.

(c) “Public leaseback corporation” means any public or private corporation, or nonprofit corporation, or any public retirement system which has the authority to assist a local agency and which acquires or constructs or finances or arranges for the acquisition or construction of land, buildings, structures, or other facilities which are permanently attached to land for public leaseback.”

²⁰*Id.* § 54241.

²¹*Id.* § 25350.9.

²²*Id.* §§ 4217.10 to .18 (“Public agency” means the state, a county, city and county, city, district, community college district, school district, joint powers authority or other entity designated or created by a political subdivision relating to energy development projects, and any other political subdivision or public corporation in the state).

Municipalities

Municipalities²³ qualify as tax-exempt issuers for purposes of federal income tax due to their tax,²⁴ eminent domain²⁵ and police powers.²⁶ Municipalities may “purchase, lease, receive, hold and enjoy real and personal property, and control and dispose of it for the common benefit.”²⁷ Municipalities “may purchase, lease, exchange, or receive such personal property and real estate situated inside or outside the city limits as is necessary or proper for municipal purposes. It may control, dispose of, and convey such property for the benefit of the city.”²⁸ Municipalities may also lease property owned or controlled by it for a period not to exceed fifty-five years.²⁹

In a somewhat complex financing arrangement, the City of Costa Mesa allocated part of its share of the state gas tax revenues for the purpose of making sublease payments pursuant to a lease and sublease on two golf courses. The use of monies from the state gas tax revenues was limited to street improvements, and according to state law, the funds can be pledged for payment of principal and interest on voter approved bonds. The court held that the use of such funds for golf course lease payments was in violation of the constitution and statutes relating to such revenues, even though, as the city argued, such payments may have been indirectly related to street improvements.³⁰

Cities may guaranty the payment of certificates of participation of lease revenue bonds with moneys credited to the Motor Vehicle License Fee Account in the Transportation Tax Fund.³¹

Municipalities are also local agencies for purposes of public leasebacks with public leaseback corporations.³²

Energy Performance Contracting

Subject to numerous requirements, a municipality, as a “public agency,” may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings or sales of energy produced by the financed facility.³³

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁴ and eminent domain powers.³⁵

²³Municipality for purposes of this discussion is a city which the Government Code defines as a “city,” “city and county,” or “incorporated town.” *Id.* § 20. Cities may adopt a charter. Cal. Const. art. XI, § 3(a). Charter cities have plenary power with respect to their “municipal affairs,” subject only to the constitution. The charter acts as a document of limitation, not a grant of power. Charters need to be checked for restrictions on leasing not contained in the general laws of the state. San Francisco, for instance, has a voter approval restriction for certain types of leases, more restrictive than the general law.

²⁴Cal. Gov’t Code § 43000.

²⁵*Id.* § 37350.5.

²⁶Cal. Const. art. XI, § 7.

²⁷Cal. Gov’t Code § 37350.

²⁸*Id.* § 37351.

²⁹*Id.* § 37380. This section allows leases of up to ninety-nine years if certain conditions are met. *Id.*

³⁰*City of Costa Mesa v. Connell*, 87 Cal. Rptr. 2d 612 (1999).

³¹Cal. Gov. Code § 37351.5.

³²*See, supra*, notes 19-20 and accompanying text.

³³Cal. Gov’t Code §§ 4217.10 to .18 (“Public agency” means the state, a county, city and county, city, district, community college district, school district, joint powers authority or other entity designated or created by a political subdivision relating to energy development projects, and any other political subdivision or public corporation in the state).

³⁴Cal. Educ. Code § 15250 (power of county board of supervisors and superintendent of schools to levy tax for the interest and redemption of school district bonds).

Equipment Leases

School districts³⁶ may “rent or lease personal property”³⁷ and “may as lessee, enter into a . . . lease-purchase agreement for equipment or service systems with any persons, firm, corporation or public agency.”³⁸ School districts must comply with applicable provisions for bidding contracts.³⁹ “The term of any [such] lease-purchase agreement shall not exceed the estimated useful life of the item but in no event shall the term exceed 10 years.”⁴⁰

Real Property Leases; Asset Transfers

School districts may “sell any real property belonging to the school district or may lease for a term not exceeding 99 years, any real property, together with personal property located thereon, belonging to the school district which is not or will not be needed by the district . . .”⁴¹ Voter approval is not required.

Notwithstanding Section 17455, the sale by the governing board of any school district of any real property belonging to the school district or the lease by that governing board, for a term not exceeding 99 years, of any real property, together with any personal property located thereon, belonging to the school district shall not be subject to any other provision of this chapter, to Article 5 (commencing with Section 17485), or to Article 8 (commencing with Section 54220) of Chapter 5 of Part 1 of Division 2 of Title 5 of the Government Code, if all of the following conditions are met:

(a) The property is sold or leased to another local governmental agency, or to a nonprofit corporation that is organized for the purpose of assisting one or more local governmental agencies in obtaining financing.

(b) (1) In the case of the sale of school district property pursuant to this section, the school district, as part of that same sale transaction, simultaneously repurchases the same property that is the subject of the transaction.

(2) In the case of the lease of school district property pursuant to this section, the school district, as part of that same lease transaction, simultaneously leases back, for a term that is not substantially less than the term of that lease, the same property that is the subject of the transaction.

(c) (1) The financing proceeds obtained by the school district pursuant to the transaction described in this section are expended solely for capital outlay purposes, including the acquisition of real property for intended use as a school site and the construction, reconstruction, and renovation of school facilities.

(2) For purposes of this section, the construction, reconstruction, or renovation of rental housing facilities for school district employees constitutes a permissible capital outlay expenditure of the financing proceeds obtained by the school district.⁴²

“Notwithstanding any other provision of this part, in connection with a sale, sale back, lease, or leaseback of school district property, no proceeds obtained by the school district from the sale of the sale

³⁵Cal. Educ. Code § 35270.5.

³⁶For purposes of this discussion, a school district is a school district of every kind or class except for a community college district. Cal. Educ. Code § 80.

³⁷Cal. Educ. Code § 38119.

³⁸Cal. Educ. Code, § 17450. Equipment “includes (1) school buses, (2) other motor vehicles, (3) test materials, educational films, and audiovisual materials, and (4) all other items defined as equipment or service systems in the California School Accounting Manual.” *Id.*

³⁹*Id.* § 17451.

⁴⁰*Id.* § 17452; § 39803 (school buses).

⁴¹*Id.* § 17455.

⁴²*Id.* § 17456. This section is sometimes referred to as the “Richmond Statute,” so-called because amendments were made to this statute in response to the Richmond Unified School District’s use of a lease/leaseback certificate of participation financing to fund its operating deficit, its subsequent default on the lease and certificates, and ensuing litigation. *See, infra*, notes 145-146.

back or leaseback agreement, or interests therein, or a debt instrument payable from payments under the sale back or leaseback agreement shall be used for general operating purposes of the school district.”⁴³

Prior to entering into a lease/leaseback arrangement under the authorization granted in Education Code Section 17456, a school district must send notification to the county superintendent of schools and the county auditor of its intention to enter into the lease transaction.⁴⁴ The notification must be sent at least 30 days prior to the District Board’s approval of the lease transaction, and must contain the following information: “information necessary to assess the anticipated effect of the debt issuance, including the repayment schedules for that debt obligation, evidence of the ability of the school district to repay that obligation, and the issuance cost.”⁴⁵ The statute goes on to provide that “[w]ithin 15 days of the receipt of the information, the county superintendent of schools and the county auditor may comment publicly to the governing board of the school district regarding the capability of the school district to repay that debt obligation.”⁴⁶ Note that the statute gives the county office of education and the county auditor the right to comment to the school district’s board on the lease financing, but not the right to prevent the transaction from being approved.

Sections 17400 to 17427 (Article 2 - Leasing Property), which is another method of lease/purchasing real property and improvements to real property, precludes use of the statutes without compliance with competitive solicitation requirements, including the underlying construction contract. The statute is complex and will not be digested here. Certain provisions of the amending legislation terminate on July 1, 2022, unless extended by the legislature; however, the provisions requiring competitive solicitation do not terminate.⁴⁷

County boards of education can “acquire, lease, lease-purchase, hold, and convey real property for the purpose of housing the offices and the services of the county superintendent of schools, except that this subdivision shall only apply to the county boards of education to which all or a portion of the duties and functions of the county board of supervisors specified in subdivision (b) of Section 1080 have been transferred, with the exception of the recreational duties and recreational functions specified in subdivisions (c) and (d) of Section 1080.”⁴⁸

Other Leasing Provisions

“Any school district may, by direct sale or otherwise, sell to a purchaser any electronic data-processing equipment, other major items of equipment, or any relocatable building owned by, or to be owned by, the school district, . . . if the purchaser agrees to lease the equipment or building back to the school district . . . for use by the school district . . .”⁴⁹ Such a sale is permitted only if it is determined by resolution to be the most economical means of providing the equipment.⁵⁰

School districts may lease with an option to purchase various school facilities from the state pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976.⁵¹

⁴³Cal. Educ. Code § 17457.

⁴⁴*Id.* § 17150.1.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.* § 17400 to 17427.

⁴⁸*Id.* § 1042.

⁴⁹*Id.* § 17597.

⁵⁰*Id.*

⁵¹*Id.* §§ 17000 to 17066.

School districts may also enter into leases of real property and of buildings which are to be used jointly by the school district and a private person.⁵²

In 1996, the State Legislature established the California School Finance Authority, in accordance with the California School Finance Authority Act.⁵³ The Authority is a public instrumentality with the authority to lease, as lessee or lessor,⁵⁴ and to enter into an agreement with a participating school district for the purpose of financing or refinancing the acquisition, construction, remodeling or equipping of an educational facility. The Authority has the power to issue revenue bonds payable solely from the funds provided in the Act.

Energy Performance Contracting

Subject to numerous requirements, a school district, as a “public agency,” may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings or sales of energy produced by the financed facility.⁵⁵

Fire Districts

Fire districts⁵⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁵⁷ and eminent domain⁵⁸ powers. Fire districts may “acquire any property . . . within the district by any means” and may “create a leasehold interest in the property for the benefit of the district.”⁵⁹

(a) A district may acquire any necessary property by purchase or purchase on contract with money borrowed pursuant to this section.

(b) The amount of indebtedness to be incurred shall not exceed an amount equal to three times the actual income from property taxes received pursuant to Section 13896 for the fiscal year preceding the year in which the indebtedness is incurred. Any indebtedness shall be repaid within 10 years from the date on which it is incurred. An indebtedness shall bear interest at a rate which shall not exceed the rate permitted under Article 7 (commencing with Section 53530) of Chapter 3 of Part 1 of Division 2 of Title 5 of the Government Code.

(c) An indebtedness shall be authorized by resolution adopted by a two-thirds majority vote of the total membership of the district board.⁶⁰

Contracts for construction are covered in the Public Contract Code.⁶¹

Subject to numerous requirements, a fire district, as a “public agency,” may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings or sales of energy produced by the financed facility.⁶²

⁵²*Id.* § 17515.

⁵³*Id.* § 17172.

⁵⁴*Id.* § 17180(f)(1).

⁵⁵Cal. Gov’t Code § 4217.10 to .18. (“Public agency” means the state, a county, city and county, city, district, community college district, school district, joint powers authority or other entity designated or created by a political subdivision relating to energy development projects, and any other political subdivision or public corporation in the state.)

⁵⁶Fire districts are “agencies” of the state. Cal. Gov’t § 56070 (public agency); *Id.* Cal. Rev. & Tax. 2211 (“local” agency).

⁵⁷Cal. Health & Safety Code § 13899.

⁵⁸*Id.* § 13861.

⁵⁹*Id.* § 13861(b).

⁶⁰*Id.* § 13906.

⁶¹Cal. Pub. Cont. Code §§20810 to 20813.

⁶²Cal. Gov’t Code § 4217.10 to .18.

Hospital Districts

Hospital districts⁶³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,⁶⁴ and eminent domain⁶⁵ powers. Hospital districts may "purchase, . . . [and] lease, . . . property of every kind and description within and without the limits of the district, and create a leasehold interest in the same" ⁶⁶

Hospital districts may

(b) enter into capital leases for the purchase by the district of equipment to be used for any district purpose.

(1) The term of any capital lease shall not be longer than 10 years.

(2) The district may secure the purchase of equipment by a capital lease by giving the lender a security interest in the equipment leased under the capital lease.

(c) Enter into lease-purchase agreements for the purchase by the district of real property, buildings, and facilities to be used for any district purpose. The term of any lease-purchase agreement shall not exceed 10 years.

(d) Nothing in this section shall provide the district with the authority to increase taxes in order to repay a line of credit established pursuant to subdivision (a) unless the tax is passed pursuant to Article 4.6 (commencing with Section 53750) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.⁶⁷

Subject to certain restrictions, the board of directors of a hospital district,

shall let any contract involving an expenditure of more than twenty-five thousand dollars (\$25,000) for materials and supplies to be furnished, sold, or leased to the district, or any contract involving an expenditure of more than twenty-five thousand dollars (\$25,000) for work to be done, to the lowest responsible bidder who shall give the security the board requires, or else reject all bids.⁶⁸

Electronic data and telecommunications equipment and services may be exempted from this requirement in certain situations.⁶⁹

Subject to numerous requirements, a hospital district, as a "public agency," may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings or sales of energy produced by the financed facility.⁷⁰

State Entities

In general, the Department of General Services is authorized to oversee acquisition and maintenance of state buildings and property.⁷¹ The State Public Works Board may acquire and construct buildings for use by state agencies⁷² when authorized by an act or appropriation.⁷³ The board may acquire real property for the state.⁷⁴ The state Public Works Board is the only state agency except for the Department of Transportation, the Department of Water Resources, The Department of Fish and Game,

⁶³Cal. Health & Safety Code §§ 32000 to 32492.

⁶⁴*Id.* § 32200.

⁶⁵*Id.* § 32121(d).

⁶⁶*Id.* § 32121(c).

⁶⁷*Id.* § 32130.6.

⁶⁸*Id.* § 32132.

⁶⁹*Id.* § 32138.

⁷⁰Cal. Gov't Code § 4217.10 to .18 ("Public agency" means the state, a county, city and county, city, district, community college district, school district, joint powers authority or other entity designated or created by a political subdivision relating to energy development projects, and any other political subdivision or public corporation in the state).

State Lands Commission, State Reclamation Board, Hastings College of Law, or the Regents of the University of California that may exercise the power of eminent domain for state purposes.⁷⁵ Other departments, agencies or branches of government may have specific authorization to acquire property,⁷⁶ and state universities have specific authority for acquiring property independently.⁷⁷ Certain Public Contract Code sections apply solely to state universities.⁷⁸ The Public Works Board and the Department of Finance are required to approve plans for capital outlay projects by any state agency, including universities, prior to the expenditure of funds from a capital outlay appropriation, subject to exceptions.⁷⁹

Generally, all contracts must be approved by the Department of General Services.⁸⁰ The department's authority includes the power to delegate procurement authority to other departments and to individual state agencies⁸¹ directly or by exempting from the approval requirement "any transactions involving not more than fifty thousand dollars (\$50,000) for which such approval is required by statute"⁸² or "any state real estate acquisition or conveyance involving not more than one hundred fifty thousand dollars (\$150,000) for which approval is required by statute."⁸³

The department of general services may lease-purchase real or personal property:

(a) The director [of the department of general services] may hire, lease, lease-purchase, or lease with the option to purchase any real or personal property for the use of any state agency, including the Department of General Services, if he or she deems the hiring or leasing is in the best interests of the state.

(b) The director shall not enter into a lease-purchase agreement that involves office space, unless specifically authorized to do so by the Legislature. The director shall solicit written bids for any lease-purchase that involves office space in a newspaper of general circulation in the county in which the project is located. All bids received shall be publicly opened and the lease awarded to the lowest responsible bidder. If the director deems the acceptance of the lowest responsible bid is not in the best interest of the state, he or she may reject all bids.⁸⁴

The acquisition of goods⁸⁵ and services (except for information technology ("IT") goods and services and telecommunications goods and services, which are treated separately⁸⁶) by state agencies is covered by Part 2, Chapter 2 of the Public Contract Code.⁸⁷

⁷¹Cal. Gov't Code §14600; *id.* § 14615; *id.* § 14660. The department may enter into lease-purchase agreements with a joint powers agency approved by the legislature for terms not exceeding 50 years. *Id.* § 6517.

⁷²Agency means "every state office, officer, department, division, bureau, board, and commission. As used in any section of this title that is added or amended effective on or after January 1, 1997, "state agency" does not include the California State University unless the section explicitly provides that it applies to the university." *Id.* § 11000.

⁷³*Id.* §§ 15808 to 15812. In addition, pursuant to *id.* §§ 14691 to 14697, a State Project Infrastructure Fund has been created for state projects, which is managed by the Public Works Board and with financial oversight of the Department of Finance, pursuant to numerous requirements. Lease purchase of projects are permissible under this statute.

⁷⁴*Id.* §§ 15850 to 15866.

⁷⁵*Id.* § 15855.

⁷⁶See for example, Gov't Code § 70371.6 (wherein the Judicial council is empowered to acquire sites for court facilities).

⁷⁷See, *infra*, notes 104-118 and accompanying text relating to the University of California.

⁷⁸Cal. Pub. Cont. Code Div. 2, Part 2, Chapters 2.1 and 2.5.

⁷⁹Cal. Gov't Code § 13332.13.

⁸⁰Cal. Pub. Cont. Code § 10295.

⁸¹*Id.* § 10108 (power to delegate the authority to carry out construction projects where the estimated cost does not exceed \$600,000).

⁸²Cal. Gov't Code § 14616.

⁸³*Id.* § 14667.1.

⁸⁴*Id.* § 14669. See State Administrative Manual for a discussion of the requirements of a financing lease. <http://sam.dgs.ca.gov>

⁸⁵"Goods" means all types of tangible personal property, including materials, supplies, and equipment. Pub. Cont. Code §10290(d).

⁸⁶*Id.* §§ 12100 to 12113 (information technology), *id.* §§ 12120, 12113 (telecommunications). Universities and community colleges are exempted from application of Public Contract Code sections relating to information technology. *Id.* § 12100.5.

Among numerous restrictions recited therein, the public contract code provides, relating to payment of interest, that:

(a) Commencing January 1, 1992, all state agencies subject to this chapter [Cal. Pub. Cont. Code §§10290 to 10526] that enter into installment purchase or lease-purchase contracts shall make periodic payments, which shall include interest computed from a date no later than the acceptance date of the goods purchased pursuant to the contract. However, if the contract requires an acceptance test, interest shall be computed from a date no later than the first day of the successful acceptance test period. Unless otherwise provided for in the contract, periodic payments shall commence upon acceptance of the goods or, if the contract requires an acceptance test, as of the first day of the successful acceptance test period. Late charges shall accrue for any periodic payment not made to the contractor or its assigns from either the payment date provided in the contract or 60 days following the receipt of a valid invoice for the periodic payment, whichever is later. However, in the event any invoice is received prior to the acceptance date, the receipt date of the invoice shall be construed to be the acceptance date. Late charges under this section shall be assessed using the interest rate as specified in Section 927.6 of the Government Code.

(b) The department is authorized to refinance installment purchase contracts when, in the determination of the department, it is financially beneficial to the state to do so.⁸⁸

The Department of General Services maintains a website with extensive information relating to all aspects of the state procurement process.⁸⁹ The department has delegated its purchasing authority to the procurement division of the department.⁹⁰ The State Administrative Manual (SAM) gives state agencies guidelines for determining whether to use lease-purchase financing.⁹¹ It also provides information to state and local entities about financing and payment programs with established lenders commonly known as GS \$Mart© (pronounced "G S Smart") for installment or lease-purchases⁹² and Lease \$Mart© (pronounced "Lease Smart") for operating and true leases.⁹³

All contracts for the lease or purchase of information technology goods or services and of telecommunications, except for contracts by public universities and community colleges, shall be made by or under the supervision of the Department of General Services and the Department of Technology through competitive means.⁹⁴

⁸⁷*Id* §§ 10100 to 19150. "Agency" is defined in the State Administrative Manual: "This term refers to one of the state's umbrella Agencies. Umbrella Agencies include the Natural Resources Agency, California Environmental Protection Agency, Government Operations Agency, Business Consumer Services and Housing Agency, California Department of Corrections and Rehabilitation, California State Transportation Agency, Labor Agency and the California Health and Human Services Agency." SAM ch. 4819.2 (revised 09/2018).

⁸⁸Pub. Cont. Code § 10320.5.

⁸⁹<http://www.dgs.ca.gov>.

⁹⁰The procurement division has established a state contracting manual (SCM) as a resource for state government employees. <http://www.dgs.ca.gov/pd/Resources/publications>, also available in the Forms & Resources Library section of the procurement division's homepage.

⁹¹SAM Ch. 3700; <http://sam.dgs.ca.gov/default.htm>.

⁹²<http://www.dgs.ca.gov/pd/Programs/StateFinancialMarketplace.aspx>.

⁹³SAM, Ch. 3400.

⁹⁴Cal. Pub. Cont. Code §§ 12100 to 12113. "Information technology" is defined in the administrative manual as "all computerized and auxiliary automated information handling, including systems design and analysis, conversion of data, computer programming, information storage and retrieval, voice, video, data communications, microwave, light wave, routers, network equipment, requisite systems controls, and simulation." SAM 4819.2 (revised 09-2018). The term "information technology" is commonly abbreviated as "IT". The oversight of "IT projects" is supervised by the director of technology and the department of finance. Cal. Gov't Code §§ 11545, 11546 (IT); § 11547 (fiscal oversight). However, the state compensation fund and the Legislature are exempted. *Id.* § 11548. "Information Technology Project" is defined as: A unique endeavor involving activities required to plan, design, develop, implement, operate and maintain an Information Technology (IT) solution that meets a specific and measurable policy or programmatic objective. IT projects include the entire systems development lifecycle from project initiation through the normalized operational cycle. IT activities related to the refresh of non- data center hardware required to operate an IT project shall not be considered an IT project. SAM 4819.2. Procurement authority may be delegated pursuant to

In relation to information technology goods and services the code provides:

(a) It is the intent of the Legislature that agencies of the state use an acquisition method that is compatible with their short- and long-term fiscal needs in contracts relating to commodities and information technology goods and services. State agencies should be able to specify their anticipated life cycle requirements that would become one of the criteria for contractor selection. These agencies should be given the choice of suppliers to meet statewide standardization needs, unique service requirements, application requirements, and long-term satisfaction criteria. There is a need for the state to enter into long-term contracts with annual cancellation and fund-out clauses, as required, to protect the state's interests as well as provide the option for multiyear renewals to encourage suppliers to develop higher levels of service and support throughout the contracts.

(b) The state may utilize multiple awards, including federal General Service Administration Multiple Awards Schedules and master agreements or contracts for goods, information technology, services, or consulting services. For purposes of this subdivision, a multiple award is an award of an indefinite quantity contract for one or more similar goods, information technology, or services to more than one supplier. Except for possible multiple awards as permitted by this subdivision, and except as described in subdivision (d), all the requirements of this chapter pertaining to other types of information technology acquisitions shall be followed. The Department of General Services shall administer this section and ensure that multiple award schedules are in compliance with all other applicable statutes.

(c) Notwithstanding any other provision of law, state agencies, in exercising their contracting authority delegated by the Department of General Services, may contract with suppliers who have multiple award schedules with the General Services Administration of the United States on the same terms, conditions, and prices if the supplier is willing to do so. The Department of General Services may also develop multiple award schedules or agreements for use by state agencies in the same manner. The Department of General Services shall determine the delegation contracting authority for agencies wishing to use multiple award schedules.

(d) For contracts related to information technology integration or development projects that generate revenues or achieve savings over a quantifiable baseline of existing costs, state agencies shall consider and may incorporate performance-based or share-in-savings contract terms to manage risks and create incentives for successful contract performance. Performance-based or share-in-savings contracts may have the following characteristics, among others:

- (1) Contract terms that specify business outcomes to be achieved, not the solution to be provided.
- (2) Contract terms that structure the contract to maintain maximum vendor commitment to project success and minimize risk to the state by sharing risk with the private sector.
- (3) Utilization of “best value” evaluation methods, which means to select the solution that will achieve the best result based on business performance measures, not necessarily the lowest price.
- (4) Contract terms that base payments to the vendor primarily on achieving predefined performance measures.⁹⁵

The Department of General Services is required to maintain policies and procedures governing the acquisition and disposal of information technology goods and services in the State Administrative Manual (SAM),⁹⁶ and made available online through the department of technology’s homepage.⁹⁷ Volume 3 of the online state contracting manual (SCM) contains IT acquisition policies, procedures, and methods applicable to state agencies.⁹⁸

Public Contract Code § 12100. *Id.* 5200.5.

⁹⁵Cal. Pub. Cont. Code. § 12101.5.

⁹⁶*Id.* § 12102.

⁹⁷<http://www.dgs.ca.gov/pd/Home>. (Provisions are extensive. *See, for example*, SAM 6876 concerning the difference between a financing and operating lease.)

⁹⁸*Id.*

Contracts for the acquisition of telecommunications goods and services, by lease or purchase, are made under the supervision of the Department of Technology in accordance with the provisions discussed above for information technology except that a public university or community college shall assume the functions of the department with regard to its own acquisitions.⁹⁹

In relation to telecommunications, the code provides:

(a) Notwithstanding any other provision of law, state and local agencies¹⁰⁰ may enter into agreements to pay for telecommunications services to be utilized beyond the current fiscal year. "Telecommunications services" for purposes of this section shall include, but not be limited to, central office-based leased communications systems equipped with primary station lines, capable of receiving in-dialed voice and data communications and capable of out-dialing voice and data communications and any customer premised equipment, software and installation costs necessary for utilization by the state or local agency.

(b) State and local agencies may enter into financing agreements for the acquisition of telecommunications services whenever the state or local agency may derive monetary benefit and greater services as a result of its ability to acquire capital at lower interest cost than the supplier of those services can provide directly to the agency or whenever the state or local agency may obtain a reduced cost of service based on length of agreement if offered by the supplier of telecommunications service.

(c) Acquisition requirements for financing of telecommunications goods and services shall be considered to have been met whenever the financing is within the scope of public sector requests for proposals or whenever the financing is offered by a sole source provider or that provider's assignee.

(d) The provisions of this section shall not be construed to alter or circumvent any existing acquisition procedure or requirement, nor to alter or circumvent the acquisition authority of any state or local agency.¹⁰¹

Public Universities

There are two systems of higher public education in the state: The University of California¹⁰² and the California State University.¹⁰³

The University of California

The University of California derives its existence from the state constitution:

The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services¹⁰⁴

⁹⁹Cal. Pub. Cont. Code § 12120.

¹⁰⁰State agency is defined as "[e]very office, officer, department, division, bureau, board, council, or commission in state government. (A "state agency" does not include an agency in the judicial or legislative branches of state government.) Local agency is defined as "[a]ny city, county, special district, authority, or other political subdivision of the state." State Administrative Manual 6602 (Rev. 06/2014).

¹⁰¹Cal. Pub. Cont. Code § 12113.

¹⁰²The University of California is a corporation governed by the Board of Regents which appoints the President of the university and the Officers of the Regents. Officers include the General Counsel, the Treasurer, the Secretary and Chief of Staff, and the Chief Compliance and Audit Officer. Chancellors head each of the 10 campuses.

¹⁰³California State University is an agency of the state governed by a board of trustees which appoints a "chancellor" as head executive officer and presidents as chief executive officers of 23 individual campuses.

¹⁰⁴Cal Const. art. 9, § 9(a).

The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, or gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct; provided, however, that sales of university real property shall be subject to such competitive bidding procedures as may be provided by statute . . .¹⁰⁵

The University of California has the power of eminent domain.¹⁰⁶

The regents are authorized to prescribe methods of procurement for goods, materials and services.¹⁰⁷

The Bylaws of the Regents of the University of California govern the composition and powers of the corporation, the duties and responsibilities of the officers of the corporation, chartered committees and other matters. Standing Orders and specific resolutions of the Regents of the University of California set forth duties of the university's officers.¹⁰⁸ A summary of legal authorities and principles, duties of various officers, matters relating to property and purchasing and references to other manuals and documents can be found in the *UC Contract and Grant Manual* (available online). It is maintained by the Research Policy Analysis and Coordination Office of the Office of the President and sets forth system-wide University of California policies.¹⁰⁹ Other manuals published by committees offer additional information.

The board of regents, and/or its Committees, has reserved authority to approve finance matters and purchases or leases of real estate within parameters specified by committee charter or regents policy.¹¹⁰ The Finance and Capital Strategies Committee is chartered to maintain oversight and review of matters pertaining to the University's finances and capital facilities.¹¹¹ The President of the university is the manager of all "external financings" and is authorized to obtain external financing for any University-related purpose, including, but not limited to, capital projects or working capital needs up to and including \$20 million and for certain capital projects and real estate purchases consistent with approved plans up to and including \$70 million. Regents Policy 5300.¹¹²

The board of regents, and/or its Committees, has reserved authority to approve finance matters and purchases or leases of real estate within parameters specified by committee charter or regents policy.¹¹³

The Secretary and Chief of Staff has authority to "execute documents effecting a conveyance of title to real property and a broad range of other documents."¹¹⁴

The president is the executive head of the university and may delegate the duties of his office.¹¹⁵ The *UC Contract and Grant Manual* describes the delegation authority of the president in more detail.¹¹⁶

¹⁰⁵Cal Const. art. 9, § 9(f).

¹⁰⁶Cal. Educ. Code § 92040.

¹⁰⁷Cal. Pub. Cont. Code § 10509.

¹⁰⁸Bylaws, standing orders, and policies are maintained by the Office of the Secretary and Chief of Staff to the Regents. <https://regents.universityofcalifornia.edu/governance/index.html>.

¹⁰⁹<https://www.ucop.edu/research-policy-analysis-coordination/resources-tools/contract-and-grantmanual/index.html>. Matter relating to lease is also contained in the Facilities Manual. .

¹¹⁰Bylaws 22.2.

¹¹¹Bylaws Appendix C. (Last am. 03/2018).

¹¹²Regents Policy 5300.

¹¹³Bylaws 22.2.

¹¹⁴Bylaws 23; Contract and Grant Manual.

In regard to goods and services individual campuses have authority to control procurements:

The President has delegated to Chancellors and Laboratory Director the 'authority to execute purchase contracts, subcontracts, and standard purchase orders for goods and services' (but excluding independent consultant agreements) with the following additional provisos:

1. purchase contracts, subcontracts, or standard purchase orders are issued in accordance with University policy (refer to 16-300 and 16-370 [of the *Contract and Grant Manual*];
2. funds are available;
3. prior approval is secured as required pursuant to the provisions of a contract, grant, or other extramural sponsor agreement (refer to 16-311[of the *Contract and Grant Manual*]; iv) prior approval shall be obtained from the Treasurer of The Regents for any acquisition or lease/purchase which contemplates or will result in the issuance of Certificates of Participation, in order to provide funding for the transaction; and
4. approval as to form is secured from the General Counsel for any purchase contract other than that made on the standard purchase order form or for any changes in the standard terms and conditions (see 16-320[of the *Contract and Grant Manual*];
5. Chancellors and Laboratory Directors are authorized to redelegate this authority to the administrative officers responsible for purchase of all goods and services.¹¹⁷

University of California contracts for the acquisition of goods are covered by competitive bidding statutes except when the regents determine an item is unique and the proposed price is reasonable.¹¹⁸

The acquisition of information technology by public universities is exempted from the Public Contract Code IT provisions.¹¹⁹ Authority to acquire information technology appears to reside with IT departments at individual campuses.

¹¹⁵Standing Order 100.4(a).

¹¹⁶<http://www.ucop.edu/raohome>. The UC Contract and Grant Manual provides: "The authority to expend contract and grant funds is authorized under The Regents of the University of California Standing Order (S.O.) 100.4(n), 'Duties of the President of the University,' which states:

The President is authorized to permit expenditures against contracts, grants, and gifts, or against firm commitments thereon, provided that the contracts, grants, and gifts have been solicited or negotiated in accordance with established Regental policy. This Presidential expenditure authority has these important features:

- Contract and grant expenditure authority is an expressly stated power of the President.
- Expenditure authority is derived from S.O. 100.4(n) whereas authority to enter into the contract or grant is derived from S.O. 100.4(dd). (See Chapter 13 for information about contract and grant authority.)

The Presidential authority to spend contract and grant funds under Standing Order 100.4(n) as well as the authority to solicit and enter into extramural awards under S.O. 100.4(dd) have been delegated to Chancellors and Vice Presidents." Cont. & Grant Man.6-210. It appears that various degrees of authority have been delegated to the chancellors, the director of the University Lawrence Berkeley National Laboratory, the Chief Operating Officer, the VP of Agriculture and Natural Resources, and the Chief Medical Officer.

The manual further provides: "The delegation of authority from the President to Chancellors and Vice Presidents under the authority in S.O.100.4(n) permits 'expenditures or commitments of funds against any approved research, training, or development contract or grant when a fully executed contract is in hand or a written notice of grant award has been received.' Chancellors may further authorize individual campus departments to incur contract and grant expenditures through authorization of the department's budget by the Accounting Officer. (See 6-230.) After the budget has been authorized by the Accounting Officer, the department may delegate signature authorization to specific individuals within the department to incur expenses. (See 6-240.)" Cont. & Grant Man.6-220.

<http://www.ucop.edu/raohome/cgmanual/chap06.pdf>.

¹¹⁷Contract and Grant Manual 16-120 citing "DA 2100 <http://www.ucop.edu/ucophome/coordrev/da/da2100.html>".

¹¹⁸Pub. Cont. Code Ch. 2.1; §§ 10500 to 10520.

¹¹⁹*Id.* § 12100.5 (2004).

California State University

California State University (CSU) is governed by the Trustees of the California State University,¹²⁰ which has “full power and responsibility in the construction and development of any state university campus, and any buildings or other facilities or improvements connected with the California State University”¹²¹ except relating to public bidding.¹²²

California State University may “[l]ease any real or personal property for the use of the California State University.”¹²³

(1) The trustees may enter into agreements with any public or private agency, officer, person, or institution, corporation, association, or foundation . . . for the furnishing of services, facilities, materials, goods, supplies, or equipment by or for the trustees or for the joint performance of an act or function or the joint furnishing of services and facilities by the trustees and the other party to the agreement.

(2) Notwithstanding any other provision of law, the trustees shall prescribe policies and procedures for the acquisition of services, facilities, materials, goods, supplies, or equipment. The policies and procedures of the trustees for the acquisition of materials, goods, supplies, or equipment shall include competitive means for obtaining best value while complying with legislative intent regarding competitive bids or proposals as it is expressed in Article 3 (commencing with Section 10300) of Chapter 2 of Part 2 of Division 2 of the Public Contract Code, and may include the use of financing arrangements.¹²⁴

Procurement policies are published in the *Integrated CSU Administrative Manual*.¹²⁵

Acquisitions that involve tax-exempt provisions (lease/purchase or installment payment agreements) must follow all of the general rules and principles of procurement as stated in other sections of this Policy Manual.

Such acquisitions are also subject to additional requirements which assure compliance with federal tax code provisions. Financed acquisitions are identified as tax-exempt whenever the seller/lessor or third party financier intends to claim the interest portion of its proceeds as exempt from federal income tax.

Procedural questions for developing such transactions can be directed to the Contract Services and Procurement Department (CS&P) at the Chancellor's Office. Helpful information for the development of contracts that provide for a financed tax-exempt acquisition can be found on the CS&P Internet website.

Fully developed contracts or purchase orders containing the tax-exempt provisions must be submitted, along with all their related financial documentation, to the Finance and Treasury at the Chancellor's Office for review and approval prior to execution.

The Chancellor's Office shall be responsible for maintaining records to insure that financiers who issue tax-exempt obligations on behalf of the CSU comply with federal tax reporting obligations. The Chancellor's Office shall also maintain pre-negotiated terms and conditions with selected financiers, provide model agreements, and coordinate efforts to obtain legal counsel on tax-exempt.¹²⁶

¹²⁰Cal. Educ. Code § 66606.

¹²¹*Id.*

¹²²*Id.*; Pub. Cont. Code, §§ 10700 to 11005 (Cal. St. Univ. Cont. Law).

¹²³Cal. Educ. Code § 89048(e) (2002).

¹²⁴*Id.* § 89036.

¹²⁵<http://www.calstate.edu/icsuam/sections/index.shtml>.

¹²⁶CSU Policy Manual for Contracting & Procurement, Policy Number: 5214.00, Policy Title: Tax-Exempt Financed Acquisitions Policy Effective Date: March 12, 2002.

Technology Educational and Research Facilities

The University of California, California State University, and community colleges are authorized to enter into lease- purchase agreements to acquire property for establishing high technology educational and research facilities and other educational facilities from the State Public Works Board.¹²⁷

Energy Performance Contracting

Subject to numerous restrictions, the State Public Works Board may execute agreements to finance the acquisition of conservation measures on “any structure, building, facility, work, or land, owned or acquired by [an] agency” and leased to the board (or other person) so as to permit the board to enter into energy and cost-saving projects subject to consent of the agency having jurisdiction over the property involved and approval by the Department of General Services.¹²⁸

Subject to numerous requirements, public agencies may enter into an energy service contract, a facility financing contract or a facility ground lease for a term of years when contract costs will be offset by energy savings¹²⁹ or repaid by sales of energy generated from the financed project.¹³⁰

The director of the department of general services, with concurrence of the Department of Finance, may enter into agreements using third party financing “to implement energy efficiencies and feasible onsite electric generation.”¹³¹

Debt Limitations

The California constitution imposes a debt limitation on the state¹³² and on counties, municipalities, school districts and county boards of education.¹³³ Fire districts are statutorily restricted,¹³⁴ as are hospital districts.¹³⁵

California courts have, since 1935,¹³⁶ consistently upheld lease-purchase financings. *City of Los Angeles v. Offner*,¹³⁷ established the basic requirements for a municipal lease to be valid. In *Offner*, the lease was for nine years and nine months, the city had an option to purchase an incinerator built on city property for the fair market value of the incinerator at the time of exercising the option to purchase. There is no language in the opinion that the city could terminate the lease unilaterally prior to the natural termination of the lease. The court in *Offner* held that the lease was valid since “each year’s installment is within the City’s income,” and “each year’s payment is for the consideration actually furnished that year.”

¹²⁷Cal. Gov’t Code §§ 15820 to 15820.61.

¹²⁸Cal. Gov’t Code § 15814.14 and generally, §§ 15814.10 to 15814.29.

¹²⁹Cal. Gov’t Code §§ 4217.10 to 4217.18.

¹³⁰*Id.* § 4217.13.

¹³¹Cal. Gov’t Code § 14712.

¹³²Cal. Const. art XVI, § 1.

¹³³Cal. Const. art. XVI, § 18, which provides, in relevant part: “a) No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose, . . .”). *See also* Cal. Gov’t Code § 25256 (counties).

¹³⁴Cal. Health & Safety Code § 13897.

¹³⁵Cal. Health & Safety Code § 32308.

¹³⁶In 1935, the California Supreme Court ruled favorably on a lease financing, in *Krenwinkle v. Los Angeles*, 4 Cal. 2d 611(1935). California appellate decisions prior to the *Krenwinkle* decision were not favorable to financing leases. *See, e.g., In re City and County of San Francisco*, 195 Cal. 426 (1925), and *Mahoney v. San Francisco*, 201 Cal. 249 (1927).

¹³⁷122 P.2d 14 (Cal. 1942).

The court in *Offner* stressed the fact that the option to purchase was for fair market value in holding that the lease was not an installment contract disguised as a lease.

In *Dean v. Kuchel*,¹³⁸ the court had a similar fact pattern except that rather than an option to purchase at fair market value, the lease in *Kuchel* would result in an automatic vesting of the property in the state at the end of the lease term. The court in *Kuchel* held, “[t]he essence of the Offner rule is that the payments are for a month to month use of the building. Here it is clearly stated the rentals are for that purpose.” The court held that there was no substantial or logical difference between an option to purchase and the vesting of title at the end of the lease term.

In *County of Los Angeles v. Byram*,¹³⁹ the court upheld a municipal lease on two grounds. First, the debt limit provision of the constitution does not apply to obligations imposed on a city or county by law. Second, the lease agreement before the court did not violate the debt limitations provisions of the California constitution. After the *Byram* decision, there were no California Supreme Court cases until *Rider v. City of San Diego*,¹⁴⁰ decided in 1998, arguably the most thorough of California decisions in the financing lease area discussed, *infra*.¹⁴¹

The lease in *County of Los Angeles v. Nesvig*¹⁴² has language which is very beneficial to the lessor. Section 14 of the ground lease stated that in case of default in payment of rent by the county, the lessor could re-enter and terminate the leaseback, or re-enter without termination of the leaseback and re-lease the premises for the account of the county. The respondent in *Nesvig* argued that these provisions effectively bound the county for the entire thirty-year term of the leaseback and effectively precluded the county from repudiating its obligations under the lease, and that, therefore, the county had incurred an obligation of more permanent nature than in *Offner* and *Kuchel*. The court did not agree with the argument and upheld the lease.

*Ruane v. City of San Diego*¹⁴³ also had interesting facts. The city’s monetary obligation under the lease was to pay \$2,206,000 concurrently with execution of the lease as prepaid rental and the further sum of \$360,000 on every January 15 and July 15 during the term of the lease, which was for the period from July 1, 1967 through May 31, 1972. There was no acceleration clause. Upon default, the maximum obligation remained the same, i.e., to pay the designated semi-annual payments, which were not payable until their due date. The court upheld such an arrangement.

The California Court of Appeals has consistently upheld the use of lease-purchase financing.¹⁴⁴ Since California courts do not view the long-term lease as creating present indebtedness for future rental payments, there is no need to use a nonappropriation clause or funding-out clause.

In April 1992, a complaint was filed in Superior Court in Contra Costa County, California, seeking to enforce payments by the Richmond Unified School District under an asset-transfer lease arrangement.¹⁴⁵ Part of the proceeds of the lease arrangement were used for operating expenses rather than capital projects, a point focused on in the litigation. The district through its state-appointed trustee and administrator contended that the lease was unenforceable in that it constituted long-term debt of the

¹³⁸218 P.2d 521 (Cal. 1950).

¹³⁹227 P.2d 4 (Cal. 1951).

¹⁴⁰*Rider v. City of San Diego*, 959 P.2d 347 (1998).

¹⁴¹*See, infra*, note 147.

¹⁴²41 Cal. Rptr. 918 (Cal. Ct. App. 1965).

¹⁴³73 Cal. Rptr. 316 (Cal. Ct. App. 1968).

¹⁴⁴*See also* *City of La Habra v. Pellerin*, 30 Cal. Rptr. 752 (Cal. Ct. App. 1963); *Starr v. City and County of San Francisco*, 140 Cal. Rptr. 73 (Cal. Ct. App. 1977).

¹⁴⁵*United States Trust Company of New York v. Richmond Unified School District*, Case No. S-92-01580 (Super. Ct. County of Contra Costa).

district which had not received voter approval. The State of California, another defendant, also answered the complaint contending that the Richmond District lease and related documents were entered into without proper authority and were without effect and void.

On December 11, 1992, the Superior Court ruled that the Richmond District's defaulted lease certificates of participation were constitutional, without regard to the District's use of the proceeds. The judge held that the lease underlying the certificates of participation did not constitute long-term debt because, among other things, the payments were due only in years in which the leased property was available for use, and the lease payments were not subject to acceleration. On April 23, 1993, the Superior Court of Contra Costa County ruled that the Richmond Unified School District violated its lease contract and was required to reimburse investors for nearly \$1.6 million of past due payments. Though the ruling strongly affirmed the trustee's right to collect past due rent, the judge said the court does not have power to order the appropriation or budgeting of money.

After an unsuccessful appeal to the Appellate Court, the defendants decided not to pursue further litigation. Instead, work-out legislation was enacted, and investors were paid in full.¹⁴⁶

In *Rider v. City of San Diego*,¹⁴⁷ the Convention Center Financing Authority was established for the purpose of issuing bonds to pay for the costs of expanding the convention center to be leased to the city. The city agreed to pay rent equal to the principal and interest of the bonds each year in addition to the administrative expenses of the authority. The court, in affirming the decision of the Court of Appeals [55 Cal. Rptr. 2nd 422 (1996)], held that the city's obligation to make rent payments was not an indebtedness of the city within the meaning of the state constitution. The constitutional provision requires approval by two-thirds of the electors before the city could incur any debt exceeding annual income and revenue. Since the arrangement was a contingent liability, the transaction was not a debt of the City. The authority and the city were separate entities, and since the bonds were obligations of the authority and not the city, the city did not incur any indebtedness. The court concluded that:

If the City had issued bonds to pay for the Convention Center expansion, the two-thirds vote requirement would have applied. Here, the City and the Port District have created a financing mechanism that matches as closely as possible (in practical effect, if not in form) a City-financed project, but avoids the two-thirds vote requirement. Nevertheless, the law permits what the City and the Port District have done. Plaintiffs are correct that this conclusion allows local governments to burden taxpayers with potentially high costs that voters have not approved, but local governments impose similar burdens on taxpayers every time they enter into long-term leases involving property of substantial value. We have long held that the two-thirds vote requirement does not apply to these leases so long as the obligation to pay rent is contingent on continued use of the leased property. (*Dean, supra*, 35 Cal.2d at pp. 447-448, 218 P.2d 521; *Offner, supra*, 19 Cal.2d at p. 487, 122 P.2d 14; *Doland v. Clark, supra*, 143 Cal. at p. 181, 76 P.958.)

Interest Rate Limitations

The rate of interest upon the loan or forbearance of any money for things other than personal, family and household purposes is a rate not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the twenty-fifth day of the month preceding the earlier of (i) the date of execution of the contract or (ii) the date of making the loan or forbearance as established by the Federal Reserve Bank of San Francisco on advances to member banks.¹⁴⁸ Case law suggests that conditional sales contracts are not subject to the usury limitation.¹⁴⁹

¹⁴⁶*See, supra*, note 42

¹⁴⁷*Rider v. City of San Diego*, 959 P.2d 347 (1998).

¹⁴⁸Cal. Const. art. XV, § 1.1(2). There is no express exception from the usury laws for the state, its subdivisions or agencies. *Regent of Univ. of Cal. v. Superior Court*, 551 P.2d 844 (Cal. 1976).

¹⁴⁹*Ehrlich v. McConnell*, 29 Cal. Rptr. 283 (Cal. Ct. App. 1963).

Any provision of law specifying the maximum interest rate on bonds¹⁵⁰ to the contrary notwithstanding, [bonds of any county, city or other public or municipal corporation] may bear interest at a coupon rate . . . as determined by the legislative body in its discretion but not to exceed 12 percent per year payable as permitted by law, unless some higher rate is permitted by law.¹⁵¹

“The authority . . . to issue bonds bearing interest at a coupon rate . . . is in addition to, and not limited by, any power or limitation made applicable to [counties, cities or other public or municipal corporations] by any other law . . . unless the other law specifically provides otherwise.”¹⁵²

Miscellaneous

California provides for automatic perfection of a security interest related to a lease/purchase or installment purchase transaction, but it appears the collateral does not include the real or personal property security interest, only an interest in “any revenues, moneys, accounts receivable, contractual rights to payment, and other rights to payment of whatever kind, subject to the pledge provided for or created in a pledge document.”¹⁵³

“A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action . . . to determine the validity of such matter.”¹⁵⁴ “If no proceedings have been brought by the public agency . . . any interested person may bring [such] action”¹⁵⁵ “For purposes of [these provisions], bonds, warrants, contracts, obligations, and evidences of indebtedness shall be deemed to be in existence upon their authorization.”¹⁵⁶ “[C]ontracts shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution.”¹⁵⁷

Counties and cities may pledge their Motor Vehicle License Fee Account state revenues to the payment of their certificates of participation or lease revenue bond financing.¹⁵⁸

Pursuant to *Mayhew Tech Center v. County of Sacramento*,¹⁵⁹ the state as lessee of real property under a lease-purchase contract with a nonappropriation clause has such an interest in ownership so as to make the property exempt from county property taxation even where nominal title to the property is held by a taxable entity.

California securities legislation makes certain acts unlawful:

It is unlawful for any person to offer or sell in an issuer transaction in this state, or otherwise knowingly offer to sell in this state, any security constituting a fractional interest in a lease, installment sale, or other obligation of a local agency without obtaining the prior written consent of that local agency to that offer or sale. However, this section shall not apply to any of the following: (a) Any security that constitutes a fractional interest in a lease, installment sale, or other obligation of a local agency and that was first issued and sold prior to October 2, 1993, (b) Offers or sales of shares or interests in any registered unit investment trust or management company, each as defined in the Investment Company Act of 1940, (c) Any security that constitutes a fractional interest in a lease, installment sale, or other obligation of a local agency and that is registered under the Securities Act of 1933, (d) Offers or sales of any security described in this section

¹⁵⁰“Bonds” means “bonds, warrants, notes or other evidences of indebtedness” Cal. Gov’t Code § 53530(b).

¹⁵¹*Id.* § 53531.

¹⁵²*Id.* § 53531.1(c).

¹⁵³Cal. Gov’t Code § 5450 to 5451.

¹⁵⁴Cal. Civ. Proc. Code § 860.

¹⁵⁵*Id.* § 863.

¹⁵⁶*Id.* § 864.

¹⁵⁷*Id.*

¹⁵⁸Cal. Gov’t Code § 25350.55 (counties); *id.* § 37351.5 (cities).

¹⁵⁹5 Cal. Rptr. 2d 702 (Cal. Ct. App. 1992).

subsequent to an offer or sale of that security in compliance with this section, (e) Offers or sales of participation interests between financial institutions, (f) Any security that constitutes a fractional interest in a lease, installment sale, or other obligation of a local agency and that is created concurrently with, and as an integral part of, a financing to which the local agency is a party, (g) Offers or sales of any security that constitutes a fractional interest in a lease, installment sale, or other obligation of a local agency made solely to one or more persons who are reasonably believed to be qualified institutional buyers or accredited investors, and (h) Any security that was first issued and sold prior to the effective date of this section if that security is either described in subdivision (b), (c), or (f),

....

Any person who willfully violates section 5951 shall upon conviction be fined not more than ...ten million dollars (\$10,000,000), or imprisoned . . . five years, or be punished by both that fine and imprisonment.¹⁶⁰

Lease Payments Secured by Enterprise Revenues

In some jurisdictions, where there is a need to finance improvements to a sewer or water system, if the size of the financing is small, or the financial strength of the enterprise is insufficient to secure the proposed financing with a traditional pledge of net revenues of the enterprise, the financing is sometimes accomplished with a lease financing that is structured as a general fund lease obligation with additional security being provided with a pledge of net revenues of the enterprise. The legal analysis on such financings must take into account two sets of restrictions, and make sure both are met – the restrictions stemming from the special fund doctrine, and those stemming from the debt limitation. So, for instance, the net revenue pledge is restricted to the revenues generated by the enterprise benefiting from the project being financed, and the obligation of the public agency to make lease payments from its general funds (usually seen as a back-up to the enterprise pledge of net revenues) must be conditioned on the City's having use and possession of the property being leased. The obligation to pay rentals from the general fund is subject to abatement, but the obligation to pay rentals from the special fund is not subject to abatement. So there is abatement so long as the special fund has sufficient revenues to make payment, even though use of the property may not be available due to casualty. If the special fund revenues are not sufficient for rentals, then the general fund becomes available, but is not available, if an abatement event exists. Having satisfied these restrictions, such a structure, incorporating a so-called “double-barreled” security, can enable a small jurisdiction to structure a more secure financing, with presumably lower interest costs.

As always with special fund type transactions, review of the various ordinances, resolutions, loan agreements and indentures applicable to said special fund, should be reviewed by counsel to assure that no default results from the special fund pledge.

Reporting to the California Debt Advisory and Investment Commission

A debt issuance, including an installment purchase or certificate of participation financing has to be reported to the California Debt Advisory and Investment Commission (“CDIAC”).¹⁶¹ In addition, a fee is imposed by the CDIAC, to be paid by the underwriter or purchaser.¹⁶²

¹⁶⁰Cal. Gov't Code *Id.* § 5954.

¹⁶¹*Id.* §§ 8855 to 8859; <http://www.treasurer.ca.gov/cdiac/reporting.asp>.

¹⁶²Cal. Gov't Code *Id.* § 8856.

It is questionable whether the CDIAC has the authority to require reporting requirements on abatement leases and nonappropriation leases, since they are not debt, and the statute does not reference leases. The instructions to the forms do make reference to leases, but one would argue that the CDIAC is exceeding their authority.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

COLORADO 2019

Current through the end of the Second Regular Session of the 71st General Assembly (2018).¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “lease any real or personal property, either as lessor or lessee, together with any facilities thereon, when deemed by the board of county commissioners to be in the best interests of the county and its inhabitants.”⁵ Counties may enter into lease-purchase agreements “to provide for financing of a courthouse, jail or other county building or equipment used . . . for governmental purposes.”⁶ Such agreements “may include an option to purchase, transfer and acquire title to such property and the improvements thereon within a period not exceeding the useful life of such property and improvements, but in no case exceeding thirty years.”⁷ The “obligation under any such leases may only be from year to year and may not constitute a mandatory charge or requirement in any ensuing budget year.”⁸ “[T]he obligation to make payments under such an agreement and the obligation to pay other charges incident to any such agreement shall not constitute or give rise to an indebtedness within the meaning of any constitutional, statutory, or home rule charter debt limitation.”⁹

Energy Performance Contracting

Subject to numerous restrictions, counties may contract for cost-saving and energy saving measures for buildings or other facilities.¹⁰

Municipalities

Municipalities¹¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹² eminent domain¹³ and police powers.¹⁴ Municipalities may “acquire, hold, lease, and dispose of property, both real and personal.”¹⁵ “In order to provide necessary land, buildings, equipment, and other property, . . . any municipality [may] enter into long-term rental or leasehold agreements.”¹⁶ Such agreements may include an “option to purchase and acquire title to such leased or rented property within a period not exceeding the useful life of such property and in no case exceeding thirty years.”¹⁷ Rental or leasehold payments may be provided for by a general levy on personal or real property and rates, toll or service charges for use of the property or any other available municipal income. An obligation to pay

¹Counties may be general law or home rule. Colo. Const. art. XIV, § 16(1).

²Colo. Rev. Stat. § 39-1-111.

³*Id.* §§ 30-20-402(1)(a).

⁴*Id.* § 30-15-402.

⁵*Id.* § 30-11-101(1)(c).

⁶*Id.* § 30-11-104.1(1).

⁷*Id.* § 30-11-104.1(2).

⁸*Id.* § 30-11-104.1(3).

⁹*Id.* § 30-11-104.1(4).

¹⁰*Id.* § 30-11-107(dd); § 30-35-201 (home rule county) and §§ 29-12.5-101 to -104.

¹¹Cities and towns with populations of 2,000 or more may adopt charters. Colo. Const. art. XX, § 6.

¹²Colo. Rev. Stat. § 31-15-302(1)(c).

¹³*Id.* § 38-6-101.

¹⁴*Id.* §§ 31-15-103, 31-15-401.

¹⁵*Id.* §§ 31-15-101(1)(d).

¹⁶*Id.* § 31-15-801.

¹⁷*Id.*

rentals “shall not constitute an indebtedness of said municipality within the meaning of the constitutional limitations on contracting of indebtedness by municipalities.”¹⁸

Energy Performance Contracting

Subject to numerous restrictions, municipalities may contract for cost-saving and energy-saving measures for buildings or other facilities.¹⁹

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁰ and eminent domain powers.²¹ School districts may “take . . . real and personal property . . . as may be reasonably necessary for any [legal] purpose”²² and have power to “purchase on such terms, including . . . installment purchase plans . . . or to lease or rent, with or without an option to purchase . . . real property . . . or equipment . . . for sites [or] buildings.”²³ New school districts may “take, hold, and convey property, both real and personal, and be a party to . . . contracts.”²⁴ This statutory language stating “in the same manner as municipal corporations of the state” has been construed to mean that school districts can enter into long-term leases as can municipal corporations.²⁵

Whenever the term of an installment purchase agreement or a lease agreement with an option to purchase . . . under which a school district becomes entitled to the use of undeveloped or improved real property or equipment for a school site, building, or structure is greater than one year, the obligation to make payments . . . shall constitute an indebtedness of the district.²⁶

These lease-purchase agreements cannot be entered without voter approval.²⁷ “[I]ndebtedness incurred by a school district by means of installment-purchase agreements having terms of more than one year shall be subject to the limitation imposed by law, on the amount of bonded indebtedness which may be incurred by a school district.”²⁸ These provisions are not applicable if a lease-purchase agreement has a nonappropriations clause²⁹ or if payments are to be made from a capital reserve fund following approval in an election.³⁰ After July 1, 1991, any lease agreement or installment purchase agreement which has been approved at a school district election is entitled to the same state funding offset program protections as school district general obligation bonds.³¹

A school district may contract with . . . a natural person, body corporate, or association for the performance of a service, including an educational service, an activity, or an undertaking that a school may be authorized by law to perform or undertake....[Such contract] may include, among other things, the

¹⁸*Id.*

¹⁹*Id.* § 31-15-302(1)(h) and §§ 29-12.5-101 to -104.

²⁰*Id.* § 22-40-102, 22-40-110.

²¹*Id.* § 22-32-111.

²²*Id.* § 22-32-110(1)(a).

²³*Id.* § 22-32-110(1)(b).

²⁴*Id.* § 22-30-120(1).

²⁵*See* Board of Directors v. Jeffrey, 149 Colo. 579, 370 P.2d 447 (1962) (school districts may enter into long-term lease-purchase agreements). *See also* Colo. Rev. Stat. § 31-15-801 (municipal corporations); *see, supra*, notes 16-17 and accompanying text.

²⁶Colo. Rev. Stat. § 22-32-127(1)(a). This section was amended to cross-reference section 22-43.7-110 which was passed with legislation called the “Building Excellent Schools Today Act” concerning state financial assistance to public schools for facility capital construction. Under section 22-43.7-110 the state may give a school district matching funds for property being acquired by the local school district under a voter approved lease-purchase agreement.

²⁷*Id.* § 22-32-127(2).

²⁸*Id.* § 22-32-127(4).

²⁹*Id.* § 22-32-127(6).

³⁰*Id.* § 22-32-127(7).

³¹*Id.* § 22-41-110.

purchase, outright or by installment sale, or rental or lease, with or without an option to purchase, of necessary building facilities, equipment, supplies, and employee services.³²

Energy Performance Contracting

Subject to numerous restrictions, boards of education may contract for cost saving and energy saving measures for buildings or other facilities.³³

Fire Districts

Fire districts³⁴ qualify as tax exempt issuers for purposes of federal income tax law due to their tax³⁵ and eminent domain powers.³⁶ Fire districts may "acquire, dispose of, and encumber real and personal property including, without limitation, rights and interests in property, leases, and easements necessary to the functions or the operation of the special district; except that the board shall not pay more than fair market value and reasonable settlement costs for any interest in real property" ³⁷ Fire protection districts may acquire, dispose of, or encumber fire stations, fire protection and fire fighting equipment,³⁸

Health Service Districts

Health service districts³⁹ qualify as tax exempt issuers for purposes of federal income tax law due to their tax⁴⁰ powers. Health service districts may "acquire, dispose of, and encumber real and personal property including, without limitation, rights and interests in property, leases, and easements necessary to the functions or the operation of the special district; except that the board shall not pay more than fair market value and reasonable settlement costs for any interest in real property" ⁴¹ Such districts have the power to "establish, maintain, or operate, directly or indirectly through lease to or from other parties or other arrangement, public hospitals, convalescent centers, nursing care facilities, intermediate care facilities, emergency facilities, community clinics, or other facilities providing health and personal care services, including but not limited to facilities licensed or certified pursuant to section 25-1.5-103(1)(a), C.R.S., and to organize, own, operate, control, direct, manage, contract for, or furnish ambulance service in said district."⁴²

³²*Id.* § 22-32-122.

³³*Id.* § 22-32-110 and §§ 29-12.5-101 to -104.

³⁴"Fire protection district" means "a special district which provides protection against fire by any available means and which may supply ambulance and emergency medical and rescue services" organized under Colo Rev. Stat. title 32, art. 1. *Id.* §§ 32-1-103(7), (20).

³⁵*Id.* § 32-1-1101(1).

³⁶*Id.* § 32-1-1002(1)(b).

³⁷*Id.* § 32-1-1001(1)(f).

³⁸*Id.* § 32-1-1002(a).

³⁹"Health service district" means "a special district that may establish, maintain, or operate, directly or indirectly through lease to or from other parties or other arrangement, public hospitals, convalescent centers, nursing care facilities, intermediate care facilities, emergency facilities, community clinics, or other facilities licensed or certified pursuant to section 25-1.5-103(1)(a), C.R.S., providing health and personal care services and may organize, own, operate, control, direct, manage, contract for, or furnish ambulance service" organized under title 32, art. 1. *Id.* §§ 32-1-103(9), (20). "Health service district" may also mean a district organized under tit. 32, art. 19, which incorporates many parts of the Special District Act giving it similar powers as the health district first mentioned. *Id.* § 32-19-103. Health districts under article 19 have taxing power. *Id.* § 32-19-111.

⁴⁰*Id.* § 32-1-1101.

⁴¹*Id.* § 32-1-1001(1)(f).

⁴²*Id.* § 32-1-1003.

State Entities

Given the complexity in the area of federal securities law and federal tax law and ongoing compliance, the Colorado Legislature has consolidated oversight in the state treasurer's office. Legislation provides:

(1) The general assembly hereby finds, determines, and declares that:

(a) The state's public financing matters are currently decentralized. Many state agencies incur financial obligations and directly or indirectly pledge or use the credit of the state without centralized management.

(b) Centralized management could have a positive impact on the state's credit rating because credit rating agencies would have a centralized point of contact with the state for state public financing matters;

(c) The issuance and incurrence of financial obligations and the state's outstanding financial obligations should be managed as a whole, by personnel with financial experience and securities market understanding, so that the issuance and incurrence of state financial obligations and the state's outstanding financial obligations can be managed as efficiently and cost effectively as possible, allowing the state to maximize refinancing opportunities;

(d) Centralized management provides a better method of ensuring that federal tax and securities law post-issuance compliance requirements for state financial obligations are met by the state;

(e) Due to changes in the public securities market, increased regulatory requirements, evolving credit criteria, recent technological developments, recent downgrading of certain government credit ratings, and the benefits set forth in this subsection (1), it is necessary to designate the state treasurer as a centralized manager for the issuance and incurrence of financial obligations by the state acting by and through a state agency;

(f) It is also important that the state treasurer develop and promulgate a state public financing policy and, in so doing, collaborate with various experts, including but not limited to the state controller, the office of state planning and budgeting, bond counsel, and the attorney general. Such a policy demonstrates a commitment to long-term financial planning, identifies policy goals, provides for appropriate financing structures, and improves the quality of decision-making. Furthermore, credit rating agencies, the federal internal revenue service, and the federal securities and exchange commission view the existence of state public financing policies favorably.

(g) Senate Bill 12-150, enacted in 2012, is not intended to grant the state treasurer any authority that supersedes a state agency's authority to enter into or incur a financial obligation, nor is Senate Bill 12-150 intended to affect other state laws regarding the general assembly's approval of any capital lease or lease-purchase agreement over five hundred thousand dollars.

(2) Nothing in this section authorizes the state treasurer or any other public agency to waive an election otherwise required under section 20 of article X or article XI of the state constitution or to hold an election inconsistent with the election requirements of said section 20 of article X. References to financial obligations, debt, or bonds in this section are for reference only and shall not be construed to create debt or a multiple fiscal-year financial obligation contrary to section 20 of article X or article XI of the state constitution.

(3) As used in this section, unless the context otherwise requires:

(a) (I) "Financial obligation" means any financial contract, note, warrant, check, bond, certificate, instrument, debenture, or other security, the principal amount of which is one million dollars or more, that is authorized to be issued or entered into by the state acting by and through a state agency under the laws of this state, that is fully or partially secured by any state revenues, and that is directly or indirectly related to the state's credit rating. "Financial obligation" includes, but is not limited to:

(A) Any capital lease or lease-purchase agreement the principal amount of which is one million dollars or more authorized pursuant to section 24-82-102 and part 8 of article 82 of this title; and

(B) Any payment obligation constituting a portion of or related to an energy performance contract as defined in section 24-30-2001 (1) or a capital project financed through a utility cost-savings contract authorized by section 24-38.5-106.

(II) Notwithstanding subparagraph (I) of this paragraph (a), for purposes of the department of transportation, "financial obligation" does not include:

(A) Any financial contract, note, warrant, check, bond, certificate, instrument, debenture, or other contract, agreement, or security that is authorized to be issued or entered into by or in support of such obligations of the high-performance transportation enterprise created in section 43-4-806 (2), C.R.S.; and

(B) Any financial contract, note, warrant, check, bond, certificate, instrument, debenture, or other contract, agreement, or security that is authorized to be issued or entered into by or in support of such obligations of the statewide bridge enterprise created in section 43-4-805 (2), C.R.S.

(b) "Internal revenue code" means the federal "Internal Revenue Code of 1986", as amended, and any regulations thereunder.

(c) (I) "State agency" means a department, board, bureau, commission, division, institution, quasi-governmental entity, or other agency or instrumentality of the state, including a state institution of higher education. "State agency" also includes an enterprise, as defined in section 24-77-102 (3), a nonprofit corporation organized under the laws of this state and created solely for the purpose of issuing financial obligations on behalf of the state acting by and through a state agency, and a trust that may be formed by the state or a state agency to implement capital lease or lease-purchase financing.

(II) "State agency" does not include:

(A) A county or city and county;

(B) A municipality;

(C) A school district;

(D) A charter school;

(E) A water conservancy district;

(F) Collegeinvest as described in section 23-3.1-205.5, C.R.S.;

(G) A district or authority organized or acting pursuant to the provisions of title 29, 30, 31, or 32, C.R.S.;

(H) A special purpose authority listed in section 24-77-102 (15) (b); or

(I) Any other political subdivision of the state or other entity that constitutes a local public body as defined in section 24-6-402 (1) (a).

(d) "State institution of higher education" has the same meaning as set forth in section 23-18-102 (10), C.R.S. For purposes of this section, "state institution of higher education" also includes the Auraria higher education center established in article 70 of title 23, C.R.S.

(e) "State revenues" means all income of the state that is received into the state treasury from taxes, fees, and other sources and appropriated for the payment of the state's expenses.

(4) (a) (I) Notwithstanding any other law to the contrary and except as provided in subparagraph (II) of this paragraph (a), for the 2012-13 state fiscal year and each state fiscal year thereafter, when a state agency obtains the required approval for the financing of a capital project as specified in law, the state treasurer shall act as the issuing manager, subject to the criteria established in the state public financing policy promulgated as specified in subsection (5) of this section, for all approved financial obligations of the state acting by and through a state agency. The state treasurer has the sole discretion to manage the issuance or incurrence of financial obligations of the state acting by and through a state agency, including all post-issuance compliance with federal and state tax and securities laws, such as arbitrage, rebate, and remedial action requirements. The state treasurer's duties with respect to the management of the issuance or incurrence of financial obligations include, but are not limited to, the following:

(A) Determining the financing structure and term;

(B) Deciding the market timing;

(C) Selecting or hiring, as applicable, the state financing team, including, where appropriate, the lessor, purchaser, underwriter, bond or disclosure counsel, trustee, escrow agent, paying agent, credit enhancer, rating agency, placement agent, liquidity provider, credit support provider, interest rate exchange agreement counterparty, and financial advisor;

(D) Determining the advisability of a state agency entering into an interest rate exchange agreement pursuant to article 59.3 of title 11, C.R.S.; and

(E) Determining whether to enter into competitive or negotiated sales of financial obligations.

(II) For a state institution of higher education, for the 2012-13 state fiscal year and each state fiscal year thereafter, the state treasurer shall act as the issuing manager, subject to the criteria established in the state public financing policy promulgated as specified in subsection (5) of this section, for any lease-purchase agreement similar to those authorized in section 23-1-106.3, C.R.S., and any financial contract, note, warrant, check, bond, certificate, instrument, debenture, or other security, the principal amount of which is one million dollars or more, that is authorized under the laws of this state to be issued or entered into by the state acting by and through a state agency other than a state institution of higher education and that finances improvements that benefit a state institution of higher education. The state treasurer has the sole discretion to manage the issuance or incurrence of such financial obligations for a state institution of higher education and shall manage the issuance or incurrence of such financial obligations in accordance with the duties set forth in sub-subparagraphs (A) to (E) of subparagraph (I) of this paragraph (a). The state treasurer shall not act as the issuing manager for any bonds subject to the higher education revenue bond intercept program established in section 23-5-139, C.R.S.

(b) (I) (A) Not less than sixty days prior to the date on which a state agency expects that a financial obligation of the state acting by and through the state agency will be incurred, a state agency shall provide written notice to the state treasurer of that expectation.

(B) Not less than thirty days prior to the date on which a state agency expects that a refinancing of a financial obligation of the state acting by and through the state agency will be incurred, a state agency shall provide written notice to the state treasurer of that expectation.

(II) The state agency shall provide the state treasurer with the information that the state treasurer considers necessary to act as the issuing manager for the issuance or incurrence of the financial obligation, including, if necessary, assumptions of underlying cash flow projections associated with the repayment of the financial obligation. The state agency shall provide the state treasurer with the information that the state treasurer considers necessary to comply with federal and state tax and securities laws and contractual covenants.

(c) In performing his or her duties as the issuing manager, the state treasurer shall consider any relevant factors that the state treasurer considers necessary to protect the financial integrity of the state.

(d) The state treasurer is the elected representative for the purpose of approving the issuance or incurrence of financial obligations by the state acting by and through a state agency when such approval is required under the internal revenue code and is the required signatory on all forms required by the federal internal revenue service to be filed in connection with the issuance or incurrence of financial obligations by the state acting by and through a state agency.

(5) No later than ninety days after May 24, 2012, the state treasurer shall promulgate by rule, in accordance with article 4 of this title, a state public financing policy, and, in so doing, shall collaborate with various experts, including but not limited to the state controller, the office of state planning and budgeting, bond counsel, and the attorney general. The state treasurer shall present the state public financing policy to the capital development committee at the earliest meeting of the capital development committee at which time is available in the meeting schedule after the policy is finalized and shall provide a copy of the final state public financing policy to the joint budget committee. The state treasurer shall notify the capital development committee and the joint budget committee, in writing, of any substantive changes that are subsequently made to the state public financing policy. For purposes of this subsection (5), the attorney general is the legal advisor to the state treasurer. The state public financing policy shall include, but shall not be limited to, the following components:

(a) The use of moral obligation pledges;

- (b) The criteria for the issuance or incurrence of financial obligations by the state acting by and through a state agency;
- (c) The use of derivatives;
- (d) The use of variable rate financial obligations;
- (e) Credit objectives;
- (f) The structuring practices for each type of financial obligation, including, but not limited to, information about the term, maturity, and type of interest;
- (g) Acceptable methods of sale;
- (h) Policies for determining when selection of external financial professionals is appropriate;
- (i) Policies related to the refunding of financial obligations;
- (j) Policies related to primary and continuing disclosure requirements for financial obligations;
- (k) Policies related to post-issuance compliance with federal and state tax and securities laws, including arbitrage, rebate, and remedial action requirements; and
- (l) Policies for investment of proceeds where not otherwise covered by law.

(6) (a) No later than ten days after a state institution of higher education enters into or issues a financial obligation in a principal amount of one million dollars or more that is secured in whole or in part by state revenues or revenues of the institution and that the state treasurer does not manage pursuant to subsection (4) of this section, including any bonds subject to the higher education revenue bond intercept program established in section 23-5-139, C.R.S., the state institution of higher education shall notify the state treasurer that it has entered into the financial obligation. The notification shall include at least the following information:

- (I) A copy of any official statement or other offering document for the issuance or incurrence of the financial obligation;
- (II) A copy of any filings or correspondence with the federal internal revenue service with respect to the issuance or incurrence, including, if applicable, a copy of each form 8038 or form 8038G;
- (III) A copy of the continuing disclosure undertaking; and
- (IV) Any other information that is described in the state public financing policy promulgated pursuant to subsection (5) of this section related to the issuance or incurrence.

(b) No later than ten days after the high-performance transportation enterprise created in section 43-4-806 (2), C.R.S., or the statewide bridge enterprise created in section 43-4-805 (2), C.R.S., enters into the financial contracts or instruments specified in sub-subparagraphs (A) and (B) of subparagraph (II) of paragraph (a) of subsection (3) of this section, the enterprises shall notify the state treasurer that they have entered into or issued such a financial contract or instrument. The notification shall include at least the following information:

- (I) A copy of any official statement or other offering document for the issuance or incurrence of such a financial contract or instrument;
- (II) A copy of any filings or correspondence with the federal internal revenue service with respect to the issuance or incurrence, including, if applicable, a copy of each form 8038 or form 8038G;
- (III) A copy of the continuing disclosure undertaking; and
- (IV) Any other information that is described in the state public financing policy promulgated pursuant to subsection (5) of this section related to the issuance or incurrence.

(7) (a) On and after July 1, 2012, the issuance or incurrence of every financial obligation by the state acting by and through a state agency that the state treasurer manages pursuant to subsection (4) of this section shall include, to the extent allowed by the internal revenue code, an amount determined by the state treasurer not to exceed the lesser of one hundred thousand dollars or two percent of the principal proceeds of the issuance or incurrence to be paid to the state treasurer. The state treasurer shall credit the moneys to the

state public financing cash fund, which is hereby created in the state treasury. The fund consists of moneys deposited in the fund pursuant to this paragraph (a) and shall be used solely for the purposes described in paragraph (b) of this subsection (7). The moneys in the fund are continuously appropriated to the state treasurer. All unexpended and unencumbered moneys in the fund and all interest and income earned on the deposit and investment of moneys in the fund shall remain in the fund and shall not revert to the general fund or any other fund at the end of a fiscal year.

(b) To the extent permitted by bond counsel, the moneys in the state public financing cash fund shall be used to reimburse the state treasurer for verifiable costs incurred in performing or overseeing the state's primary issuance compliance and post-issuance compliance responsibilities over the term of a financial obligation, including complying with or monitoring compliance with the requirements of the internal revenue code, making public disclosures or continuing disclosure undertakings required pursuant to federal securities laws or ensuring that such disclosures are made, and performing or coordinating requirements in connection with the financial obligation.

(8) No later than ninety days after May 24, 2012, the state treasurer shall create and maintain a correct and current inventory of all state-owned real property described in section 24-30-1303.5 that is leased property or collateral in any type of financial obligation. The state treasurer shall annually provide a copy of the inventory to the capital development committee.⁴³

The executive director of the department of personnel, with the approval of the governor, and after review by the capital development committee, may acquire real property on behalf of the state by lease-purchase agreement.⁴⁴ Such agreement must comply with the requirements of section 24-82-801,⁴⁵ which provides:

(1) (a) (I) Except as provided in subsection (6) of this section, and subject to the requirement set forth in subsection (1)(a)(II) of this section, no lease-purchase agreement for real property that requires total payments exceeding five hundred thousand dollars over the term of the agreement shall be entered into unless such agreement is specifically authorized, prior to its execution, by a bill enacted by the general assembly, other than the annual general appropriation act or a supplemental appropriation act.

(II)(A) Each bill enacted by the general assembly on or after August 8, 2018, as required in subsection (1)(a)(I) of this section, must include a requirement that the state agency or state institution of higher education entering into the lease-purchase agreement present a plan to the capital development committee, no later than the December of the fourteenth calendar year or the January of the fifteenth calendar year after either the date of the substantial completion of the construction or after the date of acquisition, that details how the state agency or state institution of higher education is prepared to fund the controlled maintenance needs of the real property so that at least an amount equal to an estimation of the sum of one percent of the insured value of the real property for each year starting with the sixteenth year after either the date of the substantial completion of the construction or after the date of acquisition is available for a total period of twenty-five years for the real property's controlled maintenance needs. The plan presented by the state agency or state institution of higher education may include a request for an additional lease-purchase agreement for such controlled maintenance needs or may include a request for partial or complete state funding of such controlled maintenance needs. The capital development committee shall review the plan presented by the state agency or state institution of higher education. Any approved plan shall be authorized by bill enacted by the general assembly, other than the annual general appropriation act or a supplemental appropriation act; except that if the approved plan is for a state institution of higher education to fund such controlled maintenance needs from cash funds then the plan may be approved by majority vote of the capital development committee.

(B) For purposes of this section, "controlled maintenance" has the same meaning as set forth in section 24-30-1301(4); except that it may include any maintenance needs that would

⁴³*Id.* § 24-36-121. Regulations adopted pursuant to this statute are in Colo. Admin. Code tit.1508, sections 1508-2:1.1 to 1508-2:1.13. Types and structural features of financial obligations are set out in section 1508-2:1.8.

⁴⁴Colo. Rev. Stat. § 24-82-102(1)(a). "*Lease-purchase agreement* means a capital lease as defined in the generally accepted accounting principles issued by the governmental accounting standards board that the controller prescribes for the state as specified in section 24-30-202(12) [requiring the controller to install a unified system]." *Id.* § 24-82-102(1)(f). Certain procedures and requirements concerning the review and approval of expenditure contracts by the state controller must be followed. *Id.* § 24-30-202. The office of the state architect, with the approval of the governor, negotiates and execute leases for real property on behalf of the state (except the judicial department). *Id.* § 24-30-1303.

⁴⁵*Id.* § 24-82-102(1)(b).

ordinarily be funded in a state agency's or state institution of higher education's operating budget. Also for purposes of this section, "insured value" means the insured value of the real property as determined through the risk management program established in part 15 of article 30 of this title 24.

(b) Except as provided in subsection (6) of this section, no lease-purchase agreement for personal property that requires total payments exceeding five hundred thousand dollars over the term of the agreement shall be entered into unless such agreement is specifically authorized, prior to its execution, by a bill enacted by the general assembly, other than the annual general appropriation act or a supplemental appropriation act, or specifically authorized by appropriation in the annual general appropriation act or a supplemental appropriation act.

(c) Subsequent to the general assembly's authorization of a lease-purchase agreement as specified in paragraphs (a) and (b) of this subsection (1), rentals and other payments by the state under any such lease-purchase agreement may be made from moneys appropriated by the general assembly as a separate line item in the capital construction or operating section of an annual general appropriation act or a supplemental appropriation act.

(2) Except as provided in subsection (6) of this section, lease-purchase agreements that require total payments of five hundred thousand dollars or less over the term of the agreement shall require an appropriation by the general assembly in an annual general appropriation act or a supplemental appropriation act.

(3) A lease-purchase agreement that requires total payments in excess of five hundred thousand dollars over the term of the agreement shall require, prior to its execution, approval by the state controller as authorized by section 24-30-202.

(4) As used in this section, "lease-purchase agreement" means a capital lease as defined in the generally accepted accounting principles issued by the governmental accounting standards board that the controller prescribes for the state as specified in section 24-30-202.

(5) A lease-purchase agreement may further provide for the issuance, distribution, and sale of instruments evidencing rights to receive rentals and other payments made by the state, but only if the lease-purchase agreement includes a provision that payments made by the state are subject to annual appropriation. A lease-purchase agreement shall not include notes, bonds, or any other evidence of indebtedness of the state within the meaning of any provision of the constitution or laws of the state of Colorado concerning or limiting the creation of indebtedness by the state.

(6) (a) Notwithstanding any provision of this section to the contrary, the department of transportation, institutions of higher education, the Auraria higher education center established in article 70 of title 23, C.R.S., and the state treasurer may enter into lease-purchase agreements if the state controller as authorized by section 24-30-202 approves each lease-purchase agreement that requires total payments in excess of five hundred thousand dollars over the term of the agreement or as otherwise provided by law.

(b) Notwithstanding any provision of this section to the contrary, the legislative department may enter into lease-purchase agreements pursuant to section 2-2-320, C.R.S.

(7) Nothing in this section shall be construed to impair any contract or instrument in existence on July 1, 2009, if the contract was validly entered into or the instrument was validly issued under the law in effect at the time of entering into said contract or issuing said instrument.

(8) All lease-purchase agreements described in section 24-48.5-312 (3) (a) (II)⁴⁶ shall include the terms specified in said section.⁴⁷

⁴⁶*Id.* § 24-48.5-312(3)(a)(II) provides with numerous exceptions that "any capital construction project that is the subject of a lease-purchase agreement, as defined in section 24-82-801(4), that provides for lease payments from money that has been appropriated in full or in part by the state shall include as a nondeductible item in the project budget an allocation of not less than one percent of the state-funded portion of the total construction costs to be used for the acquisition of works of art."

⁴⁷*Id.* § 24-82-801.

The state treasurer is authorized to enter into lease-purchase agreements for "real and associated personal property existing or to be constructed" and to be managed by the department of personnel for state agencies and non-state lessees:⁴⁸

(1) As used in this section, unless the context otherwise requires:

(a) (I) "Annual lease-purchase payment" means the total amount due from the state on property subject to a lease-purchase agreement and includes:

(A) The annual base rent scheduled to be paid and the additional rent estimated to be paid on or pursuant to the lease-purchase agreement and any ancillary agreements that may include, but need not be limited to, any of the following that are paid on a current basis and not paid by a lessor or other third party as part of a lease-purchase agreement: All acquisition costs, such as due diligence costs associated with evaluation of an existing building; land acquisition; penalties for breaking lease agreements; a capital reserve for space planning and capital improvements needed in the building for demolition and construction of tenant space for state agencies or the release to existing tenants; relocation costs; office furniture and equipment; insurance; and the costs associated with any lease-purchase financing; plus

(B) Operating and maintenance costs and a reserve for controlled maintenance costs.

(II) For the construction of a new building on land owned or leased by the state, the acquisition costs may also include the architectural and engineering design and engineering costs, site preparation, provisions for utilities and tap fees, and materials and construction costs.

(b) "Annual rent costs" means base rent typically found in the leased space line item in the annual general appropriation bill plus all operation, maintenance, and related costs paid to a lessor or other third party.

(c) "Department" means the department of personnel, created in section 24-1-128.

(d) "Executive director" means the executive director of the department of personnel.

(e) "Lease-purchase agreement" shall have the same definition as provided in section 24-82-801 (4).

(2) (a) Subject to the provisions of this section, the state treasurer, on behalf of the state of Colorado for the use of the department, is authorized to enter into one or more lease-purchase agreements for real and associated personal property existing or to be constructed pursuant to requirements of the state to be exclusively used, possessed, and managed by the department for state agencies and nonstate lessees of the department as the executive director may solely determine according to the plan approved pursuant to subsection (4) of this section and subject to the terms of the lease-purchase agreement.

(b) Subject to the provisions of section 2 of article XI of the state constitution, the state treasurer, for the use and benefit of the department, may enter into such lease-purchase agreements in conjunction with the state board of land commissioners, created pursuant to section 9 of article IX of the state constitution, or with a private person. The state treasurer shall transfer all benefits and responsibilities under the lease-purchase agreement to the department. The department shall manage the property for the state as the executive director may solely determine, subject to the terms of the lease-purchase agreement.

(3) The state treasurer shall enter into a lease-purchase agreement authorized pursuant to subsection (2) of this section on behalf of the state for the use and benefit of the department only if, at the time that the lease-purchase agreement is executed:

(a) The state agencies that will be located in the property that is the subject of the lease-purchase agreement are funded, in whole or in part, by appropriations and a portion of the appropriations are being expended to pay rent to a lessor;

(b) The projected annual rent costs of the state agencies that will be located in the property plus any current rental payments or rental payments projected to be received from nonstate lessees for each fiscal year during the maximum term of the lease-purchase agreement exceed the

⁴⁸*Id.* § 24-82-802.

annual lease-purchase payment for the property, adjusted as appropriate to account for any differences in services provided to, or costs paid for the benefit of, the state under the related leases and lease-purchase agreements;

(c) The property or proposed construction plan for the property has been reviewed by the state architect who shall make written recommendations to the executive director for controlled maintenance needs during the term of the lease-purchase agreement;

(d) The plan for the lease-purchase transaction has been approved first by the office of state planning and budgeting and the capital development committee of the general assembly pursuant to subsection (4) of this section;

(e) The executive director acknowledges his or her approval of the terms of the lease-purchase agreements and any ancillary agreements;

(f) The agreements for the lease-purchase transaction accurately reflect the plan approved by the office of state planning and budgeting and the capital development committee; and

(g) The state controller has approved all agreements pursuant to section 24-30-202.

(4) Prior to the state treasurer entering into any lease-purchase agreement pursuant to this section, the executive director shall submit the report required by section 24-82-102 (1) and the plan for the lease-purchase transaction to the office of state planning and budgeting. If the office of state planning and budgeting approves the report and the plan, it shall submit the report and the plan to the capital development committee of the general assembly. The capital development committee shall approve the plan or refer its recommendations regarding the plan, with written comments, to the executive director and the office of state planning and budgeting.

(5) Approval of the plan by the office of state planning and budgeting shall not authorize the department to expend any moneys on the annual lease-purchase payment in any fiscal year in an amount greater than the projected annual rent costs of the state agencies plus any rental payments projected to be received from nonstate lessees for such fiscal year, adjusted as appropriate to account for any differences in services provided to, or costs paid for the benefit of, the state under the related leases and lease-purchase agreements.

(6) The state of Colorado, acting by and through the state treasurer, for the use and benefit of the department may, at the state treasurer's sole discretion, enter into one or more lease-purchase agreements authorized by subsection (2) of this section with any for-profit or nonprofit corporation, trust, or commercial bank as a trustee, as lessor.

(7) (a) A lease-purchase agreement authorized in subsection (2) of this section shall provide that all of the obligations of the state under the lease-purchase agreement shall be subject to the action of the general assembly in annually making moneys available for all payments thereunder. The lease-purchase agreement shall also provide that the obligations shall not be deemed or construed as creating an indebtedness of the state within the meaning of any provision of the state constitution or the laws of the state of Colorado concerning or limiting the creation of indebtedness by the state of Colorado and shall not constitute a multiple fiscal-year direct or indirect debt or other financial obligation of the state within the meaning of section 20 (4) of article X of the state constitution. In the event the state of Colorado does not renew a lease-purchase agreement authorized in subsection (2) of this section, the sole security available to the lessor shall be the property encumbered to secure the nonrenewed lease-purchase agreement or equivalent substitute collateral provided by the state.

(b) A lease-purchase agreement authorized in subsection (2) of this section may contain such terms, provisions, and conditions as the state treasurer, acting on behalf of the state of Colorado and for the use and benefit of the department, may deem appropriate, including all optional terms; except that a lease-purchase agreement:

(I) Shall not exceed in its term the shorter of the remaining useful life of the building or twenty-five years; and

(II) Shall specifically authorize the state of Colorado:

(A) To receive title to all real and personal property that is the subject of the lease-purchase agreement on or prior to the expiration of the terms of the lease-purchase agreement; and

(B) To reduce the term of the lease through prepayment of rental and other payments subject to the terms of the lease-purchase agreement and any ancillary agreement.

(c) A lease-purchase agreement authorized in subsection (2) of this section may provide for the issuance, distribution, and sale of instruments evidencing rights to receive rentals and other payments made and to be made under the lease-purchase agreement. The instruments shall not be notes, bonds, or any other evidence of indebtedness of the state within the meaning of any provision of the state constitution or the law of the state concerning or limiting the creation of indebtedness of the state and shall not constitute a multiple fiscal-year direct or indirect debt or other financial obligation of the state within the meaning of section 20 (4) of article X of the state constitution.

(d) Interest paid under a lease-purchase agreement authorized in subsection (2) of this section, including interest represented by the instruments, shall be exempt from Colorado income tax.

(e) The state of Colorado, acting through the state treasurer, for the use and benefit of the department, is authorized, if the executive director concurs, to enter into ancillary agreements and instruments as are deemed necessary or appropriate in connection with a lease-purchase agreement, including but not limited to ground leases, site leases, easements, or other instruments relating to the real property on which the facilities are located; except that no ancillary agreement is authorized that would cause the annual lease-purchase payment to exceed the annual rent costs appropriated to the state agencies prior to the lease-purchase agreement plus any rent projected to be received from nonstate lessees.

(f) A lease-purchase agreement authorized in subsection (2) of this section may require the state to provide insurance; except that no insurance is authorized that would cause the annual lease-purchase payment to exceed the annual rent costs of the state agencies prior to the lease-purchase agreement plus any rent projected to be received from nonstate lessees, adjusted as described in paragraph (b) of subsection (3) of this section. The insurance may be provided through the self-insured property fund created pursuant to section 24-30-1510.5.

(8) Any provision of the fiscal rules promulgated pursuant to section 24-30-202 (1) and (13) that the state controller deems to be incompatible or inapplicable with respect to said lease-purchase agreements or any such ancillary agreement may be waived by the controller or his or her designee.

(9) If a lease-purchase agreement authorized pursuant to subsection (2) of this section is executed, during the term of the lease-purchase agreement, moneys that at the time of the execution are appropriated to a state agency for rental payments in an amount equal to the annual lease-purchase payment, less any payments projected to be received from nonstate lessees pursuant to subsection (10) of this section, shall be transferred to the lease-purchase servicing account of the capital construction fund, created in section 24-75-302 (3.5), and, subject to annual appropriation, shall be used to pay the annual lease-purchase payments for the property that is the subject of the lease-purchase agreement or for operating, maintenance, and controlled maintenance costs for the property subject to the lease-purchase agreement. Moneys held in the lease-purchase servicing account shall be for the benefit of the department.

(10) (a) If the executive director determines that, in a property subject to a lease-purchase agreement authorized pursuant to subsection (2) of this section, there is space that is not needed by a state agency, the executive director, separately or in conjunction with the state board of land commissioners or another person, may:

(I) Hire a building manager to manage the space; or

(II) Subject to the approval of the office of state planning and budgeting, lease the space to any person on commercially reasonable terms.

(b) (I) Any moneys received by the executive director on behalf of nonstate lessees pursuant to paragraph (a) of this subsection (10) shall be transmitted to the state treasurer, who shall credit the same to the lease-purchase rental cash fund for the benefit of the department, which fund is hereby created and referred to in this section as the "fund". The moneys in the fund shall be subject to annual appropriation by the general assembly to the department of personnel and shall only be used for the annual lease-purchase payments for lease-purchase agreements authorized pursuant to subsection (2) of this section or for operating, maintenance, and controlled maintenance costs for the buildings subject to the lease-purchase agreements.

(II) Any moneys in the fund not expended for the purpose of this subsection (10) may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund.⁴⁹

The acquisition of real property by state agencies and institutions of higher education may be subject to review and approval by the capital development committee.⁵⁰

The state, when acting through the department of personnel, may develop a master lease program:

24-82-702. Lease-purchase agreements

(1) If the director determines that the state will realize economic or other benefits by revising or replacing existing lease-purchase agreements, or by entering into additional lease-purchase agreements, or by combining all or any portion of existing or additional lease-purchase agreements authorized by appropriations made by the general assembly, the director may develop a master lease program and execute such agreements. Any additional lease-purchase agreement executed by the director pursuant to this part 7 may include personal property which is the subject of an existing lease-purchase agreement or personal property for which an appropriation has been made by the general assembly for the fiscal year commencing July 1, 1987, and any fiscal year thereafter. An additional lease-purchase agreement executed by the director pursuant to this part 7 may include real property only if the initial acquisition of such property by means of a lease-purchase agreement was specifically authorized by a separate bill enacted by the general assembly pursuant to section 24-82-801. For the purposes of this subsection (1), appropriations made by the general assembly do not include continuing appropriations made by permanent statute.⁵¹

24-82-701. Definitions

As used in this part 7, unless the context otherwise requires:

(1) "Additional lease-purchase agreement" means any transaction entered into on or after July 1, 1987, in which the state, acting by and through the department of personnel as provided by this part 7, is the lessee of real or personal property which shall be used by the state and in which the state has an option to purchase such real or personal property.

(2) "Director" means the executive director of the department of personnel.

(3) "Existing lease-purchase agreement" means any lease-purchase agreement entered into prior to July 1, 1987, in which the state is the lessee of real or personal property which shall be used by the state and in which the state has an option to purchase such real or personal property.

(3.5) "Lease purchase" means a capital lease as defined in the generally accepted accounting principles issued by the governmental accounting standards board that the controller prescribes for the state as specified in section 24-30-202 (12).

(4) "Master lease program" means the refinancing, revising, replacement, or consolidation of any existing or additional lease-purchase agreement or agreements.

(5) "State" means the state of Colorado or any department, agency, or commission thereof, including any state institution of higher education and the board of directors of the Auraria higher education center, but does not include the legislative department when acting pursuant to section 2-2-320 (2) (b), C.R.S.⁵²

24-82-702. Lessor

(1) The lessor under any additional lease-purchase agreement entered into by the director pursuant to the provisions of this part 7 shall be any for-profit or nonprofit corporation, trust, or commercial bank as trustee.

(2) On and after August 11, 2010: (a) The director is authorized to execute on behalf of the nonprofit corporation abolished by Senate Bill 10-122, enacted in 2010, any documents related to any

⁴⁹*Id.* § 24-82-802.

⁵⁰*Id.* § 2-3-1304(h).

⁵¹*Id.* § 24-82-702.

⁵²*Id.* § 24-82-701.

additional lease-purchase agreement for which said nonprofit corporation was the lessor pursuant to the provisions of this part 7;

(b) The director is authorized to expend moneys of the nonprofit corporation abolished by Senate Bill 10-122, enacted in 2010, as is necessary and appropriate to wind up the affairs of the nonprofit corporation. After receiving written notification from the director that the affairs of the nonprofit corporation have been concluded, the state treasurer shall transfer the remaining balance of any account in the state treasury containing moneys of the nonprofit corporation to the general fund.

c) The state treasurer is authorized to accept on behalf of the nonprofit corporation abolished by Senate Bill 10-122, enacted in 2010, any revenues to which the nonprofit corporation would otherwise be legally entitled. Any revenues so received by the state treasurer shall be credited to the general fund.⁵³

24-82-704. Payment obligations subject to annual appropriation by the general assembly

Every additional lease-purchase agreement authorized by the director pursuant to the provisions of this part 7 shall provide that all payment obligations of the state under such additional lease-purchase agreement are subject to annual appropriation by the general assembly and that such obligations shall not be deemed or construed as creating an indebtedness of the state within the meaning of any provision of the Colorado constitution or the laws of the state of Colorado concerning or limiting the creation of indebtedness by the state of Colorado.⁵⁴

24-82-705. Terms and conditions of lease-purchase agreements

Any additional lease-purchase agreement entered into by the director pursuant to the provisions of this part 7 may contain such terms, provisions, and conditions as the director may deem appropriate. Such provisions may allow the state to receive fee title to the real and personal property which is the subject of such additional lease-purchase agreement on or prior to the expiration of the entire term of the agreement, including all optional renewal terms. Any additional lease-purchase agreement entered into pursuant to the provisions of this part 7 may further provide for the issuance, distribution, and sale of instruments evidencing rights to receive rentals and other payments made and to be made under such additional lease-purchase agreement, but only if and after a court of competent jurisdiction renders a final decision as to the constitutionality of the issuance of certificates of participation or other instruments evidencing the commitment of a district to make payments in subsequent fiscal years of moneys due under an installment purchase agreement for the purchase of real or personal property which requires payments during more than one fiscal year, or any agreement for the lease or rental of real or personal property which requires payments during more than one fiscal year and under which such district is entitled to receive title to the property at the end of the term for nominal or no additional consideration. Such instruments shall not be notes, bonds, or any other evidence of indebtedness of the state of Colorado within the meaning of any provision of the Colorado constitution or the laws of the state of Colorado concerning or limiting the creation of indebtedness by the state of Colorado. Interest paid under any additional lease-purchase agreement entered into pursuant to this part 7, including interest represented by such instruments, shall be exempt from Colorado income tax. Any such additional lease-purchase agreements shall provide an option for the state to purchase the property which is the subject of the lease prior to the termination of such additional lease-purchase agreement. In no event shall any individual representing a firm which was the successful bidder for a proposed financial services contract, which contract related to a master leasing program, prior to June 20, 1987, be allowed to become the underwriter or financial advisor for any master leasing agreement entered into by the director prior to June 30, 1988, pursuant to the provisions of this part 7.⁵⁵

24-82-706. Subsequent payments

Rentals and other payments made by the state under any additional lease-purchase agreement entered into pursuant to the provisions of this part 7 may be made from moneys appropriated by the general assembly without the necessity of a separate bill.⁵⁶

24-82-707. Ancillary agreements

⁵³*Id.* § 24-82-703.

⁵⁴*Id.* § 24-82-704.

⁵⁵*Id.* § 24-82-705.

⁵⁶*Id.* § 24-82-706.

The director may enter into or execute or may negotiate with any officer of the state to enter into or execute any deed, conveyance, escrow agreement, or other agreement or instrument which he deems necessary or appropriate in connection with any additional lease-purchase agreement entered into pursuant to this part 7.⁵⁷

24-82-708. Fiscal rules inapplicable - independent powers

(1) The provisions of section 24-30-202 (5) (b) shall not apply to any additional lease-purchase agreement or ancillary agreement entered into pursuant to this part 7. Any provision of the fiscal rules promulgated pursuant to section 24-30-202 (1) and (13) which the controller deems to be incompatible or inapplicable with respect to any such lease-purchase agreement or ancillary agreement may be waived by the controller or his designee.

(2) The powers conferred by this part 7 are in addition to any other law, and the limitations imposed by any other law do not affect the powers conferred by this part 7 and do not apply to the financing and refinancing contemplated by this part 7.⁵⁸

24-82-709. Participation by institutions of postsecondary education

Institutions of postsecondary education, including the board of directors of the Auraria higher education center, may utilize the provisions of this part 7 so long as the criteria established by this part 7 for inclusion in a master lease are satisfied and so long as such institutions act in a manner which is consistent with the provisions of section 23-1-104, C.R.S.[relating to annual appropriations made by the general assembly]⁵⁹

The state has authority to enter into leveraged leases with private entities.⁶⁰ The treasurer on behalf of the state board of land commissioners may enter into lease-purchase agreements for commercial property that may be leased to state agencies.⁶¹

State departments (except the legislative department), agencies, and the governing boards of institutions of higher education have authority to enter into capital leases that comply with the provisions of section 24-82-801,⁶² pursuant to the following:⁶³

24-82-1202. Leases of buildings

(1) Subject to the provisions of this part 12, the executive director of a state department, or the governing board of an institution of higher education, is authorized to execute a lease agreement for up to thirty years for the rental of an approved building project.

(2) (a) Prior to executing a lease agreement authorized pursuant to this part 12, the executive director of the leasing state department shall submit a report to the office of state planning and budgeting on the proposed approved building project, including the proposed terms of the lease agreement, through the budgeting process established pursuant to section 24-37-304. If the office of state planning and budgeting approves the proposed approved building project and the lease, it shall make recommendations concerning the proposed approved building project and the lease to the capital development committee. If the capital development committee approves the proposed approved building project and the lease for the proposed approved building project, it shall make recommendations concerning the proposed approved building project and the lease to the joint budget committee. Following receipt of the recommendations, if the joint budget committee approves the proposed approved building project and the lease, it shall include any necessary moneys for the approved building project in its recommendations for the next long appropriations bill.

(b) Prior to executing a lease agreement authorized pursuant to this part 12, the governing board of a leasing institution of higher education shall submit a report to the Colorado commission on higher education on the proposed approved building project, including the proposed terms of the lease agreement, pursuant to the provisions of section 23-1-106, C.R.S. If the proposed approved building project does not require the approval of the capital development committee pursuant to section 23-1-106, C.R.S., the commission may approve the proposed approved building project and

⁵⁷*Id.* § 24-82-707.

⁵⁸*Id.* § 24-82-708.

⁵⁹*Id.* § 24-82-709.

⁶⁰*Id.* §§ 24-82-1001 to 1005.

⁶¹Colo. Rev. Stat. § 36-1-118.5.

⁶²*See, supra*, note 47 and accompanying text.

⁶³*Id.* §§ 24-82-1201 to 24-82-1207. The legislative department may enter into contracts under Colo. Rev. Stat. § 2-2-320.

the lease. If the proposed approved building project is subject to the approval of the capital development committee pursuant to section 23-1-106, C.R.S., and if the commission approves the proposed approved building project and the lease, the commission shall make recommendations concerning the proposed approved building project and the lease to the capital development committee. If the capital development committee approves the proposed approved building project and the lease for the proposed approved building project, it shall make recommendations concerning the proposed approved building project and the lease to the joint budget committee. Following receipt of the recommendations, if the joint budget committee approves the proposed approved building project and the lease, it shall include any necessary moneys for the approved building project in its recommendations for the next general appropriation bill.⁶⁴

24-82-1203. Payment obligations subject to annual appropriation by the general assembly

Each lease agreement entered into pursuant to the provisions of this part 12 shall provide that all payment obligations of the state under the lease agreement are subject to annual appropriation by the general assembly and that the obligations shall not be deemed or construed as creating an indebtedness of the state within the meaning of any provision of the Colorado constitution or the laws of the state of Colorado concerning or limiting the creation of indebtedness by the state of Colorado.⁶⁵

24-82-1204. Terms and conditions of lease agreements

(1) A lease agreement entered into pursuant to the provisions of this part 12 may contain such terms, provisions, and conditions as the executive director of the leasing state department or the governing board of the leasing institution may deem appropriate. Any lease agreement entered into pursuant to this part 12 shall comply with the requirements of section 24-82-801.

(2) As used in this section, "lease agreement" means a capital lease as defined in the generally accepted accounting principles issued by the governmental accounting standards board that the controller prescribes for the state as specified in section 24-30-202 (12).⁶⁶

24-82-1205. Ancillary agreements

The executive director of a leasing state department or the governing board of the leasing institution may enter into or execute, or may negotiate with an officer of the state to enter into or execute, a deed, conveyance, escrow agreement, or other agreement or instrument that he or she or the board deems necessary or appropriate in connection with a lease agreement entered into pursuant to this part 12.⁶⁷

24-82-1206. Fiscal rules inapplicable - independent powers

(1) The provisions of section 24-30-202 (5) (b) shall not apply to a lease agreement or ancillary agreement entered into pursuant to this part 12. Any provision of the fiscal rules promulgated pursuant to section 24-30-202 (1) or (13) which the controller deems to be incompatible with or inapplicable to a lease agreement entered into pursuant to this part 12 or ancillary agreement may be waived by the controller or his or her designee.

(2) The powers conferred by this part 12 are in addition to any other law, and the limitations imposed by any other law shall not affect the powers conferred by this part 12.⁶⁸

24-82-1207. Inapplicability of part 7

The provisions of part 7 of this article shall not apply to leases entered into pursuant to this part 12.⁶⁹

Generally, capital construction contracts for public projects that do not receive federal funding, including projects by institutions of higher education, must be publicly bid.⁷⁰

The Procurement Code applies to all publicly funded contracts entered into by the executive branch except for the procurement of real property, bridge and highway construction, certain expenditures

⁶⁴Colo. Rev. Stat. § 24-82-1202.

⁶⁵*Id.* § 24-82-1203.

⁶⁶*Id.* § 24-82-1204.

⁶⁷*Id.* § 24-82-1205.

⁶⁸*Id.* § 24-82-1206.

⁶⁹*Id.* § 24-82-1207. *See, supra*, for Part 7, notes 51 to 59 (master lease program).

⁷⁰*Id.* § 24-92-103. The chapter is inapplicable to political subdivisions. *Id.* § 24-92-104.

by the board of land commissioners and the department of human services and by governing boards of higher education that have formally opted out.⁷¹

Information technology spending on projects greater than \$10,000 must be approved or initiated by the office of information technology.⁷² A contract for “a major information technology project as defined in section 24-37.5-102(2.6) shall contain a clause providing that the contract shall not be deemed valid until it has been approved” by the chief information officer or a designee.⁷³

Authority is provided to the State to enter into lease-purchase agreements for the construction of facilities at Colorado State University.⁷⁴

Contingency clauses in options to purchase must comply with the following:

If a state department, institution, or agency enters into a contract to purchase real property or any interest therein that has a total purchase price of more than one hundred thousand dollars, the contract must contain a contingency clause that requires the state to secure an appraisal of the subject real property or interest therein prior to closing by an independent appraiser licensed in the state of Colorado to substantiate the purchase price and that makes the closing of the purchase contingent on the approval of the contract by the state controller. When the state department, institution, or agency entering into the contract receives the appraisal, the state department, institution, or agency shall provide a copy of the appraisal to the state controller. This paragraph (b) shall not apply to the acquisition of property by the department of transportation for the construction, maintenance, or supervision of the public highways of this state, nor shall it apply to any additional lease-purchase agreement entered into pursuant to the master lease program authorized by part 7 of article 82 of this title.⁷⁵

Any commitment voucher that provides that the financial obligations of the state in subsequent fiscal years are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available shall not be deemed to create any state multiple-fiscal year direct or indirect debt or other financial obligation whatsoever for purposes of section 20(4)(b) of article X of the state constitution. If a lease-purchase agreement is subject to the requirement of specific authorization by the general assembly under part 8 of article 82 of this title, such committees shall make a recommendation to the general assembly concerning whether to authorize the lease-purchase agreement involving the issuance of certificates of participation or other instruments. The department of personnel and the Colorado commission on higher education shall maintain comparative data which will assist in determining the relative costs to the state, over the entire term of the arrangement, of financing the purchase or lease of property through pay-as-you-go methods, certificates of participation, or other arrangements.⁷⁶

In 2017 the General Assembly enacted Section 24-82-1301 to -1303, a comprehensive statute that provides twenty year lease-purchase financing over a four year period in the amount of two billion dollars for state highway projects and capital construction projects focusing on the controlled maintenance and upkeep of state capital assets, including the using of state buildings as collateral for such financings. It also allows for projects for state institutions of higher educations.

⁷¹*Id.* § 24-101-105 (other exemptions apply); Colo. Admin. Code 101-9. “Procurement” means ... leasing, or otherwise acquiring any supplies, services, or construction. “Procurement” includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration. Colo. Rev. Stat. § 24-101-301.

⁷²Colo. Rev. Stat. § 24-37.5-105(3)(i). Agencies overseen by the office of information technology include “all of the departments, divisions, commissions, boards, bureaus, and institutions in the executive branch of the state government.” The legislative and judicial departments, the department of law, the department of state, the department of the treasury, and state-supported institutions of higher education are not included. *Id.* § 24-37.5-102(4).

⁷³*Id.* § 24-30-202(1). (“Major information technology project” means a project of state government, excluding the department of education through June 30, 2019, that has a significant information technology component, including, without limitation, the replacement of an existing information technology system.”)

⁷⁴*Id.* § 23-31-903.

⁷⁵*Id.* § 24-30-202(5)(b).

⁷⁶*Id.* § 24-30-202(5.5).

Energy Performance Contracting

Subject to numerous restrictions, the state, state agencies and state institutions of higher education may enter into energy cost savings contracts to improve the energy efficiency of state buildings or facilities.⁷⁷ The legislative authorization required by section 24-82-801(1)⁷⁸ is not required for lease-purchase agreements in an energy cost-savings contract.⁷⁹

Debt Limitations

Counties, municipalities, school districts, fire districts, and health service districts are constitutionally limited in the amount of debt which they may incur.⁸⁰ The state is constitutionally limited in the amount of debt it may incur.⁸¹ Pursuant to statute, the University of Colorado "board of regents is prohibited from creating any debt against the university, in any manner encumbering the same, or incurring any expense beyond its ability to pay from the annual income of the university for the current year."⁸² Other universities are similarly limited.⁸³

In *Gude v. City of Lakewood*,⁸⁴ the city was to lease land to the building authority for a twenty-five year term for the construction of a city hall. The city was then to lease the building for a twenty-five year term through a one-year lease with one-year renewal options.⁸⁵ The arrangement was upheld and said not to violate the constitutional debt limitation. No showing was made that current revenues would be insufficient to meet current expenses including the rents. The yearly rental obligation was contingent upon the exercise of the yearly renewal options.⁸⁶ Thus, constitutional debt was defined as one legislature creating a debt and obligating a future legislature to appropriate funds to discharge the debt. The renewal option prevented creation of an obligation on future legislatures for payment of the rentals.⁸⁷ Voters had previously voted down a proposal to finance the project with general obligation debt.⁸⁸

In *Glennon Heights, Inc. v. Central Bank & Trust*,⁸⁹ a lease-purchase agreement for real property, which included an option in the state to purchase and a nonappropriation clause, was held not to violate the debt limitation because the state could not be required to appropriate funds for renewal or to exercise its option to purchase. The court also noted that holdover rent was subject to availability of funds.⁹⁰

In *Board of County Commissioners of Boulder County v. Dougherty, Dawkins, Strand & Bigelow, Incorporated*,⁹¹ the appellate court analyzed the effect of article X, section 20 of the Colorado Constitution enacted in 1992 and labeled by its proponents as "The Taxpayer's Bill of Rights"

⁷⁷Colo. Rev. Stat. §§ 24-30-2001 to -2003 and *id.* § 24-38.5-106.

⁷⁸*See, supra*, note 47 and accompanying text.

⁷⁹*Id.* § 24-30-2003(4).

⁸⁰Colo. Const. art. XI, § 6; *id.* art. X, § 20 (The Taxpayer's Bill of Rights, "TABOR").

⁸¹Colo. Const. art. XI, §§ 1, 3 ; *id.* art. X, § 20.

⁸²Colo. Rev. Stat. § 23-20-135.

⁸³*See e.g.* § 23-56-106 (Western State Colo. Univ.).

⁸⁴636 P.2d 691 (Colo. 1981).

⁸⁵*Id.* at 694.

⁸⁶*Id.* at 699.

⁸⁷*Id.* The court noted that there was no contention or showing that lease rentals exceeded a reasonable amount so that the city was under a practical compulsion to exercise its renewal options to protect an investment. *Id.* at 700, n.8.

⁸⁸*Id.* at 699.

⁸⁹658 P.2d 872 (Colo. 1983); *see also* *Heberer v. Board of Comm'rs*, 88 Colo. 159, 293 P. 349 (1930) (twenty-five year lease of real property by a county held not to violate the debt limit because monthly rentals under the lease were paid from current annual revenues).

⁹⁰658 P.2d at 879, n.10.

⁹¹890 P.2d 199 (Colo. App. 1994), referred to herein as *Dougherty*. *See also*, *Bruce v. Pikes Peak Library District*, 155 P.2d 630 (Colo. App. 2007), for further discussion of the nuances of TABOR.

(“TABOR”) on a lease-purchase agreement subject to annual appropriation entered into by Boulder County, as lessee. TABOR prohibits the creation of multiple-fiscal year debt or other financial obligations without prior voter approval. The court reviewed the lease-purchase agreement, the certificates of participation and the certificate purchase agreement. The lease-purchase agreement terminated annually, with the county having the option to renew it annually for another year and terminated automatically if the county failed to appropriate rental payments for the following fiscal year. Among other things, the plaintiffs argued that the economic consequences of non-renewal rise to the level of a penalty, thereby obligating the county to renew each year. The court, following case law prior to the adoption of TABOR, held that the lease-purchase agreement did not violate the Colorado constitution. The court held that the economic consequences are speculative and do not compel the county to renew. The case was not appealed to the Colorado Supreme Court.⁹²

In *Tokai Financial Services, Inc. v. Sangre de Cristo School District RE-22J*,⁹³ the district court analyzed an agreement under which the school district leased two copiers from Tokai for a period of five years. The agreement contained both a nonappropriation clause and a nonsubstitution clause. The court held that the lease, without the nonsubstitution clause, did not violate TABOR. The sole issue was whether the nonsubstitution clause operated to violate TABOR. The nonsubstitution clause allowed the school district to terminate its lease payments, but obligated the school district to not obtain other copying services. The court stated that arrangements purporting not to bind future legislatures must leave those legislatures with “flexibility which is real, not illusory” to deal with future exigencies or changing circumstances. The court held that “requiring a school district to perform its constitutional and statutory duties without access to copying services amounts to a penalty so severe that future school boards are deprived of real discretion in deciding whether the lease should be continued.” The agreement was ruled void and unenforceable as a result of the nonsubstitution clause. The case was not appealed.

In a recent case, the Colorado Supreme Court concluded that proposed legislation authorizing the issuance of revenue anticipation notes by the State, for the purpose of financing the cost of various state highway construction projects, was not a “debt by loan in any form” which is prohibited by the state constitution.⁹⁴ The notes would be payable from the allocation of monies to the Federal Highway Trust Fund, although payments are subject to discretionary annual allocation amounts. The notes would not pledge revenues of future years, do not require the application of taxes otherwise available for general purposes, and do not obligate a future legislature to appropriate funds. However, the court held that the notes constitute a “multiple-fiscal year direct or indirect district debt or other financial obligation,” and as such, require voter approval in accordance with the provisions of article X, section 20(4)(b) of the state constitution. The question of issuing notes was approved by the voters at the election in November, 1999.

“Multiple-year contracts may be entered into where allowed by law or if subject to annual appropriation.”⁹⁵

⁹²In Submission of Interrogatories on House Bill 99-1325, 99 P.2d 549, 557 (Colo. 1999), *see, infra*, note 94 and accompanying text, the Colorado Supreme Court stated that the lease-purchase agreement analyzed by the appellate court in the Dougherty decision shall be outside the scope of TABOR.

⁹³Alamosa County, No. 94-CV-54 (3/7/95).

⁹⁴Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999). In Colorado Criminal Justice Reform Coalition, 121 P.3d 288 (Co. App. 2005), the court held that the legislation passed by the Colorado General Assembly for two state lease-purchase construction projects was constitutional and the lease-purchase agreements would not be multiple-fiscal year financial obligations of the State for purposes of TABOR. The court followed Gulde and Dougherty and distinguished Submission of Interrogatories on House Bill 99-1325. The court also focused on the fact that the lessor and not the state would be selling any financing instruments in the lease-purchase agreements. *Id.* at 294.

⁹⁵Colo. Rev. Stat. § 29-1-110. This is a generic statute set forth in the budget law.

Interest Rate Limitations

“If there is no agreement or provision of law for a different rate, the interest on money shall be at the rate of eight percent per annum, compounded annually.”⁹⁶ The parties to a bond may stipulate for the payment of a higher rate of interest than 8 percent per annum, but not exceeding 45 percent per annum.⁹⁷

Miscellaneous

Bond counsel in Colorado take the position that TABOR does not allow governments to grant a security interest in equipment and fixtures and that the lessor should hold title to the leased property.

Property lease-purchased to Gunnison County where legal title remained with the lessor was held to be tax-exempt public property since the county occupied and controlled the property, controlled construction and improvements to the property, maintained and insured the property and had an option to purchase the property for a nominal amount at the end of the lease.⁹⁸

Property lease-purchased to municipalities and school districts is statutorily exempt from taxes.⁹⁹ Real or personal property lease-purchased by the state or any of its political subdivisions, including institutions of higher education, is exempt from property tax:

(1) (a) Property, real and personal, that is used by the state or any of its political subdivisions pursuant to the provisions of any installment sales agreement, lease-purchase agreement, or any other agreement whereby the state or such political subdivision shall be entitled to acquire title to such property at the end of the agreement term without cost or for only nominal consideration shall be exempt from the levy and collection of property tax.

(b) (I) (A) Subject to the provisions of sub-subparagraph (B) of this subparagraph (I), on and after January 1, 2009, the part of real property that is used by the state, a political subdivision, or a state-supported institution of higher education pursuant to the provisions of any lease or rental agreement for at least a one-year term, with or without an option to purchase, and pursuant to which the subject real property is used for purposes of the state, political subdivision, or institution of higher education, as applicable, shall be exempt from the levy and collection of property tax. If the state or any political subdivision or state-supported institution of higher education enters into a lease or rental agreement or is already in a lease or rental agreement on or after January 1, 2009, and is exempt from the levy and collection of property tax pursuant to this section, the state, political subdivision, or state-supported institution of higher education, as applicable, shall file a copy of the lease or rental agreement with the county assessor's office. The state or a political subdivision or institution of higher education shall notify the county assessor's office in the event that the lease or rental agreement is terminated prior to the term stated in such lease or rental agreement. Nothing in this paragraph (b) shall affect property tax exemptions allowed pursuant to section 8-82-104, 22-32-127, 29-4-227, 30-11-104.2, 31-15-802, or 43-1-214, C.R.S.

(B) The state, a political subdivision, or a state-supported institution of higher education shall reduce, deduct, or offset property taxes from rent due under any lease or rental agreement pursuant to sub-subparagraph (A) of this subparagraph (I). Upon receipt of a lease or rental agreement for the state, a political subdivision, or a state-supported institution of higher education, the county assessor shall send a notice to the landlord acknowledging receipt of the lease or rental agreement. The notice shall identify the property, the property address, and the parties to the lease or rental agreement.

(C) To the extent that real property taxes are shared and payable by one or more tenants under the lease of property that are not the state, a political subdivision, or a state-supported institution of higher education, real property taxes otherwise due but for the application of this paragraph (b) shall be deemed taxes paid by the property owner or the landlord of a property leased in part to the state, a political subdivision, or a state-supported institution of higher education.

⁴⁵*Id.* § 5-12-101.

⁹⁷*Id.* § 5-12-103.

⁹⁸*Gunnison County v. Board of Assessment Appeals*, 693 P.2d 400 (Colo. 1984).

⁹⁹Colo. Rev. Stat. § 31-15-802 (municipalities); § 22-32-127(1)(b) (school districts).

(D) Only a tenant that is the state, a political subdivision, or a state-supported institution of higher education shall receive any benefit related to the tenant's property tax-exempt status pursuant to this paragraph (b).

(E) It is the general assembly's intent that the application of this paragraph (b) be cost-neutral in that the tax reduction and the rent reduction pursuant to this paragraph (b) are equal.

(II) For purposes of this paragraph (b), "state-supported institution of higher education" includes, but need not be limited to, all postsecondary institutions in the state supported in whole or in part by state funds, including junior colleges and community colleges, extension programs of the state-supported universities and colleges, local district colleges, area technical colleges, and the institutions governed by the regents of the university of Colorado. (2) A leasehold interest in real or personal property that is owned by the state or by a political subdivision of the state and that has been leased to a private person, the use and possession of which has been leased back to the state or a political subdivision of the state, shall be exempt from the levy and collection of property tax during the term of the use and possession of the property by the state or a political subdivision of the state. Property that is the subject of a leveraged leasing agreement executed by the state or by a political subdivision of the state shall be treated as tax-exempt property owned by the state for purposes of any state or local tax.

(2) A leasehold interest in real or personal property that is owned by the state or by a political subdivision of the state and that has been leased to a private person, the use and possession of which has been leased back to the state or a political subdivision of the state, shall be exempt from the levy and collection of property tax during the term of the use and possession of the property by the state or a political subdivision of the state. Property that is the subject of a leveraged leasing agreement executed by the state or by a political subdivision of the state shall be treated as tax-exempt property owned by the state for purposes of any state or local tax.

(3) The lease of property by a political subdivision of the state to a private person and the sublease of the property back to the political subdivision of the state pursuant to a leveraged leasing agreement shall not cause the private person to whom the property has been leased to incur any liability in tort by virtue of the private person's status as a lessor under the leveraged leasing agreement.¹⁰⁰

The Local Government Budget Law¹⁰¹ provides:

No local government¹⁰² shall enter into any lease-purchase agreement¹⁰³ whose duration, including all optional renewal terms, exceeds the weighted average useful life of the assets being financed. In the case of a lease-purchase agreement involving both real property and other property, the lease-purchase agreement shall provide that the real property involved shall be amortized over a period not to exceed its weighted average useful life and the other property shall be separately amortized over a period not to exceed its weighted average useful life. This provision shall not prevent a local government from releasing property from a lease-purchase agreement pursuant to an amortization schedule reflecting the times when individual pieces of property have been amortized.¹⁰⁴

This legislation also requires that certain information be disclosed in the budget concerning lease-purchase agreements.¹⁰⁵

The State of Colorado, Division of Securities, determined that the term "bond" in section 11-59-103(2) [the Colorado Municipal Bond Supervision Act] includes certificates of participation. Accordingly, COPs issued by a special district, a municipal general improvement district, a municipal special improvement district, a county local improvement district, or a county public improvement

¹⁰⁰Colo. Rev. Stat. § 39-3-124.

¹⁰¹Colo. Rev. Stat. § 29-1-103(3)(e)(I).

¹⁰²"Local government" includes an authority, county, municipality, city and county, district, other political subdivision, home rule city, home rule city and county, school district and junior college district. *Id.* §§ 29-1-102(13) and 29-1-103(3)(b).

¹⁰³Lease-purchase agreement means "a capital lease as defined in the generally accepted accounting principals issued by the governmental accounting standards board. . . ." *Id.* § 29-1-103(3)(c).

¹⁰⁴*Id.* § 29-1-103(3)(e)(I). This provision is inapplicable to lease-purchase agreements entered into prior to the effective date of the statute (April 9, 1990). *Id.* § 29-1-103(3)(e)(II).

¹⁰⁵*Id.* § 29-1-103.

district, are subject to the requirements of the Act, including the registration provisions, unless certain exemptions apply.¹⁰⁶

Certificates of participation (“COPs”) were issued in 1986 to finance the cost of constructing a municipal building, to be leased by the City of Sheridan. Several years later, as a result of declining municipal revenues, the city exercised its right to terminate the lease. In 1996, the city commenced eminent domain proceedings to acquire ownership of the building, but the city’s offer was considerably below the outstanding principal amount of the COP’s of \$3,500,000. The trustee and the city eventually agreed on the amount of \$2,000,000 which was paid by the city. Certain COP holders objected to the settlement, and challenged the order of the District Court approving the amount. The Minnesota Court of Appeals concluded that the record indicated the price offered by the city was the best price that the trustee could get for the facility, and the District Court did not abuse its discretion in finding that the trustee did not breach its fiduciary duties.¹⁰⁷ Another interesting aspect of the case was the holding by the court that the District Court in Minnesota had jurisdiction over a trust administered in Minnesota, even though a majority of the trust assets and trust beneficiaries were located outside the state.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰⁶Letter, dated January 15, 1997, from Philip A. Feigin, Securities Commissioner, State of Colorado, Division of Securities.

¹⁰⁷In re Trusteeship created by the City of Sheridan, Colorado, 593 N.W.2d 702 (1999).

CONNECTICUT 2019

The Statutes and Constitution are current through the 2018 February Regular Session of the Connecticut General Assembly, Westlawⁱ

Counties

Counties do not qualify as tax-exempt issuers for federal income tax purposes because they lack sovereign powers. Counties are without authority to lease, sell or purchase property. All county property, debt and obligations have been statutorily vested in the state.¹

Municipalities

Municipalities² qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,³ eminent domain⁴ and police powers.⁵ Municipalities may “acquire by . . . purchase . . . and hold . . . lease, sell . . . and convey such real and personal property or interest therein absolutely or in trust” for municipal purposes.⁶ A municipality’s lease power includes the authority to “bind itself to appropriate funds as necessary to meet rent and other obligations as provided in such lease” which “may be for such a term or any extensions thereof and upon such other terms and conditions as have been approved by the municipality.”⁷ The authority to sell, lease, or transfer real property owned by municipalities is subject to notice, hearing and public approval requirements.⁸

Municipalities appear to be empowered to enter into lease-purchase agreements for financing “school building projects,” including those concerning energy conservation, where the total cost is less than one million dollars.⁹ “School building project” means “the construction, purchase, extension, replacement, renovation or major alteration of a building to be used for public school purposes, including the equipping and furnishing of any such construction, purchase, extension, replacement, renovation or major alteration, the improvement of land therefor, or the improvement of the site of an existing building for public school purposes, but shall not include the cost of a site.”¹⁰

Energy Performance Contracting

Participating municipalities¹¹ may enter into energy-savings performance contracts to acquire energy saving measures for a term not to exceed twenty years with providers authorized by the Department of Administrative Services, subject to numerous restrictions.¹²

¹Conn. Gen. Stat. Ann. § 6-2a.

²The term municipality for purposes of this discussion “means any town, city or borough, consolidated town and city or consolidated town and borough.” *Id.* § 7-148(a). Connecticut also has charter cities. *Id.* § 7-188.

³*Id.* § 7-148(c)(2)(B).

⁴*Id.* § 7-148(c)(3).

⁵*Id.* § 7-148(c)(7).

⁶*Id.* § 7-148(c)(3)(A).

⁷*Id.*

⁸*Id.* § 7-163e.

⁹*Id.* § 10-289a; read with *id.* § 10-282(3), (17).

¹⁰*Id.* § 10-282(3).

¹¹“Participating municipality” means a municipality (defined in § 4-230 as a town, consolidated town and city, consolidated town and borough, city or borough, including a local board of education) that voluntarily takes part in the standardized energy-savings performance contract process. *Id.* §§ 16a-37x(7), (8).

¹²*Id.* § 16a-37x.

School Districts

Only regional school districts¹³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax¹⁴ and eminent domain powers.¹⁵ Regional school districts may “purchase, lease or rent property,”¹⁶ “purchase, receive, hold and convey real and personal property” and “build, equip, purchase, rent, maintain or expand schools.”¹⁷

Energy Performance Contracting

Regional school districts may enter into energy-savings performance contracts to acquire energy saving measures with providers authorized by the Department of Administrative Services, subject to numerous restrictions.¹⁸

Fire Districts

Fire districts¹⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁰ and eminent domain powers.²¹ Fire districts “have the powers, not inconsistent with the general statutes, in relation to the objects for which it was established, that are necessary for the accomplishment of such objects.”²²

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

As of July, 2011 the Department of Administrative Services, headed by the Commissioner of Administrative Services, became successor to the departments of Public Works²³ and Information Technology.²⁴ The commissioner’s general powers and responsibilities include: the purchase, lease or contract for and provision of supplies, materials, equipment and contractual services;²⁵ the purchase and

¹³Pursuant to statute each town controls all public schools within its limits and for such purpose is the school district and has the powers and duties of the school district *Id.* § 10-240. Regional school districts provide public schools for more than one town and are separate entities. *Id.* § 10-56. It appears that a lease-purchase agreement would need to be entered into with the town in order for it to be tax-exempt, if the school district involves only a single town and is not a regional school district. Such towns have the same leasing powers with respect to the operation of the school district as a regional school district as set forth in *id.* § 10-241 and -241a.

¹⁴*Id.* § 10-241, through the grant of powers under general statutes under *id.* § 10-47.

¹⁵*Id.* § 10-241a, through the grant of powers under general statutes under *id.* § 10-47.

¹⁶*Id.* § 10-47.

¹⁷*Id.* § 10-56(a).

¹⁸*Id.* § 16a-37x (school boards are included in the definition of municipality). *See, also, id.* § 10-282(16) and (17) and 10-§ 292c.

¹⁹Fire districts may be created by voters within towns for the purpose of extinguishing fires. *Id.* §§ 7-324 to 326. Alternatively they may exist pursuant to a special act and have the option of adopting home rule charters. *Id.* §§ 7-324, 7-328a.

²⁰*Id.* § 7-328.

²¹*Id.* § 48-7.

²²*Id.* § 7-325.

²³*Id.* § 4a-1 (Except relating to construction and construction management.)

²⁴*Id.*; *id.* §, 4d-2. A division of information technology, headed by a chief information officer, is established within the Department of Administrative Services. *Id.* § 4d-2. The provisions of title 4a of the General Statutes apply to the “purchasing, leasing and contracting for information system and telecommunication system facilities, equipment services.” *Id.* § 4d-8.

²⁵*Id.* § 4a-2(2); *id.* § 4a-51. “Supplies”, “materials” and “equipment” mean any and all articles of personal property furnished to or used by any state agency, *id.* § 4a-50.

contracting for information systems and telecommunication system facilities, equipment and services for state agencies;²⁶ and the purchase, sale, lease, sublease and acquisition of property and space to house state agencies.²⁷ The commissioner of administrative services must approve agency agreements for the lease of personal property.²⁸ Purchases and contracts for equipment generally are subject to competitive bidding.²⁹

Numerous provisions in the General Statutes relate to leasing real property. Many of these are referenced in the statute set out below regarding the authority of the commissioner and other officers of the state.

Notwithstanding any other statute or special act to the contrary, the Commissioner of Administrative Services shall be the sole person authorized to represent the state in its dealings with third parties for the acquisition or leasing of real estate for housing the offices or equipment of all agencies of the state or for the state-owned public buildings or realty and the Commissioner of Construction Services shall be the sole person authorized to represent the state in its dealings with third parties for the construction or development of real estate or state-owned public buildings or realty, as provided for in sections 2-90, 4b-1 to 4b-5, inclusive, 4b-21, 4b-23, 4b-24, 4b-26, 4b-27, 4b-30 and 4b-32, subsection (c) of section 4b-66 and sections 4b-67 to 4b-69, inclusive, 4b-71, 4b-72, 10-95, 10a-72, 10a-89, 10a-90, 10a-114, 10a-130, 10a-144, 17b-655, 22-64, 22a-324, 26-3, 27-45, 32-1c, 32-39, 48-9, 51-27d and 51-27f, except that (1) the Joint Committee on Legislative Management may represent the state in the planning and construction of the Legislative Office Building and related facilities, in Hartford; (2) the Chief Court Administrator may represent the state in providing for space for the Court Support Services Division as part of a new or existing contract for an alternative incarceration program pursuant to section 54-103b or a program developed pursuant to section, 46b-121k, as amended by this act, or 46b-121i; (3) the board of trustees of a constituent unit of the state system of higher education may represent the state in the leasing of real estate for housing the offices or equipment of such constituent unit, provided no lease payments for such realty are made with funds generated from the general revenues of the state; (4) the Labor Commissioner may represent the state in the leasing of premises required for employment security operations as provided in subsection (c) of section 31-250; (5) the Commissioner of Developmental Services may represent the state in the leasing of residential property as part of the program developed pursuant to subsection (b) of section 17a-218, provided such residential property does not exceed two thousand five hundred square feet, for the community placement of persons eligible to receive residential services from the department; (6) the Commissioner of Mental Health and Addiction Services may represent the state in the leasing of residential units as part of a program developed pursuant to section 17a-455a, provided each such residential unit does not exceed two thousand five hundred square feet; and (7) the Connecticut Marketing Authority may represent the state in the leasing of land or markets under the control of the Connecticut Marketing Authority, and, except for the housing of offices or equipment in connection with the initial acquisition of an existing state mass transit system or the leasing of land by the Connecticut Marketing Authority for a term of one year or more in which cases the actions of the Department of Transportation and the Connecticut Marketing Authority shall be subject to the review and approval of the State Properties Review Board. The Commissioner of Administrative Services shall have the power to establish and implement any procedures necessary for the commissioner to assume the commissioner's responsibilities as said sole bargaining agent for state realty acquisitions and shall perform the duties necessary to carry out such procedures. The Commissioner of Administrative Services or the Commissioner of Construction Services may appoint, within each department's budget and subject to the provisions of chapter 67, such personnel deemed necessary by the applicable commissioner to carry out the provisions hereof, including experts in real estate, construction operations, financing, banking, contracting, architecture and engineering. The Attorney General's office, at the request of the Commissioner of

²⁶*Id.* § 4a-2(5), § 4d-5. The term “state agency” generally includes any officer, department, board, council, commission, institution or other agency of the Executive Department of state government. *Id.* § 4a-50. In title 4d on information technology, “state agency” is defined to mean “each department, board, council, commission, institution or other agency of the Executive Department of the state government, provided each board, council, commission, institution or other agency included by law within any given department shall be deemed a division of that department and shall include (A) the offices of the Governor, Lieutenant Governor, Treasurer, Attorney General, Secretary of the State and Comptroller, and (B) all operations of an Executive Department agency which are funded by either the General Fund or a special fund.” *Id.* § 4d-1.

²⁷*Id.* § 4a-2(6).

²⁸*Id.* § 4a-6.

²⁹*Id.* § 4a-57. Exceptions from competitive bidding requirements apply to some purchases up to \$50,000 and to some “non-competitive purchases” and some information technology personal property and telecommunication systems. General Letter Number: 71 (Oct. 1, 2015); Conn. Gen. Stat. Ann. § 4a-58.

Administrative Services, shall assist the Commissioner of Administrative Services in contract negotiations regarding the purchase or lease of real estate, and, at the request of the Commissioner of Construction Services, shall assist said commissioner in contract negotiations regarding the construction of real estate.

(e) The State Properties Review Board shall be within the Department of Administrative Services and shall have independent decision-making authority.

(f) The State Properties Review Board shall review real estate acquisitions, sales, leases and subleases proposed by the Commissioner of Administrative Services, the acquisition, other than by condemnation, or the sale or lease of any property by the Commissioner of Transportation under subdivision (11) of section 13b-4, subject to section 4b-23 and subsection (h) of section 13a-73 and review, for approval or disapproval, any contract for a project described in subsection (h) of section 4b-91. Such review shall consider all aspects of the proposed actions, including feasibility and method of acquisition and the prudence of the business method proposed. The board shall also cooperate with and advise and assist the Commissioner of Administrative Services and the Commissioner of Transportation in carrying out their duties. The board shall have access to all information, files and records, including financial records, of the Commissioner of Administrative Services and the Commissioner of Transportation, and shall, when necessary, be entitled to the use of personnel employed by said commissioners. The board shall approve or disapprove any acquisition of development rights of agricultural land by the Commissioner of Agriculture under section 22-26cc. The board shall hear any appeal under section 8-273a and shall render a final decision on the appeal within thirty days thereafter. The written decision of the board shall be a final decision for the purposes of sections 4-180 and 4-183. The provisions of this section shall not apply to any airport, airport site or any part thereof operated by the Connecticut Airport Authority established pursuant to section 15-120bb.³⁰

The Commissioner of Construction Services, subject to the provisions of section 4b-30,³¹

... may enter into contracts for the construction upon state-owned land of buildings or facilities or both, and for the subsequent leasing of such building or facilities to the state to meet the needs of agencies and institutions, without first leasing the underlying state-owned land to the developer. Such contracts shall contain provisions providing for the state to buy the buildings and facilities for a lump sum at stated times during or at the end of the lease term or, at the state's option, to buy the same by paying the purchase price in installments.³²

The Commissioner of Administrative Services may

... lease state-owned land to private developers for construction of buildings and facilities to meet the needs of agencies and institutions, provided such developers shall agree to lease such buildings and facilities back to the state with options to purchase. Such options to purchase shall give the state the alternative of purchasing such building and facilities for a lump sum at a stated time, or times, during or at the end of the

³⁰*Id.* § 4b-3(d), (e), (f). *See also, id.* § 4b-24 (duties of Commissioner of Administrative Services).

³¹*Id.* § 4b-30 provides: "The Commissioner of Public Works shall assign office space and provide necessary accommodations in state-owned facilities for state agencies, other than institutions, the Legislative Branch and the Judicial Branch. Subject to the provisions of section 4b-23 the commissioner shall execute all leases for offices or any other type of space or facility necessary to meet the needs of all state agencies, the Judicial Branch, the Division of Criminal Justice, the Public Defender Services Commission and institutions. Any provisions of the general statutes to the contrary notwithstanding the Commissioner of Public Works shall be the sole authority for negotiating such leases, provided any such leases, intending to provide for the needs of institutions, shall further be subject to the approval of the board of trustees of the institution involved and provided further, the Commissioner of Public Works shall expedite the handling of leases to meet emergency and short term needs. Subject to the provisions of section 4b-23, the commissioner may delegate authority to the Chief Court Administrator to negotiate and enter into leases for office, court or parking facilities for the Judicial Branch when the commissioner deems such delegation to be appropriate and such leases will be consistent with relevant real estate and contracting laws. For the purposes of this section, the term "Judicial Branch" does not include the courts of probate, the Division of Criminal Justice and the Public Defender Services Commission, except where they share facilities in state-maintained courts.

(b) The Commissioner of Public Works shall have the primary responsibility for ensuring that the lessor of the offices, space or other facilities which are covered by each such lease complies with the provisions of the lease. In carrying out such responsibility the commissioner shall inspect such offices, space and other facilities at least once annually."

³²*Id.* § 4b-36.

lease term; or to purchase the same by paying the purchase price in specified installments over a stated period of time.³³

* * * *

In any lease entered into pursuant to sections 4b-35 to 4b-39, inclusive, which grant the state an option to buy where the option price is to be paid in installments over a stated period of time, such installments shall be described in the lease so as to identify clearly those portions of the installments which represent interest, taxes or any other item the identification of which will promote the most economical and advantageous terms to the state.³⁴

Entities seeking to enter into lease-purchase agreements with the state must comply with the following:

(a) Any person, firm, partnership, association, corporation or other entity, seeking to enter into a lease or lease-purchase agreement with the state through the Commissioner of Public Works, shall file a sworn statement with said commissioner disclosing the names of any persons having a financial interest in the property or premises involved, including the beneficiary of any undisclosed trust or the equitable owner of such property or premises. Corporate applicants shall disclose the names and addresses of officers and stockholders, except that this requirement shall not apply to publicly held corporations.

(b) If, before the approval of any such lease, lease-purchase agreement or renewal of such lease or agreement, by the State Properties Review Board, there is a change in the persons or the stockholders of a corporation, having a financial interest in the property or premises involved, the applicant shall submit an affidavit to the Commissioner of Public Works indicating the change, not later than five business days after the change. The commissioner shall forward a copy of such affidavit to the State Properties Review Board upon receipt.

(c) Failure to make any disclosure required by this section to the Commissioner of Public Works shall be punishable by a civil penalty of not more than one thousand dollars, which may be imposed by such commissioner after notice and opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive.³⁵

Special documentation may be required for lease-purchase agreements:

Except for such emergency purchases as are made by a budgeted agency under regulations adopted by the Commissioner of Administrative Services, no budgeted agency or any agent thereof shall incur any obligation, by order, contract or otherwise, except by the issue of a purchase order or any other documentation approved by the Comptroller, necessary to process the transaction transmitted by the budgeted agency or its agents to the commissioner and the Comptroller, provided the amount to be charged against the appropriation for a budgeted agency in any year for a purchase order for a current expenditure shall be the amount anticipated to be spent in such year. The amount to be charged against the appropriation for any budgeted agency in any year for a capital expenditure, including an installment purchase, shall be the state's total cost for such capital expenditure unless otherwise authorized by the General Assembly or approved by the Finance Advisory Committee. Upon the receipt of any such purchase order or any other documentation approved by the Comptroller necessary to process the transaction, the Comptroller shall immediately charge the same to the specific appropriation of the budgeted agency issuing the same and certify on the face of the purchase order or approve such other documentation that the purchase is approved and recorded, if the proposed purchase is within the applicable specific appropriation and the budgeted agency has unencumbered funds sufficient to defray such expenditure. In transactions requiring purchase orders, the Comptroller shall promptly transmit such certified purchase order to the vendor named in the purchase order.³⁶

The Commissioner of the Department of Transportation has broad powers subject to review of the State Properties Review Board. The commissioner is authorized

³³*Id.* § 4b-35.

³⁴*Id.* § 4b-37.

³⁵*Id.* § 4b-33.

³⁶*Id.* § 4-98(a).

[to] provide for the planning and construction of any capital improvements and the remodeling, alteration, repair or enlargement of any real asset that may be required for the development and operation of a safe, efficient system of highway, mass transit, marine and aviation transportation, provided (A) the acquisition, other than by condemnation, or the sale or lease, of any property that is used for such purposes shall be subject to the review and approval of the State Properties Review Board in accordance with the provisions of subsection (f) of section 4b-3 [relating to the review requirement], and (B) any contract for the planning, construction, remodeling, alteration, repair or enlargement of any public building which is estimated to cost more than five hundred thousand dollars shall be advertised and awarded in accordance with section 13b-20n (relating to bidding).³⁷

The Board of Regents for Higher Education³⁸ may

. . . make or enter into contracts, leases or other agreements in connection with its responsibilities . . . , provided all acquisitions of real estate by lease or otherwise shall be subject to the provisions of section 4b-23 [requiring compliance with the state facility plan and reporting to the Secretary of the Office of Policy and Management]³⁹

There is statutory authority for boards of trustees of the “constituent units”⁴⁰ of the university system and institutions to expend authorized funds on the purchase of equipment without approval of the Department of Administrative Services if done according to approved procedures.⁴¹ The University of Connecticut may “acquire by purchase, contract, lease, long-term lease or gift, and hold or dispose of, real or personal property or rights or interests in any such property and to hold, sell, assign, lease, rent, encumber, other than by mortgage, or otherwise dispose of any real or personal property, or any interest therein, owned by the university or in its control, custody or possession in accordance with section 10a-109n;” and it may “make, enter into, execute, deliver and amend any and all contracts, including, but not limited to, total cost basis contracts, agreements, leases, instruments and documents and perform all acts and do all things necessary or convenient to plan, design, acquire, construct, build, enlarge, alter, reconstruct, renovate, improve, equip, finance, maintain and operate projects and to carry out the powers granted by sections 10a-109a to 10a-109y, inclusive, or reasonably implied from those powers.”⁴²

Energy Performance Contracting

Subject to numerous restrictions, state agencies⁴³ are authorized to enter into energy-saving performance contracts with vendors approved by the Department of Administrative Services.⁴⁴

Debt Limitations

There are no constitutional debt limitations. Bonded indebtedness of municipalities and regional school districts is statutorily limited.⁴⁵

³⁷ *Id.* § 13b-4(11). *See also, id.* § 13b-34 (powers of commissioner relating to public transportation).

³⁸ The Board of Regents for Higher Education serves as the governing body for the regional community-technical college system, the Connecticut State University System and Charter Oak State College. It is also authorized to act as the board of trustees for the respective systems. *Id.* §§ 10a-71 (community-technical colleges), 10a-88 (state university system), 10a-143(e) (Charter Oak State College).

³⁹ *Id.* § 10a-6(a)(15).

⁴⁰ “Constituent units” means the subdivisions of the state system of higher education. *Id.* § 10a-1.

⁴¹ *Id.* § 10a-151b; § 4a-52a.

⁴² *Id.* § 10a-109(d) (7), (11)..

⁴³ State agency “means any office, department, board, council, commission, institution, constituent unit of the state system of higher education, technical education and career school or other agency in the executive, legislative or judicial branch of state government.” *Id.* § 1-79(20) as referenced in *Id.* § 16a-37x(6).

⁴⁴ *Id.* § 16a-37x.

⁴⁵ *Id.* § 7-374 (municipalities), *Id.* § 10-56 (regional school districts).

Interest Rate Limitations

Municipalities may issue “bonds, notes or other obligations bearing interest at such rate or rates as it may deem advisable, or at such discounts as it may deem advisable, not withstanding any provision of the general statutes, special acts or its charter.”⁴⁶ The maximum legal rate of interest in the absence of any agreement to the contrary, is 8 percent per annum based on a 360-day year.⁴⁷ Loans at a rate greater than 12 percent per annum are prohibited,⁴⁸ but this rate limitation does not apply to “any obligations, including bonds, notes or other obligations, issued by . . . the state, . . . any municipality, . . . district . . . or other political subdivision of the state.”⁴⁹

Miscellaneous

In *20 Summer Street Associates v. State Department of Adult Probation*,⁵⁰ the court held that the state’s continued possession of lessor’s property without lessor’s consent, without statutory authority, and without resorting to eminent domain amounted to an unconstitutional taking of the lessor’s property.

In *State v. Lex Associates*, the State sought to exercise its option to purchase property used as a courthouse, pursuant to a lease with a private lessor.⁵¹ When the lessor refused to convey title to the State, the State brought an action for specific performance. The State continued to make payments as a set off against the purchase price. The lessor argued that the payments were rent because of the continued use of the property pending litigation. The court held that once the State had properly exercised its option to purchase the property and tendered payment to the lessor, the State became the equitable owner, and subsequent payments by the State should be treated as a setoff against the purchase price. The court also held that the lease was invalid against claims by the lessor and that it was unenforceable because of inadequate consideration.

Land, buildings or facilities leased pursuant to section 4b-35 and section 4b-36[supra] shall be exempt from municipal taxation. The value of such land, buildings or facilities shall be used for computation of grants in lieu of taxes pursuant to section 12-18b.⁵²

On and after July 1, 1995, any property which is subject to an agreement entered into by the Commissioner of Administrative Services for the purchase of such property through a long-term financing contract shall be exempt from taxation by the municipality in which such property is located, during the term of such contract. The assessed valuation of such property shall be included with the assessed valuation of state-owned land and buildings for purposes of determining the state grant in lieu of taxes under the provisions of section 12-18b.⁵³

No state officer, employee, agency, board or commission, or any agent thereof, shall incur, for any purpose, any obligation, by order, contract, lease purchase, installment purchase or any other means, which anticipates that any gain therefrom or interest payable thereon by the state or such officer, employee, agency, board or commission, or agent thereof, shall be excludable from the taxable income of the recipient of such payments for the purposes of federal or state income taxation unless, prior to the execution of any such obligation by or on behalf of the state or such officer, employee, agency, board, commission or agent, (1) such officer, employee, agency, board or commission, or the agent thereof, has filed with the Treasurer, and the Treasurer has approved, documents relating to the transaction which support the availability of such tax exclusion and which set forth such monitoring procedures as may be necessary to ensure compliance with any requirements of the Internal Revenue Code of 1986, as from time to time amended, or any subsequent

⁴⁶*Id.* § 7-370a.

⁴⁷*Id.* § 37-1.

⁴⁸*Id.* § 37-4.

⁴⁹*Id.* § 37-9.

⁵⁰484 A.2d 947 (Conn. Super. Ct. 1984).

⁵¹*State v. Lex Associates*, 730 A.2d 38 (1999).

⁵²Conn. Gen. Stat. Ann. § 4b-39.

⁵³*Id.* § 4b-46.

corresponding internal revenue code of the United States, related to the tax-exempt status of such obligation, and (2) such obligation contains a certificate from the Treasurer to the effect that the documents required to be filed with and approved by the Treasurer pursuant to this section have been so filed and approved and that any monitoring procedures which may be necessary to ensure compliance with any requirements of the Internal Revenue Code of 1986, as from time to time amended, or any subsequent corresponding internal revenue code of the United States, related to the tax-exempt status of such obligation, have been implemented. Any such obligation which does not contain such a certificate shall not be considered an obligation of the state of Connecticut or of any officer, employee, agency, board or commission thereof, or any agent thereof, for any purpose relating to the exclusion of such obligation, or any gain therefrom or interest thereon, from the taxable income of the recipient for the purposes of federal or state income taxation. For the purposes of this section, "state officer, employee, agency, board or commission, or any agent thereof", shall include the John Dempsey Hospital Finance Corporation or any similar organization.⁵⁴

Conn. Gen. Stat. Ann. § 42b-1(h) provides a definition of “Obligations” that includes a “lease” and an “installment purchase agreement” for registered public obligation provisions. In addition, the definition is also made applicable by the statute to numerous other “bond” provisions, including Conn. Gen. Stat. Ann. §§ 7-260, 7-273dd, 7-369, 7-373, 7-377a, 7-378 and 7-380. Review of all of these bond statutes and the possible implications to leases is beyond the scope of this survey.

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

⁵⁴*Id.* § 3-20d.

DELAWARE 2019

Current through 81 Laws 2018, chs. 200-453. Revisions to 2018 Acts by the Delaware Code Revisors were unavailable at the time of publication, by Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties have broad home rule powers.⁵ Contracts for goods in excess of \$50,000 are subject to public bidding laws.⁶ Sussex County may “acquire” and enter into “lease or rental agreement(s) with any public or private entity for real or immovable property.”⁷

State procurement statutes specifically regulate the purchase of vehicles. Counties, generally, must purchase passenger vehicles including sedans, station wagons, vans, off-road vehicles and trucks rated 10,000 GVW or less “for State use” through the Delaware Division of Support Services with approval of the director of the office of management and budget.⁸ The purchase of “special purpose vehicles” by a county without the written approval of the Delaware Office of Management and Budget Director, the Delaware Controller General, and the Delaware Secretary of Administrative Services is prohibited.⁹ Lease of passenger vehicles must be from the Delaware Division of Support Services.¹⁰ Section 6906 appears to be applicable to all county vehicles, with the exception of procurement of vehicles by the New Castle County Police and Sussex County.¹¹

Energy performance contracting

Subject to numerous provisions, counties¹² may enter into a qualified “energy performance contract structured as a . . . lease-purchase agreement for the purchase and installation of cost saving measures” for a term not to exceed twenty years.¹³

Municipalities

Municipalities¹⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁵ eminent domain¹⁶ and police powers.¹⁷ Municipalities may provide by charter the authority to

¹Delaware has three counties: Kent, Sussex and New Castle County. Del. Code Ann. tit. 9, § 101.

²*Id.* § 8003.

³*Id.* § 2807 (New Castle County); *id.* § 4612(1) (Kent County) and *id.* § 6702(1) (Sussex County).

⁴*Id.* § 2651 (New Castle County); *id.* § 4901 (Kent County); *id.* §§ 6802, 7002 (Sussex County).

⁵*Id.* § 1101 (New Castle County); *id.* § 7001 (Sussex County); *id.* § 4110 (Kent County).

⁶*Id.* § 314. New Castle County is subject to some contracting statutes applicable to the state. *Id.*

⁷*Id.* § 6111.

⁸*Id.* tit. 29, § 6906. This statute covers agencies and school districts. Agency is defined in *id.* § 6902 broadly as “every board, department, bureau, commission, person or group of persons or other authority which directly receives monies under any budget appropriation act or supplemental appropriation act and which was created and now exists or hereafter is created to: a. Execute, supervise, control and/or administer governmental functions under the laws of this State; and/or b. To perform such governmental functions under the laws of this State, or to perform such other duties as may be prescribed; and/or c. To collect and/or use any taxes, fees, licenses, permits or other receipts for service or otherwise for the performance of any function or related to or supported in whole or in part by the laws of this State; and/or d. To administer any laws providing for the collection of taxes, fees, permits, licenses or other forms of receipts from any sources whatsoever for the use of the State or any agency of the State . . .”

⁹*Id.* § 6906(b).

¹⁰*Id.* § 6906(d). There is an exception for cars leased out of state on business.

¹¹*Id.* § 6906(e) and (f).

¹²Counties are included in the definition of “agency” for purposes of the statute. *Id.* tit. 29 § 6972.

¹³*Id.* §§ 6973, 6974.

¹⁴Municipal corporations for purposes of this discussion are cities, towns and villages. *Id.* tit. 22, § 801. Home rule or constitutional charter is also available. *Id.* tit. 22, § 802.

“enter into contracts.”¹⁸ The power to “acquire and erect buildings” has been implied as an “incidental power” even where a municipality’s charter did not expressly grant the authority to “acquire or dispose of real estate.”¹⁹ The restrictions on the purchase and lease of vehicles under Section 6906 appear to be applicable to municipalities.²⁰

Energy performance contracting

Subject to numerous provisions, municipalities²¹ may enter into a qualified “energy performance contract structured as a . . . lease-purchase agreement for the purchase and installation of cost-saving measures” for a term not to exceed twenty years.²²

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²³ and eminent domain powers.²⁴ School districts have the power to “purchase, receive, take, lease or otherwise acquire, own, hold, improve and otherwise use real or personal property, or any interest therein and to sell, convey, lease, exchange, transfer or otherwise dispose of all or any of its property or interest therein.”²⁵ School districts may purchase or “enter into contracts relating to the acquisition of land for school purposes,” if the school board has funds available to it for such purposes.²⁶ Surplus real or personal property may be sold or leased subject to certain restrictions.²⁷ The restrictions on the purchase and lease of vehicles under Section 6906 appear to be applicable to school districts.²⁸

Energy performance contracting

Subject to numerous provisions, school districts²⁹ may enter into a qualified “energy performance contract structured as a . . . lease-purchase agreement for the purchase and installation of cost-saving measures” for a term not to exceed twenty years.³⁰

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

¹⁵*Id.* tit. 22, § 830.

¹⁶*Id.* tit. 29, §§ 9501-9506; *see also* City of Wilmington v. Lord, 340 A.2d 182, 184 (Del. Super. Ct. 1975) (home rule city is considered a sovereign and thus has eminent domain power).

¹⁷Del. Code Ann. tit. 22, §§ 301, 801.

¹⁸Hearn Bros., Inc. v. City of Newark, 261 A.2d 532, 534 (Del. 1969).

¹⁹Drexler v. Commissioners of Bethany Beach, 15 Del. ch. 214, 135 A. 484, 485 (1926); *but see* State v. Penn Cent. Corp., 445 A.2d 939 946 (Del. Super. Ct. 1982) (“power to convey municipal property will not be implied where the charter does not provide such power”).

²⁰*See, supra*, notes 8-11 and accompanying text.

²¹Municipalities are included within the definition of “agency” for purposes of the statute. Del. Code Ann. tit. 29 § 6972.

²²*Id.* §§ 6973, 6974.

²³Del. Code Ann. tit. 14, § 1902.

²⁴*Id.* tit. 14, § 2303.

²⁵*Id.* § 1022.

²⁶*Id.* § 2124.

²⁷*Id.* § 1057.

²⁸*See, supra*, notes 8-11 and accompanying text.

²⁹School districts are included within the definition of “agency” for purposes of the statute. Del. Code Ann. tit. 29 § 6972.

³⁰*Id.* §§ 6973, 6974. *See also*, tit. 29 § 7530 (allowing use of certain funds subject to annual appropriation).

State Entities

The Facilities Management Section of the Office of Management and Budget is responsible for overseeing the acquisition, construction, renovation, and leasing of public buildings for all state departments and agencies, except school districts and institutions of higher learning.³¹

Contracts for “materiel” are subject to competitive bidding.³²

Vehicles must be purchased through the Office of Management and Budget.³³

The Chief Information Officer of the Department of Technology and Information has authority to “purchase, lease or rent data processing equipment in the name of the Department” and, when authorized by the Chief Information Officer, the department may “enter into lease or purchase agreements in the acquiring or the use of any data processing equipment . . .” for providing service to multiple state agencies, departments and institutions.³⁴

The Department of Corrections is authorized “to acquire, by lease, purchase or otherwise, all necessary facilities, equipment, supplies or articles for the carrying out of its duties in the safekeeping, maintenance, improvement and rehabilitation of those in its care.”³⁵ It may acquire land and buildings “by lease, purchase or otherwise.”³⁶

The University of Delaware “shall have all the powers and franchises incident to a corporation, including the power to take and hold real and personal estate by deed, devise, bequest, gift grant or otherwise . . .”³⁷ The board of trustees of the University of Delaware may control the “extension” of the “campus or other land holdings;”³⁸ may control matters having to do with the formulation of the terms of contracts for facilities or for purchasing equipment and may purchase supplies and equipment under exemption from the state procurement laws unless expressly provided by the General Assembly.³⁹ Delaware State University is likewise authorized to “take and hold real and personal estate by deed, devise, bequest, gift, grant or otherwise.”⁴⁰

The Board of Trustees of the Delaware Technical and Community College⁴¹ is authorized “to acquire (by gift, purchase, condemnation or otherwise), own, lease, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for educational purposes.”⁴²

³¹*Id.* tit. 29 §§ 401 to 408; *id.* § 6307A.

³²*Id.* § 6923. Materiel means “materials, equipment, tools, supplies, or any other personal property, but does not include real property or electric, gas, water, telephone or similar utilities.” *Id.* § 6902.

³³*Id.* tit. 29 § 6906.

³⁴*Id.* tit. 29 § 9004C.

³⁵*Id.* tit. 11 § 6556.

³⁶*Id.* tit. 11 § 6558.

³⁷*Id.* tit. 14 § 5104(a).

³⁸*Id.* tit. 14 § 5106(7).

³⁹*Id.* tit. 14 § 5106(5), (6).

⁴⁰*Id.* tit. 14 § 6503(a).

⁴¹The Board of Trustees of the Delaware Technical and Community College is a state agency. *Id.* tit. 14 § 9102.

⁴²*Id.* tit. 14 § 9105.

Energy performance contracting.

Subject to numerous provisions, a state agency may enter into a qualified “energy performance contract structured as a . . . lease-purchase agreement for the purchase and installation of cost saving measures” for a term not to exceed twenty years.⁴³

Debt Limitations

There are no constitutional debt limitations. State debt is statutorily limited.⁴⁴ Bonded indebtedness is statutorily limited.⁴⁵ In *Corhran v. Mayor of Middletown*,⁴⁶ a lease for one year with an option to renew by the municipality was not debt when the obligations of the lease were payable out of current revenues. The court said “if the municipality is contingently liable to pay money and the arising of the contingency is solely in its own control . . . no indebtedness either present or future can be said to have been created.”⁴⁷

Interest Rate Limitations

The maximum legal rate of interest is 5 percent over the Federal Reserve discount rate; however, this rate does not apply to amounts in excess of \$100,000, if the loan is not secured by a mortgage on the principal residence of the borrower.⁴⁸ No other provisions limiting the interest rate on lease-purchase agreements were found.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁴³*Id.* tit. 29 §§ 6973, 6974. Agency means “any state agency, authority, or any political subdivision of state or local government, including, but not limited to, county, city, township, village or municipal government, local school districts, and institutions of higher education, any state-supported institution, or a joint action agency composed of political subdivisions.”

⁴⁴*Id.* tit. 29 § 7422.

⁴⁵*Id.* tit. 9, § 1163 (New Castle County); *id.* § 4111 (Kent County); *id.* § 7002(t) (Sussex County); *id.* tit. 22, § 106 (cities over 50,000); *id.* § 830 (municipalities with charter limitations); *id.* tit. 14, § 2107 (school districts).

⁴⁶14 Del. ch. 295, 125 A. 459 (1924).

⁴⁷125 A. at 460.

⁴⁸Del. Code Ann. tit. 6, § 2301.

FLORIDA 2019

Current through the 2018 Second Regular Session of the Twenty-Fifth legislature. Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase or lease and sell or exchange real or personal property.”⁵ Counties have the power to “sell and convey real or personal property, and to lease real property, belonging to the county,” if it is in the best interest of the county and certain public bidding procedures are followed.⁶

Counties may “lease-purchase” for “periods not to exceed thirty years at a stipulated rental to be paid from current or other legally available funds.”⁷ These “lease-purchase arrangements” may be with “private individuals, other governmental agencies or corporations”⁸ Although such agreements must be approved by the board of county commissioners, in *Frankenmuth v. Magaha*, the Florida Supreme Court held that a county board may approve an agreement absent an express resolution, and outlined a three-part test for determining whether, under Florida Statute 125.031, a county board has ratified an agreement after the fact.⁹

If the term of the lease is for a period of over sixty months, “the rental shall be payable only from funds arising from sources other than ad valorem taxation.”¹⁰ The statute does not specifically provide for the payment of interest by the county, but the attorney general has said that interest may be paid if the lease-purchase agreement is in the nature of a revenue certificate that does not pledge ad valorem taxes as payment.¹¹

Lease-purchases appear to be subject to advance of sale reporting requirements to the state division of finance and post-closing reporting requirements,¹² and public sale requirements.¹³ The reporting requirement picks up “limited revenue bonds,” which are defined as “any obligations issued by a unit to pay the cost of a project or improvement thereof, or combination of one or more projects or improvements thereof, and payable from funds, exclusive of ad valorem taxes, special assessments, or

¹Counties may be charter or noncharter. Fla. Const. art. 8, § 1(f), (g). The Metropolitan Government of Dade County may exercise the home rule powers of municipalities. Fla. Const. art. 8, § 6(f) (“may exercise all powers conferred now or hereafter by general law upon municipalities”).

²*Id.* art. 7, § 9.

³Fla. Stat. Ann. § 127.01.

⁴*Id.* § 125.01(1).

⁵*Id.* § 125.01(3)(a).

⁶*Id.* § 125.35.

⁷*Id.* § 125.031.

⁸*Id.* Leases entered into by the county with the state are exempted from the thirty year limitation. *Id.*

⁹769 So.2d 1012 (Fla. 2000). The Florida Attorney General has opined that (i) a county sheriff has authority to lease-purchase vehicles, (ii) the county commission would need to approve any rental payments, (iii) the lease-purchase agreement would need a nonappropriation clause and (iv) *Frankenmuth* may not require county commission approval initially of the lease-purchase agreement, since unlike the county controller, the county sheriff has independent authority from the county commission to purchase. 2006 WL 2053477 (Fla. A.G.). It is questionable whether the lease-purchase agreement directly with the county sheriff can be tax-exempt. If the county sheriff does not have taxing, eminent domain or police powers, the county commission will need to be the lessee and sublease the property to the county sheriff.

¹⁰Fla. Stat. Ann. § 125.031.

¹¹1980 Op. Att’y Gen. (Fla. Mar. 25, 1980) (available on Lexis, States library, Fla. file), 1980 WL 100567. *See also* Penn v. Pensacola-Escambia Governmental Center Auth., 311 So.2d 97, 99 (Fla. 1975) (upholds payment of interest by county on lease-purchase agreement).

¹²Fla. Stat. Ann. §§ 218.37 and .38; <https://www.flrules.org/gateway/Division.asp?DivID=46>.

¹³Fla. Stat. Ann. § 218.385.

earnings from such projects or improvements.”¹⁴ There is a \$2,000,000 threshold set forth in Section 218.37(2) for collection of data on lease-purchase agreements and certificates of participation, but it appears that the definition of limited revenue bond is broad enough to pick up all lease-purchase agreements and certificate of participation transactions. *See also*, the possible requirement for reporting finder fees for lease-purchase and certificate of participation transactions, which is discussed at the end of the Miscellaneous section, *infra*, resulting from this broad definition of limited revenue bonds.

Leases may be negotiated by the county administrator, subject to approval by the board of county commissioners.¹⁵

Energy Performance Contracting

Counties may enter into contracts for the implementation of energy, water, or wastewater efficiency or conservation measures in county facilities, subject to numerous statutory restrictions.¹⁶

Municipalities

Municipalities¹⁷ qualify as tax-exempt issuers for purposes of federal income tax due to their tax,¹⁸ eminent domain¹⁹ and police powers.²⁰ Municipalities may provide for the purchase, sale and lease of property in their charters.²¹

Public works projects are subject to public bidding statutes.²²

Lease-purchases appear to be subject to pre-sale and post-closing reporting requirements to the state division of finance, public sale requirements and finder fee disclosure.²³

Energy Performance Contracting

Municipalities may enter into contracts for the implementation of energy, water, or wastewater efficiency or conservation measures in municipal facilities, subject to numerous statutory restrictions.²⁴

School Districts

School districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ A school board has the power, subject to the rules of the state board,

¹⁴*Id.* § 218.31(12) (definition of limited revenue bond) and § 218.369 (incorporating limited revenue bonds into definition of “general obligation and revenue bonds” for purposes of §§ 218.37 and .38).

¹⁵*Id.* § 125.74.

¹⁶*Id.* § 489.145.

¹⁷Municipalities for purposes of this discussion are constitutional home rule cities. Fla. Const. art. 8, § 2 (home rule cities); Fla. Stat. Ann. § 166.021).

¹⁸Fla. Const. art. 7, § 9.

¹⁹Fla. Stat. Ann. § 166.401.

²⁰Fla. Const. art. 8, § 2; Fla. Stat. Ann. § 166.021. *See generally*, *Miami v. Girtman*, 104 So.2d 62 (Fla. Dist. Ct. App. 1938).

²¹*City of West Palm Beach v. Williams*, 291 So.2d 572, 574 (Fla. 1974); *Penn*, 311 So.2d at 100 (lease of property).

²²Fla. Stat. Ann. § 180.24.

²³*See, supra*, notes 12-14 and accompanying text.

²⁴Fla. Stat. Ann. § 489.145.

²⁵School districts for purposes of this discussion are districts based on a county unit. Fla. Stat. Ann. § 1001.30. School districts have home rule powers. *Id.* § 1001.32(2), but the Florida attorney general takes the position that such powers are exercisable only “for school purposes.” 2007 Op. Att’y Gen. (November 2, 2007) (addressed to Mr. Delbrugge), 2007 WL 3308139.

²⁶Fla. Const. art. 7, § 9; Fla. Stat. Ann. § 1011.71.

²⁷Fla. Stat. Ann. § 1013.24.

to control property and convey title to both real and personal property.²⁸ School districts have the authority to dispose of any surplus real or tangible personal property upon compliance with certain procedures.²⁹

Purchases and leases are subject to the rules of the State Board of Education.³⁰ School districts may participate in statewide contracts.³¹

A district school board, when acquiring, whether by purchase, lease, lease with option to purchase, rental or otherwise, information technology, as defined in Section 282.0041(14), F.S., may make any acquisition through the competitive solicitation process as described herein or by direct negotiation and contract with a vendor or supplier, as best fits the needs of the school district as determined by the district school board.³²

Grounds and educational facilities may be lease-purchased:

[A school board may] [e]nter into leases or lease-purchase arrangements, in accordance with the requirements and conditions provided in s. 1013.15(2), with private individuals or corporations for the rental of necessary grounds and educational facilities for school purposes or of educational facilities to be erected for school purposes. Current or other funds authorized by law may be used to make payments under a lease-purchase agreement. Notwithstanding any other statutes, if the rental is to be paid from funds received from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held. The provisions of such contracts, including building plans, shall be subject to approval by the Department of Education, and no such contract shall be entered into without such approval. As used in this section, “educational facilities” means the buildings and equipment that are built, installed, or established to serve educational purposes and that may lawfully be used. The State Board of Education may adopt such rules as are necessary to implement these provisions.³³

Under section 1013.15(2) cited in the above section, school districts are authorized to “rent or lease educational facilities and sites.”³⁴ Facilities and sites rented or leased for one year or less are not required to be approved by the [Office of Educational Facilities of the Department of Education (the “office”)] and shall be funded through the operations budget.³⁵ The lease-purchase of educational facilities and sites shall be competitively bid as required by section 1013.37 and must use revenues authorized by section 1011.71(2), which allows school districts to levy additional taxes to lease-purchase property, subject to numerous provisions.³⁶ A lease contract for one year or less, when extended or renewed beyond a year, becomes a multiple year lease.³⁷ The term of any lease-purchase agreement, including any renewal terms, shall not exceed the lesser of the useful life of the facility and site or thirty years whichever is less.³⁸ Such lease-purchase agreements shall expire on June 30 of each fiscal year and may be automatically renewed annually by the school district making sufficient annual appropriations

²⁸*Id.* § 1001.42(2).

²⁹*Id.* § 1013.28; § 1013.15(1).

³⁰*Id.* § 1010.04.

³¹*Id.*

³²Fla. Admin. Code Rule 6A-1.012 (02/25/2009). Fla. Stat. Ann. § 282.0041(11) provides: “Information technology” means equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate information of any kind or form.

³³Fla. Stat. Ann. § 1001.42.

³⁴*Id.* § 1013.15(2)(b); *see also id.* § 1001.42(11)(b)5. Section 1013.01(6) defines “educational facilities” as “buildings and equipment, structures, and special educational use areas that are built, installed, or established to serve primarily the educational purposes and secondarily the social and recreational purposes of the community”

³⁵*Id.* § 1013.15(2)(a).

³⁶*Id.* § 1013.15(2)(b).

³⁷*Id.* § 1013.15(2)(a).

³⁸*Id.* § 1013.15(2)(c)(1).

therefor.³⁹ Failure of the school district to renew a lease-purchase agreement shall not constitute a default or require the payment of a penalty nor limit the right of the school district to purchase or utilize educational facilities and sites similar in function to the education facilities and sites which are the subject of the lease-purchase agreement.⁴⁰ “Educational facilities and sites being acquired pursuant to a lease-purchase agreement shall be exempt from ad valorem taxation.”⁴¹ The interest rate on such lease-purchase agreements shall be calculated in accordance with and be governed by the provisions of section 215.84.⁴² Such lease-purchase agreements shall not constitute a debt, liability, or obligation of the state or local school board.⁴³

School districts may issue interest-bearing notes for “obligations by way of anticipation of budgeted revenues accruing on a current basis without pledging the credit of the district or requiring future levy of taxes for certain purposes for a period of one year; however, such obligations may be extended from year to year with the consent of the lender for a period not to exceed four years or for a total of five years including the initial year of the loan.”⁴⁴ “The purposes for which such obligations may be incurred . . . shall include only the purchase of school buses, land, and equipment for educational purposes; [and] the erection of, alteration to, or addition to educational facilities. . . .”⁴⁵

Lease-purchases of \$2 million or more appear to be subject to pre-sale and post-closing reporting requirements to the state division of finance, public sale requirements and finder fee disclosure.⁴⁶

Energy Performance Contracting

School districts may enter into contracts for energy conservation measures, subject to numerous restrictions.⁴⁷ Such measures include alterations to existing facilities, or acquisition of equipment to be used in new construction that reduces energy costs.⁴⁸

Fire Districts

*Independent special fire control districts*⁴⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁵⁰ and eminent domain powers.⁵¹ Independent special fire control districts are authorized to “acquire, by purchase, lease, . . . or otherwise, real and personal property . . . for any purpose authorized by this act The board may purchase equipment by an installment sales contract if funds are available to pay the current year’s installments on the equipment and to pay the amounts due

³⁹*Id.* § 1013.15(2)(c)(2).

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* See, *infra*, notes 119 to 121 and accompanying text.

⁴³*Id.* § 1013.15(2)(c)(3).

⁴⁴*Id.* § 1011.14. See Op. Att’y Gen. (Fla. Mar. 7, 1997) (available on Lexis, States library, Fla. file) opining that this statute does not apply to lease agreements entered into by school boards for the lease of equipment to be used in the public school system.

⁴⁵Fla. Stat. Ann. § 1011.14(1).

⁴⁶See, *supra*, notes 12-14 and accompanying text.

⁴⁷Fla. Stat. Ann. § 1013.23.

⁴⁸*Id.*

⁴⁹“‘Independent special fire control district’ means an independent special district as defined in s. 189.012, created by special law or general law of local application, providing fire suppression and related activities within the jurisdictional boundaries of the district. The term does not include a municipality, a county, a dependent special district as defined in s. 189.012, a district providing primarily emergency medical services, a community development district established under chapter 190, or any other multiple-power district performing fire suppression and related services in addition to other services.” *Id.* § 191.003(5).

⁵⁰Fla. Stat. Ann. § 191.006(14).

⁵¹*Id.* § 191.006(12).

that year on all other installments and indebtedness.”⁵² Independent special fire control districts may “acquire and maintain rescue, medical, and other emergency equipment, pursuant to the provisions of chapter 401 [relating to medical telecommunications and transportation services].”⁵³

Like counties, political subdivisions of the state may enter into guaranteed energy, water, and wastewater performance savings contracts, subject to numerous restrictions.⁵⁴

Lease-purchases of \$2 million or more appear to be subject to pre-sale and post-closing reporting requirements to the state division of finance, public sale requirements and finder fee disclosure.⁵⁵

Hospital Districts

Hospital districts are creatures of specific legislation and are not covered by this survey.

State Entities

The acquisition of real property in the State of Florida is generally overseen by the Department of Management Services and is subject to numerous requirements.⁵⁶

No executive branch department or agency, public officer or employee shall enter into any contract on behalf of the state, which contract binds the state or its executive agencies to the lease, rental, lease-purchase, purchase, or sale-leaseback of office space, real property or improvements to real property for a period in excess of 1 fiscal year, including any and all renewal periods and including all leases which constitute a series of leases unless the following statement is included in the contract: “The State of Florida’s performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.” The foregoing statement shall not be amended, supplemented, or waived, and shall be printed in type at least as large as any other type appearing on the contract. Any contract in violation of this section shall be null and void.⁵⁷

The following statutory section essentially prohibits substitution language in a lease-purchase agreement:

No executive agency or department, public officer or employee may enter any lease, contract, rental agreement, lease-purchase agreement, purchase agreement, or sale-leaseback agreement on behalf of the state that requires the state agency or department, public officer or employee to refrain from making legislative budget or fixed capital outlay requests for alternate space other than that in any such lease, rental agreement, lease-purchase agreement, purchase agreement, or sale-leaseback agreement. Any contract in violation of this section shall be null and void. This section shall not apply to any facility financed under the Florida Building and Facilities Act.⁵⁸

For personal property lease-purchases, state agencies, universities and community colleges are required to use master equipment financing agreements negotiated by the Division of Bond Finance and executed by the Chief Financial Officer, unless specifically exempted:

(1) The Division of Bond Finance of the State Board of Administration and the Chief Financial Officer shall plan and coordinate deferred-payment purchases made by or on behalf of the state or its agencies or by or on behalf of state universities or Florida College System institutions participating under this section pursuant to s. 1001.706(7) or s. 1001.64(26), respectively. The Division of Bond Finance shall

⁵²*Id.* § 191.006(7).

⁵³*Id.* § 191.008(1).

⁵⁴*Id.* § 489.145.

⁵⁵*See, supra*, notes 12-14 and accompanying text.

⁵⁶*See generally id.* §§ 272.03, 253.025, 255.25, 255.2501.

⁵⁷*Id.* § 255.2502.

⁵⁸*Id.* § 255.2503.

negotiate and the Chief Financial Officer shall execute agreements and contracts to establish master equipment financing agreements for consolidated financing of deferred-payment, installment sale, or lease purchases with a financial institution or a consortium of financial institutions. As used in this act, the term “deferred-payment” includes installment sale and lease-purchase.

(a) The period during which equipment may be acquired under any one master equipment financing agreement shall be limited to not more than 3 years.

(b) Repayment of the whole or a part of the funds drawn pursuant to the master equipment financing agreement may continue beyond the period established pursuant to paragraph (a).

(c) The interest rate component of any master equipment financing agreement shall be deemed to comply with the interest rate limitation imposed in s. 287.063 so long as the interest rate component of every interagency, state university or community college agreement entered into under such master equipment financing agreement complies with the interest rate limitation imposed in s. 287.063. Such interest rate limitation does not apply when the payment obligation under the master equipment financing agreement is rated by a nationally recognized rating service in any one of the three highest classifications, which rating services and classifications are determined pursuant to rules adopted by the Chief Financial Officer.

(2) *Unless specifically exempted by the Chief Financial Officer, all deferred-payment purchases, including those made by a state university or community college that is participating under this section, shall be acquired by funding through master equipment financing agreements. The Chief Financial Officer is authorized to exempt any purchases from consolidated financing when, in his or her judgment, alternative financing would be cost-effective or otherwise beneficial to the state. [Emphasis added.]*

(3) The Chief Financial Officer may require agencies to enter into interagency agreements and may require participating state universities or community colleges to enter into systemwide agreements for the purpose of carrying out the provisions of this act.

(a) The term of any interagency or systemwide agreement shall expire on June 30 of each fiscal year but shall automatically be renewed annually subject to appropriations and deferred-payment schedules. The period of any interagency or systemwide agreement shall not exceed the useful life of the equipment for which the agreement was made as determined by the Chief Financial Officer.

(b) The interagency or systemwide agreements may include, but are not limited to, equipment costs, terms, and a pro rata share of program and issuance expenses.

(4) Each state university or community college may choose to have its purchasing agreements involving administrative and instructional materials consolidated under this section.

(5) The Chief Financial Officer is authorized to automatically debit each agency’s or state university’s funds and each community college’s portion of the Community College Program Fund consistently with the deferred-payment schedules.

(6) All funds debited from each agency, state university, and community college pursuant to the provisions of this section may be deposited in the trust fund and shall be used to meet the financial obligations incurred pursuant to this act. Any income from the investment of funds may be used to fund administrative costs associated with this program.

(7) The Chief Financial Officer may borrow sufficient amounts from trust funds to pay issuance expenses for the purposes of administering this section. Such amounts shall be subject to approval of the Executive Office of the Governor and subject to the notice, review, and objection procedures of s. 216.177. Amounts loaned shall be repaid as soon as practicable not to exceed the length of time obligations are issued to establish the master equipment financing agreement.

(8) The State Board of Administration and the Chief Financial Officer, individually, shall adopt rules to implement their respective responsibilities under this section.

(9) For purposes of this section, deferred-payment commodity contracts for replacing the state accounting and cash management systems may include equipment, accounting software, and implementation and project management services.

(10)

(a) A master equipment financing agreement may finance the cost of energy, water, or wastewater efficiency and conservation measures as defined in s. 489.145, excluding the costs of training, operation, and maintenance, for a term of repayment that may exceed 5 years but may not exceed 20 years.

(b) The guaranteed energy, water, and wastewater savings contractor shall provide for the replacement or the extension of the useful life of the equipment during the term of the contract.

(11) For purposes of consolidated financing of deferred payment commodity contracts under this section by a state agency, the annualized amount of any such contract must be supported from available recurring funds appropriated to the agency in an appropriation category, as defined in chapter 216, which the Chief Financial Officer has determined is appropriate or which the Legislature has designated for payment of the obligation incurred under this section.⁵⁹

* * *

No agreement entered into pursuant to s. 287.064 shall establish a debt of the state or shall be a pledge of the faith and credit of the state; nor shall any agreement be a liability or obligation of the state except from appropriated funds. All agreements, however, may be automatically renewable at the end of each fiscal year, subject to sufficient annual appropriations.⁶⁰

* * *

(1) (a) When any commodity contract requires deferred payments and the payment of interest, such contract shall be submitted to the Chief Financial Officer for the purpose of preaudit review and approval prior to acceptance by the state.

(b) Contracts executed pursuant to this subsection may bear interest at a rate not to exceed an average net interest cost rate which shall be computed by adding 150 basis points to the 20 “bond buyer” average yield index published immediately preceding the first day of the calendar month in which the contract is submitted to the Chief Financial Officer for preaudit review and approval.

(2) (a) No funds appropriated shall be used to acquire equipment through a lease or deferred-payment purchase arrangement unless approved by the Chief Financial Officer as economically prudent and cost-effective.

(b) The Chief Financial Officer shall establish, by rule, criteria for approving purchases made under deferred-payment contracts which require the payment of interest. Criteria shall include, but not be limited to, the following provisions:

1. No contract shall be approved in which interest exceeds the statutory ceiling contained in this section. However, the interest component of any master equipment financing agreement entered into for the purpose of consolidated financing of a deferred-payment, installment sale, or lease-purchase shall be deemed to comply with the interest rate limitation of this section so long as the interest component of every interagency agreement under such master equipment financing agreement complies with the interest rate limitation of this section.

2. No deferred-payment purchase for less than \$30,000 shall be approved, unless it can be satisfactorily demonstrated and documented to the Chief Financial Officer that failure to make such deferred-payment purchase would adversely affect an agency in the performance of its duties. However, the Chief Financial Officer may approve any deferred-payment purchase if the Chief Financial Officer determines that such purchase is economically beneficial to the state.

⁵⁹*Id.* § 287.064.

⁶⁰*Id.* § 287.0641.

3. No contract shall be approved which extends payment beyond 5 years, unless it can be satisfactorily demonstrated and documented to the Chief Financial Officer that failure to make such deferred-payment purchase would adversely affect an agency in the performance of its duties. The payment term may not exceed the useful life of the equipment unless the contract provides for the replacement or the extension of the useful life of the equipment during the term of the loan.

(c) The Chief Financial Officer shall require written justification based on need, usage, size of the purchase, and financial benefit to the state for deferred-payment purchases made pursuant to this subsection.

(3) This section does not apply to the Legislature.

(4) For purposes of this section, deferred-payment commodity contracts for replacing the state accounting and cash management systems may include equipment, accounting software, and implementation and project management services.

(5) For purposes of this section, the annualized amount of any such deferred payment commodity contract must be supported from available recurring funds appropriated to the agency in an appropriation category, as defined in chapter 216, that the Chief Financial Officer has determined is appropriate or that the Legislature has designated for payment of the obligation incurred under this section.⁶¹

Updated administrative rules relating to master finance agreements may be found online at <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=69I-3>. The text of rules 69I-3.001 and 69I-3.004 is set out below.

Consolidated Equipment Financing Program.

Rule 69I-3.001

(1) For the purposes of this rule chapter, the following definitions shall be used:

(a) “Additional Services” means administrative and any other services associated with managing the Consolidated Equipment Financing Program.

(b) “Agency” for purposes of this rule, means any eligible participant in the Program, including the state or its agencies, as authorized by Section 287.064(1), F.S., each department, agency, board and commission in the executive branch, the judicial branch and the legislative branch of Florida government.

(c) “Chief Financial Officer” means the head of the Department of Financial Services, whose deferred payment commodity contracting duties are carried out by and through its Division of Accounting and Auditing. However, the Chief Financial Officer’s duty to execute the master equipment financing agreements is not delegated to the division.

(d) “Educational Institution” means state universities and state community colleges who also participate in the Consolidated Equipment Financing Program as authorized by Section 287.064(1), F.S.

(e) “Interagency Agreement” means an equipment financing agreement between a financial institution and the Agency or Educational Institution, based on the executed Master Equipment Financing Agreement. The respective Agency or Educational Institution is responsible for all payments under its completed and approved Interagency Agreement. Equipment purchased by the Interagency Agreement shall be directly billed by the financial institution to the respective Agency or Educational Institution.

(f) “Master Equipment Financing Agreement” means a master equipment financing agreement to be executed pursuant to Section 287.064, F.S., for the purpose of implementing a consolidated financing program for the acquisition of equipment by deferred payment purchases, as

⁶¹*Id.* § 287.063.

defined by Section 287.064(1), F.S., made by or on behalf of the State of Florida or its agencies or by or on behalf of Educational Institutions. The term “Master Equipment Financing Agreement” includes all agreements and contracts necessary or convenient for the establishment of a Master Equipment Financing Agreement.

(g) “Master Equipment Financing Agreement for Conservation Measures” means a master equipment financing agreement to be executed pursuant to Section 287.064(10), F.S., for the purpose of implementing a consolidated financing program for the financing of the cost of energy, water, or wastewater efficiency and conservation measures (“Conservation Measures”) as defined in Section 489.145, F.S.

(h) “Program” means the Consolidated Equipment Financing Program, which shall consist of the program of financing the deferred payment purchases of equipment on behalf of the State, Educational Institutions or State Agencies pursuant to Section 287.064, F.S.

(i) “Rent” means the amount of payment for a period as defined in an Interagency Agreement within a Master Equipment Financing Agreement.

(2) An Agency or Educational Institution that desires to make deferred payment purchases shall make a written request to participate in the Program. An Agency shall make a written request for exemption from the Program. The Legislature is not required to request an exemption and is exempt from the Program pursuant to Section 287.063(3), F.S.

(a) An Agency or Educational Institution that desires to finance or refinance existing deferred payment purchases through the Program shall make a written request to participate in the Program. An Agency or Educational Institution requesting permission to participate in the Program must submit to the Chief Financial Officer for preaudit review and approval the following:

1. A completed and executed Form DFS-A1-410 (for purchases under the Consolidated Equipment Financing Program) Application to Finance Equipment per Section 287.064, F.S. (Revised 5-4-10). The Form is hereby incorporated by reference, can be viewed at <http://www.myfloridacfo.com/aadir/>, and is available from the Division of Accounting and Auditing, Bureau of Accounting, 200 East Gaines Street, Tallahassee, Florida 32399-0354.

2. A statement documenting whether the equipment is new or used and, if the equipment is used, whether the equipment is currently financed under an installment purchase contract approved by the Chief Financial Officer and, if so, state the date of approval by the Chief Financial Officer and the Chief Financial Officer approval number assigned.

3. A statement documenting the proposed original term and renewal terms under the Interagency Agreement and the anticipated remaining useful economic life of the equipment.

4. A statement certifying that the deferred payment commodity contract does not exceed the useful life of the equipment unless the contract provides for the replacement or the extension of the useful life of the equipment during the term of the loan.

5. If the equipment purchase financing term is beyond 5 years, the Agency must seek an exemption from the Program pursuant to Section 287.064(2), F.S. and seek an exemption according to Rule 69I-3.004, F.A.C.

6. Documentation to substantiate that the annualized amounts of any deferred payment commodity contract are supported from available recurring funds available to make the payments under the Interagency Agreement as they become due. Available recurring funds must be appropriated to the Agency in an appropriation category as defined in Section 287.064(11) F.S., determined by the Chief Financial Officer as appropriate, or designated by the Legislature for payment of the obligation incurred under Section 287.064 or 489.145, F.S., as applicable. In accordance with Section 216.023(4)(a)9., F.S., supporting information for any proposed consolidated financing of

deferred payment commodity contracts must also include a narrative describing and justifying the need, baseline for current costs, estimated cost savings, projected equipment purchases, estimated contract costs, and return on investment calculation.

7. Documentation to substantiate that the Agency or Educational Institution has complied with all applicable requirements to lawfully procure the equipment.

8. Documentation to substantiate that the purchase by deferred payment is economically beneficial to the State or that failure to make the purchase will adversely affect the Agency's or Educational Institution's performance of its duties.

(b) An Agency or Educational Institution financing the acquisition of equipment shall provide the information required in subsection (a) at least twenty-one days prior to the anticipated date of awarding the contract for such equipment.

(c) Any contract for equipment, the payment of which is anticipated to be made by deferred payment and the payment of interest, shall specify that the award of such contract is contingent upon approval pursuant to Section 287.063, F.S., unless specifically exempted pursuant to Rule 69I-3.004, F.A.C. and Section 287.064, F.S.

(3) The Chief Financial Officer may exempt any equipment from financing under the Program when alternative financing would be cost effective or otherwise beneficial to the State. The factors to be examined by the Chief Financial Officer to determine whether the equipment may be deemed exempt from the Program, as stated in Rule 69I-3.004, F.A.C.

(4) Agencies or Educational Institutions may use a Master Equipment Financing Agreement for Conservation Measures, pursuant to Section 287.064(10)(a), F.S., to finance the cost of energy, water, or wastewater efficiency and conservation measures in accordance with Section 489.145, F.S., excluding the costs of training, operation, and maintenance, for a term of repayment that may exceed 5 years but may not exceed 20 years. The term for repayment may not extend beyond the weighted average useful life of the Conservation Measures financed. The contract shall provide for the replacement or the extension of the useful life of the equipment during the term of repayment. An Agency or Educational Institution that desires to make deferred payment purchases of Conservation Measures shall make a written request to use a Master Equipment Financing Agreement for Conservation Measures. An Agency or Educational Institution requesting permission to use a Master Equipment Financing Agreement for Conservation Measures must submit to the Chief Financial Officer for preaudit review and approval based on the following:

(a) A completed Form DFS-A1-413 (for purchases under the Consolidated Equipment Financing Program for Conservation Measures) Application to Finance Conservation Measures (effective 5-4-10). Form DFS-A1-413 is hereby incorporated by reference and is available from the Division of Accounting and Auditing, Bureau of Accounting, 200 East Gaines Street, Tallahassee, Florida 32399-0354.

(b) Items in subparagraphs (2)(a)2. through 4. and 6. through 8. in paragraph (2)(a) above.

(5) If equipment is eligible for financing under more than one master equipment financing agreement, the Chief Financial Officer shall determine which Master Equipment Financing Agreement shall be utilized. The factors to be examined to determine whether the equipment is eligible for financing under more than one master equipment financing agreement shall include the following:

(a) The type or category of the equipment;

(b) The useful life of the equipment;

(c) The length of the proposed original term and renewal terms of the Interagency Agreement; and

(d) Availability of funds under the Master Equipment Financing Agreement.

(6) The Chief Financial Officer may, when stipulated in the Master Equipment Financing Agreement, automatically debit or otherwise collect from each Agency the rent payments on Interagency

Agreements. The payments or any fractional part thereof under an Interagency Agreement may be prorated by the Chief Financial Officer and, whether or not prorated, shall be payable on the commencement date of the Interagency Agreement and thereafter the rent payment may, when stipulated in the Master Equipment Financing Agreement, be automatically debited or otherwise collected pursuant to the Interagency Agreement.

(7) The Chief Financial Officer shall calculate and determine compliance with any interest rate limitations applicable to the Interagency Agreement or any Master Equipment Financing Agreement. For the purpose of determining compliance with interest rate limitations on any Interagency Agreement, interest rates shall not include administrative costs, surcharges and insurance expense related to the Program.

(8) For the purpose of determining the useful life of equipment, the factors to be considered by the Chief Financial Officer shall include the following:

- (a) The type or category of equipment;
- (b) Whether the equipment is new or used;
- (c) The condition of the equipment;
- (d) The period of intended use; and
- (e) Purpose of the equipment.

(9) The procedure for the negotiation and execution of Master Equipment Financing Agreements is as follows:

(a) Upon the receipt of a written request by the Chief Financial Officer, the Division of Bond Finance of the State Board of Administration shall negotiate Master Equipment Financing Agreements. The procurement and negotiation of Master Equipment Financing Agreements shall be according to Rule 19A-5.0035, F.A.C.

(b) Upon the Chief Financial Officer's acceptance of the terms and conditions of a Master Equipment Financing Agreement negotiated by the Division of Bond Finance, the Chief Financial Officer shall execute the Master Equipment Financing Agreement.⁶²

* * * *

Rule 69I-3.004

(1) For the purposes of this rule, the following definitions shall be used:

(a) "Agency", for purposes of this rule, means each department, agency, board and commission in the executive branch, and the judicial branch of Florida government. The legislative branch of Florida government is expressly exempt from this rule, pursuant to Section 287.063(3), F.S.

(b) "Chief Financial Officer" means the the head of the Department of Financial Services, whose deferred payment commodity contracting duties are carried out by and through its Division of Accounting and Auditing. However, the Chief Financial Officer's duty to execute the master equipment financing agreements is not delegated to the Division.

(c) "Financing Agreement" means the proposed financing agreement associated with deferred payment purchases for which exemption from using the Consolidated Equipment Financing Program is sought.

(d) "Program" means the Consolidated Equipment Financing Program, which shall consist of the program of financing the deferred payment purchases of equipment on behalf of the State or State Agencies pursuant to Section 287.064, F.S.

⁶²Fla. Admin. Code Ann. Rule 69I-3.001.

(2) An Agency that desires to make deferred payment purchases not using the Consolidated Equipment Financing Program shall make a written request for exemption from the Program and seek approval to obtain financing pursuant to Section 287.063, F.S.

(a) An Agency requesting exemption from the Program must submit to the Chief Financial Officer for preaudit review and approval the following:

1. A draft of the Financing Agreement for which an exemption from the program is sought.

2. A statement documenting whether the equipment is new or used and, if the equipment is used, whether the equipment is currently financed under an installment purchase contract approved by the Chief Financial Officer, including the date of approval by the Chief Financial Officer and the assigned Chief Financial Officer approval number.

3. A statement documenting the proposed original term and renewal terms under the proposed Financing Agreement and the anticipated remaining useful economic life of the equipment.

4. A statement documenting that the payment term in the proposed Financing Agreement does not exceed the useful life of the equipment or that the contract provides for the replacement or the extension of the useful life of the equipment during the term of the loan.

5. Documentation, including the amortization table for the proposed Financing Agreement, to substantiate that the interest rate of the Financing Agreement is lower than the interest rate offered by the Program and does not exceed the statutory ceiling contained in Section 287.063(1)(b), F.S.

6. If the equipment purchase price is beyond 5 years, documentation as authorized by Section 287.063(2)(b), F.S., to substantiate that the failure to make such deferred payment purchase would adversely affect the Agency in performance of its duties.

7. Documentation to substantiate that the annualized amounts of any Financing Agreement are supported from available recurring funds available to make the payments under the proposed Financing Agreement as they become due, appropriated to the Agency in an appropriation category as defined in Sections 287.063(5) and 287.064(11), F.S., or documentation that the Legislature has designated for payment of the obligation incurred under Section 287.063, F.S.

8. Documentation to substantiate that the Agency has complied with all applicable requirements to lawfully procure the equipment.

9. Unless waived by a formal Comptroller/Chief Financial Officer Memorandum, documentation to substantiate that the purchase by deferred payment is economically beneficial to the State or that failure to make the purchase will adversely affect the Agency's performance of its duties.

10. Documentation to substantiate type or category of equipment, condition of the equipment, the period of intended use and purpose of the equipment.

(b) An Agency financing the acquisition of equipment shall provide the information required in subsection (a) at least twenty-one days prior to the anticipated date of awarding the contract for such equipment.

(c) An Agency shall provide documentation to substantiate that the contract for equipment, the payment of which is anticipated to be made by deferred payment and the payment of interest, specifies that the award of such contract is contingent upon approval pursuant to Section 287.063, F.S.

(3) The Chief Financial Officer is authorized to determine that alternative financing would be cost-effective or otherwise beneficial to the state pursuant to Section 287.064(2), F.S., and thus exempt any equipment from financing under the Program. The factors to be examined by the Chief Financial Officer to determine whether the equipment may be deemed exempt from the Program shall include the following:

(a) The nature of the equipment in accordance with Section 287.063(1)(a), F.S.;

(b) The useful life of the equipment in accordance with Sections 287.063(2)(b), (3), F.S., which shall include a determination of the following:

1. The type or category of equipment;
2. Whether the equipment is new or used;
3. The condition of the equipment;
4. The period of intended use; and
5. Purpose of the equipment;

(c) The length of the proposed original term and renewal terms of the proposed Financing Agreement in accordance with Sections 287.063(2)(b), (3), F.S.;

(d) Availability of funds under the Program in accordance with Section 287.063(5), F.S.;

(e) Impact on the federal tax exemption of the interest portion of the consolidated rent payments under the proposed alternative financing in accordance with 26 CFR 1.103-1; and

(f) The alternative financing costs.

(4) The Chief Financial Officer shall calculate and determine compliance with any interest rate limitations applicable to the Financing Agreement that is determined to be exempt from the Program. For the purpose of determining compliance with interest rate limitations on any proposed Financing Agreement, interest rates shall not include administrative costs, surcharges and insurance expense related to the financing, which is determined to be exempt from the Program in accordance with Sections 287.063(1)(b) and 287.063(2)(b)1., F.S.⁶³

The Department of Management Services is empowered to “control and approve” the “purchase, lease, or acquisition” of telecommunications equipment.⁶⁴ Under statutes covering procurement of personal property, Chapter 287, the term “commodity” used therein includes equipment and information technology “purchased, leased, or otherwise contracted for by the state and its agencies.”⁶⁵ Information technology purchases by state agencies that exceed a total cost of \$250,000 must be reviewed by the Agency for State Technology unless specifically mandated by the legislature.⁶⁶ The Agency for State Technology manages the state data center and “collaborates” with the Department of Management Services in overseeing acquisitions of information technology by agencies of the state for conformance with established standards.⁶⁷

⁶³*Id.* Rule 69I-3.004.

⁶⁴*Id.* § 282.702. “Telecommunications” means the science and technology of communication at a distance, including electronic systems used in the transmission or reception of information. *Id.* § 282.0041(25).

⁶⁵*Id.* § 287.012(5). (The term also includes interest on deferred-payment commodity contracts approved pursuant to s. 287.063 entered into by an agency for the purchase of other commodities.) “Information technology” means “equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate information of any kind or form.” *Id.* § 282.0041(11).

⁶⁶*Id.* § 282.0051.

⁶⁷*Id.*

Purchasing categories are created by statute by threshold amount⁶⁸ and the purchase and lease-purchase of commodities and contractual services are overseen extensively by the Department of Management Services.⁶⁹

Chapter 287 contains numerous restrictions regarding commodities contract documents. For example, one section provides: "Each state agency shall include in its standard contract document a requirement that any state funds provided for the purchase of or improvements to real property are contingent upon the contractor or political subdivision granting to the state a security interest in the property at least to the amount of state funds provided for at least 5 years from the date of purchase or the completion of the improvements or as further required by law."⁷⁰ Another provides: "No executive branch public officer or employee shall enter into any contract on behalf of the state, which contract binds the state or its executive agencies for the purchase of services or tangible personal property for a period in excess of 1 fiscal year, unless the following statement is included in the contract: 'The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.'"⁷¹

Statutes in the title on taxation and finance further provide:

(1) No agency or branch of state government shall contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency or branch unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void.

(2) Any person who willfully contracts to spend, or enters into an agreement to spend, any money in excess of the amount appropriated to the agency or branch for whom the contract or agreement is executed is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.⁷²

The corrections department has specific statutory authority to enter into

. . . lease-purchase agreements to provide correctional facilities for the housing of state inmates. However, no such lease-purchase agreement shall be entered into without specific legislative authorization of that agreement, and funds must be specifically appropriated for each lease-purchase agreement. The facilities provided through such agreements shall meet the program plans and specifications of the department. The department may enter into such lease agreements with private corporations and other governmental entities. However, notwithstanding the provisions of s. 255.25(3)(a), no such lease agreement may be entered into except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder.⁷³

The juvenile justice department, subject to competitive bidding requirements and subject to numerous restrictions, may lease-purchase juvenile justice facilities.⁷⁴

The Department of Management Services may acquire land and buildings for the use of state government with legislative approval. Title is in the Board of Trustees of the Internal Improvement Trust Fund for the use and benefit of the State of Florida.⁷⁵

⁶⁸*Id.* § 287.017((1) Category One: \$20,000; (2) Category Two: \$35,000; (3) Category Three: \$65,000; (4) Category Four: \$195,000; (5) Category Five: \$325,000).

⁶⁹*Id.* § 287.042.

⁷⁰*Id.* § 287.05805.

⁷¹*Id.* § 287.0582.

⁷²*Id.* § 216.311.

⁷³*Id.* § 944.10 (3).

⁷⁴*Id.* § 985.682(11)(b) and (c).

⁷⁵*Id.* § 272.122.

Higher Education

University and Florida college system institution boards of trustees⁷⁶ have the power of eminent domain.⁷⁷

Purchases and leases by state universities must comply with the law and regulations of the Board of Governors.⁷⁸

The Board of Governors shall develop guidelines for university boards of trustees relating to the acquisition of real and personal property and the sale and disposal thereof and the approval and execution of contracts for the purchase, sale, lease, license, or acquisition of commodities, goods, equipment, contractual services, leases of real and personal property, and construction. The acquisition may include purchase by installment or lease-purchase. Such contracts may provide for payment of interest on the unpaid portion of the purchase price. Title to all real property acquired prior to January 7, 2003, and to all real property acquired with funds appropriated by the Legislature shall be vested in the Board of Trustees of the Internal Improvement Trust Fund and shall be transferred and conveyed by it. Notwithstanding any other provisions of this subsection, each board of trustees shall comply with the provisions of s. 287.055 for the procurement of professional services as defined therein. Any acquisition pursuant to this paragraph is subject to the provisions of s. 1010.62.⁷⁹

College system institutions may purchase and lease real and personal property if in compliance with the law and rules of the State Board of Education and the policies of the system board of trustees “and are for the implementation of approved programs.”⁸⁰ College System institutions may not expend public funds for the acquisition of additional property without the specific approval of the Legislature.⁸¹

Florida college system institution boards of trustees may choose to consolidate equipment contracts under master equipment financing agreements made pursuant to Florida Statutes Section 287.064, discussed *supra*:

Each board of trustees is authorized to contract for the purchase, sale, lease, license, or acquisition in any manner, including purchase by installment or lease-purchase contract which may provide for the payment of interest on the unpaid portion of the purchase price and for the granting of a security interest in the items purchased, subject to the provisions of subsection (38) and ss. 1009.22 and 1009.23, of goods, materials, equipment, and services required by the Florida College System institution. The board of trustees may choose to consolidate equipment contracts under master equipment financing agreements made pursuant to s. 287.064.⁸²

State universities and college system institutions can elect to participate in the state’s consolidated equipment financing program, by which they are subject to the program requirements for exemption from the state’s program. It appears that such an election has been made.

Florida college system institution boards of trustees are authorized to

⁷⁶There is a university system, governed by a board of governors. A board of trustees administers each university. Fla. Const. art. 9, § 7. There is a state college system. *Id.* art. 9, § 8. Each institution within it is governed by a local board of trustees. Fla. Stat. Ann. § 1001.60. Community colleges are encompassed in the state college system. *Id.* § 1000.21(3). Institutions in both systems are enumerated in section 1000.21.

⁷⁷*Id.* § 1013.25.

⁷⁸*Id.* § 1010.04(1)(c).

⁷⁹*Id.* § 1001.706(7). Section 1010.62 concerns revenue bonds and debt. The definition of “debt” therein is broad enough to include lease-purchase agreements, certificates of participation, installment sales, leases, or any other financing mechanisms.

⁸⁰*Id.* § 1010.04(1)(a); § 1001.65.

⁸¹*Id.* § 1013.40.

⁸²*Id.* § 1001.64(26).

enter into short-term loans and installment, lease-purchase, and other financing contracts for a term of not more than 5 years, including renewals, extensions, and refundings. Payments on short-term loans and installment, lease-purchase, and other financing contracts pursuant to this subsection shall be subject to annual appropriation by the board of trustees. Each board of trustees is authorized to borrow funds and incur long-term debt, including promissory notes, installment sales agreements, lease-purchase agreements, certificates of participation, and other similar long-term financing arrangements, only as specifically provided in ss. 1009.22(6) and (9) and 1009.23(11) and (12). At the option of the board of trustees, bonds issued pursuant to ss. 1009.22(6) and (9) and 1009.23(11) and (12) may be secured by a combination of revenues authorized to be pledged to bonds pursuant to such subsections. Revenue bonds may not be secured by or paid from, directly or indirectly, tuition, financial aid fees, the Florida College System Program Fund, or any other operating revenues of a Florida College System institution. Lease-purchase agreements may be secured by a combination of revenues as specifically authorized pursuant to ss. 1009.22(7) and 1009.23(10).⁸³

College system boards of trustees may lease-purchase grounds and buildings other than dormitories:

Each board of trustees may enter into lease-purchase arrangements with private individuals or corporations for necessary grounds and buildings for Florida College System institution purposes, other than dormitories, or for buildings other than dormitories to be erected for Florida College System institution purposes. Such arrangements shall be paid from capital outlay and debt service funds as provided by s. 1011.84(2), with terms not to exceed 30 years at a stipulated rate. The provisions of such contracts, including building plans, are subject to approval by the Department of Education, and no such contract may be entered into without such approval.⁸⁴

Educational facilities and sites may be lease-purchased by university boards of trustees, subject to numerous restrictions.⁸⁵

University boards of trustees also have broad authority to lease out property to be leased back as a means of financing improvements thereto⁸⁶ A state university or direct-support organization⁸⁷ may not issue debt⁸⁸ without the approval of the Board of Governors.⁸⁹ The Board of Governors may approve the issuance of debt by a state university or a direct-support organization only when such debt is used to finance or refinance capital outlay projects.⁹⁰ The debt may be secured by or payable only from those revenues authorized for such purpose....⁹¹ “The maturity of debt used to finance or refinance the acquisition of equipment or software, including any extensions, renewals, or refundings thereof, shall be limited to 5 years or the estimated useful life of the equipment or software, whichever is shorter.”⁹²

⁸³*Id.* § 1001.64(38) (statutory cross-references within this section refer to different sources of revenue for payment of installments of lease-purchase agreements).

⁸⁴*Id.* § 1001.64(36).

⁸⁵*Id.* § 1013.15(3).

⁸⁶*Id.* § 1013.171.

⁸⁷“Direct-support organization” means an organization created pursuant to s. 1004.28 (A Florida corporation not for profit incorporated under the provisions of chapter 617 and approved by the Department of State) or any entity specifically established to incur debt. *Id.* § 1010.62(1)(d).

⁸⁸“Debt” means . . . lease-purchase agreements, certificates of participation, installment sales, leases, or any other financing mechanism or financial arrangement, whether or not a debt for legal purposes, for financing or refinancing for or on behalf of a state university or a direct-support organization or for the acquisition, construction, improvement, or purchase of capital outlay projects. *Id.* § 1010.62(1)(c).

⁸⁹*Id.* § 1010.62(3)(a).

⁹⁰“Capital outlay project” means: “1. Any project to acquire, construct, improve, or change the functional use of land, buildings, and other facilities, including furniture and equipment necessary to operate a new or improved building or facility. 2. Any other acquisition of equipment or software.” *Id.* § 1010.62(1)(b).

⁹¹*Id.* § 1010.62(3)(a).

⁹²*Id.*

State universities may lease-purchase equipment and software in accordance with the “deferred-purchase” provisions in chapter 287 (relating to public procurement) without the approval of the Board of Governors.⁹³

Energy Performance Contracting

State entities may contract for energy, water, and wastewater efficiency and conservation measures in agency facilities, subject to numerous restrictions.⁹⁴ These contracts are subject to review and approval of the Chief Financial Officer.⁹⁵ A master equipment financing agreement may be used to finance the cost of energy, water, or wastewater efficiency and conservation measures.⁹⁶ The Office of the Chief Financial Officer may develop model agreements and related forms that affected state agencies shall use, and others may use, to affect a purchase under contracts for conservation measures.⁹⁷

Florida College System institutions and state universities may enter into contracts for energy conservation measures under the statute applicable to school districts, subject to numerous restrictions.⁹⁸

Debt Limitations

The state, counties, school districts and municipalities are constitutionally limited in the creation of indebtedness.⁹⁹ Lease-purchase agreements should specifically provide that they are payable from “sources other than ad valorem taxes.”¹⁰⁰

In *Frankenmuth v. Magaha*,¹⁰¹ the Florida Supreme Court held that a nonsubstitution clause in a lease-purchase agreement entered into by the Escambia County Comptroller violated Article VII, Section 12 of the Florida Constitution.

Granting a security interest in the financed property can cause a violation of constitutional debt limitations. The attorney general has said that a municipality may not create a security interest in a lease which will “coerce a tax in order to prevent the loss of an asset to the city.”¹⁰²

In *Nohrr v. Brevard County Educational Facilities Authority*,¹⁰³ the Florida Supreme Court, in validating revenue bonds issued by a county educational facilities authority, deleted provisions of the trust indenture relating to a mortgage of the project and the accompanying right of foreclosure of the project. The project was being leased to a non-profit corporation, not a public entity, but the court in its holding

⁹³*Id.* § 1010.62(3)(c).

⁹⁴*Id.* § 489.145.

⁹⁵*Id.* § 287.064.

⁹⁶*Id.* § 287.064(10)(a).

⁹⁷*Id.* § 489.145.

⁹⁸Fla. Stat. Ann § 1013.23 (colleges and universities).

⁹⁹Fla. Const. art. 7, § 11 (state); *Id.* art. 7, § 12 (local governments) (requiring voter approval).

¹⁰⁰*State v. Orange County*, 281 So.2d 310, 313 (Fla. 1973); *State v. Board of Pub. Instruction*, 214 So.2d 723, 724 (Fla. 1968); *see also State v. Volusia County School Bldg. Auth.*, 60 So.2d 761 (Fla. 1952). The court held unconstitutional the legislation, bonds and lease contract under which the authority would issue bonds and then lease the acquired facility to the school district. It is not clear whether any nonappropriation language was present in the lease contract. The court noted, “[i]t is a matter of common knowledge that the Board of Public Instruction is possessed of no funds except those raised by taxation or that arise from appropriations by the legislature for specific purposes designated by law.” *Id.* at 761.

¹⁰¹769 So.2d 1012 (Fla. 2000). The 11th Circuit Court of Appeals later held that the lease-purchase agreement at issue was valid and binding on the county, because (1) the invalid non-substitution clause was severable, and (2) based on the Florida Supreme Court’s three-part test (*see, supra*, note 9 and accompanying text) the county board had ratified the agreement. *Frankenmuth v. Escambia County*, 289 F.3d 723 (11th Cir. 2002).

¹⁰²1980 Op. Att’y Gen. (Fla. Jan. 31, 1980) (available on Lexis, States Library, Fla. file); 1988 Op. Att’y Gen. 53 (Fla. Nov. 29, 1988) (available on Lexis, States Library, Fla. file).

¹⁰³247 So.2d 304 (Fla. 1971).

emphasized that if the authority had leased to a public entity, then there would be compulsion on the public entity to levy a tax to prevent foreclosure on the project.¹⁰⁴ In *Nohrr*, the court approved of a mechanism where no mortgage and right of foreclosure was involved and in which the trustee under the trust indenture was empowered in the event of default to sell a portion of the property on the part of the authority.¹⁰⁵

In *State of Florida v. Brevard County*,¹⁰⁶ the Florida Supreme Court upheld the circuit court's validation of a certificate of participation lease-purchase equipment financing. Brevard County created a not-for-profit corporation to serve as its lessor. The essential terms of the agreement follow. The county's obligation to make payments is secured solely by "non-ad valorem revenues actually budgeted for such purpose during any fiscal year."¹⁰⁷ The lessor assigns to a trustee its right to receive lease payments. Title transfers to the lessee at the end of the lease. The county will purchase the leased equipment on behalf of the lessor pursuant to an agency agreement. The lease is subject to annual appropriation. In the event of termination, the county has the prior right to prepay the lease payments and acquire the property. If the lease is terminated, the lessor may sell or relet the leased equipment. Any moneys received by the lessor in excess of the county's remaining obligations under the lease will be returned to the county. The lease does not contain a nonsubstitution clause. The court distinguished *Nohrr v. Brevard County Educational Facilities Authority*¹⁰⁸ stating that (i) "[t]here is no prohibited security interest with right of foreclosure," (ii) "[t]he county is simply renting equipment under the lease," (iii) there is no compulsion to keep the lease current since there is no forfeiture of equity, and (iv) the county maintains full budgetary flexibility by its annual renewal option.¹⁰⁹

In 1990, the Florida Supreme Court rendered a decision¹¹⁰ in three consolidated validation proceedings. *Orange County School Board v. State of Florida*¹¹¹ involved a lease-purchase financing with an unaffiliated not-for-profit corporation as lessor. The lessor was to issue lease revenue bonds payable from revenues from the lease with the school board and secured by a mortgage of the lessor's interest in the property under the lease. The lease was subject to annual appropriation and was payable from ad valorem tax-based revenues. *Sarasota County School Board v. State of Florida*¹¹² involved a lease-purchase financing with an affiliated not-for-profit corporation as lessor. The lessor was to issue lease revenue bonds payable from revenues from the lease with the school board and secured by a mortgage of the lessor's interest in the property under the lease. The lease was subject to annual appropriation and was payable from ad valorem tax based revenues. *Collier County School Board v. State of Florida*¹¹³ involved a lease-purchase financing with an affiliated not-for-profit corporation as lessor. The lessor's interest in the lease was to be certificated by the creation of certificates of participation. The lease was subject to annual appropriation and was payable from ad valorem tax based revenues.

The court decided that the lease revenue bonds and the certificates of participation could be validated under Chapter 75 of the Florida Statutes.¹¹⁴ It decided that Article VII, Section 12 of the Florida Constitution does not require referendum approval for the revenue bonds' validation. The court held that

¹⁰⁴In *Wilson v. Palm Beach County Housing Auth.*, 503 So.2d 893 (Fla. 1987), the court receded from *Nohrr* and held that where the authority did not have ad valorem taxing authority it could mortgage the project.

¹⁰⁵*Nohrr*, 247 So.2d at 311.

¹⁰⁶539 So.2d 461 (Fla. 1989).

¹⁰⁷*Id.* at 462.

¹⁰⁸*See, supra*, notes 103-105 and accompanying text.

¹⁰⁹539 So.2d at 464.

¹¹⁰*State v. School Bd. of Sarasota County*, 561 So.2d 549 (Fla. 1990).

¹¹¹No. 75154 (Fla.).

¹¹²No. 74979 (Fla.).

¹¹³No. 75009 (Fla.).

¹¹⁴561 So.2d 549, 552.

the obligations are not supported by the pledge of ad valorem taxation, and thus were not “payable from ad valorem taxation” within the meaning of Article VII, Section 12.¹¹⁵ Although the agreements were in fact supported in part by ad valorem revenues, the agreements expressly provided that the use of the ad valorem taxing power to service bonds cannot be compelled. The court further decided that provisions in the lease agreements giving the boards freedom to decide anew each year whether to appropriate funds for the lease payments exempted the obligations from the referendum requirement of Article VII, Section 12.¹¹⁶

Interest Rate Limitations

All contracts for amounts less than \$500,000 are subject to an interest limitation of 18 percent per annum simple interest.¹¹⁷ Charging interest at rates in excess of 25 percent per annum is criminal usury.¹¹⁸

Bonds¹¹⁹ issued by a governmental unit¹²⁰ “may bear interest at a rate not to exceed an average net interest cost rate, which shall be computed by adding 300 basis points to The Bond Buyer ‘20 Bond Index’ published immediately preceding the first day of the calendar month in which the bonds are sold.”¹²¹

Miscellaneous

The Supreme Court recently reversed a lower appellate court ruling and held that property, in which the Authority had an equitable ownership, was exempt from property taxation.¹²² The Authority, as lessee, leased the property pursuant to a lease with option to purchase, and financing of the project involved the execution and delivery of certificates of participation. Leasehold interests in property of the state or any political subdivision, municipality, agency, authority, or other public body corporate of the state are subject to taxation unless expressly exempted.¹²³ Leasehold interests may be exempted from ad valorem taxation, subject to numerous restrictions.¹²⁴ In Florida, lease-purchase agreements with municipalities, political subdivisions and state agencies appear to be fully exempt from documentary stamp taxes and excise taxes.¹²⁵

Florida requires that a “Truth-in-Bonding” statement be prepared for both state¹²⁶ and local bonds.¹²⁷ The lender has to provide certain information and sign the document. Failure to comply does not affect validity. The definition of “obligation” in the provision applicable for the state includes lease-

¹¹⁵*Id.* at 522-53.

¹¹⁶*Id.* at 552, 553.

¹¹⁷*Id.* Fla. Stat. Ann. § 687.02.

¹¹⁸*Id.* § 687.071(2).

¹¹⁹“Bonds” include general obligation bonds, revenue bonds, bond anticipation notes, limited revenue bonds and special assessment bonds. Fla. Stat. Ann. § 215.84(2)(b). Limited revenue bonds are obligations payable from “funds of the governmental unit, exclusive of ad valorem taxes, special assessments, or earnings from such projects or improvements.” *Id.* § 215.84(2)(b)4.

¹²⁰“Governmental unit” includes a department, board, commission, or other agency of the state, counties, municipalities and school districts. *Id.* § 215.84(2)(a).

¹²¹*Id.* § 215.84(3). The State Board of Administration may authorize an interest rate in excess of the maximum rate. *Id.* § 215.84(4). The section also provides for variable interest rates. *Id.* § 215.84(3).

¹²²*Leon County Educational Facilities Authority v. Hartsfield*, 698 So.2d 526 (Fla. 1997). *See also* *Barnett v. Dept. of Management Services*, 931 So.2d 121 (Fla. App. 2006) (similar result of exemption of property from real property taxes for lease-purchase of state prison).

¹²³Fla. Stat. Ann. § 196.001.

¹²⁴*Id.* § 196.199.

¹²⁵*See* Fla. Stat. Ann. §§ 201.01, 201.24 and Op. Att’y Gen. (Fla. July 25, 1975).

¹²⁶*Id.* § 216.0442.

¹²⁷*Id.* § 218.385.

purchase agreements.¹²⁸ That definition is not in the local government statute,¹²⁹ but the form includes the word obligation and creates an implication and expectation that the lessor must provide information and sign it, as well, and as discussed below, the definition of “limited revenue bond” has been argued by bond counsel to pick up lease-purchase agreements.

Given that the definition of “limited revenue bond” is “any obligation issued by a unit to pay the cost of a project or improvement thereof, or combination of one or more projects or improvements thereof, and payable from funds, exclusive of ad valorem taxes, special assessments, or earnings from such projects or improvements,”¹³⁰ it appears that any finder’s fees may need to be disclosed for a lease-purchase agreement or certificate of participation transaction. Failure to disclose is a third degree felony:

(1)(a) As used in this section, “finder” means a person who is not regularly employed by, or not a partner or officer of, an underwriter, bank, banker, or financial consultant or adviser and who enters into an understanding with either the issuer or the managing underwriter, or both, for any paid or promised compensation or valuable consideration directly or indirectly, expressly or impliedly, to act solely as an intermediary between such issuer and managing underwriter for the purpose of influencing any transaction in the purchase of such bonds.

(b) No underwriter, commercial bank, investment banker, or financial consultant or adviser shall pay any finder any bonus, fee, or gratuity in connection with the sale of general obligation bonds or revenue bonds issued by any unit of local government, unless full disclosure is made to the unit of local government prior to or concurrently with the submission of a purchase proposal for bonds by the underwriter, commercial bank, investment banker, or financial consultant or adviser and subsequently in the official statement or offering circular, if any, detailing the name and address of any finder and the amount of bonus, fee, or gratuity paid to such finder.

(2) The willful violation of this section is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.¹³¹

In addition, payment of finder’s fees is not permitted for the sale of bonds by a unit of local government, which might include lease-purchase agreements.¹³² We did not see a similar restriction on payment for state bonds. Payment of a finder’s fee is a felony. However, the payment of the finder’s fee does not affect validity of the bonds.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹²⁸*Id.* § 216.0442.

¹²⁹*Id.* § 218.369.

¹³⁰*Id.* § 218.31(12) (“Limited revenue bonds” means any obligations issued by a unit to pay the cost of a project or improvement thereof, or combination of one or more projects or improvements thereof, and payable from funds, exclusive of ad valorem taxes, special assessments, or earnings from such projects or improvements.)

¹³¹*Id.* § 218.386. *See also*, Fla. Admin. Code Ann. Rules 19A-1 and 19A-5.

¹³² *Id.* § 218.386.

GEORGIA 2019

The Statutes and Constitution are current with legislation passed during the 2018 Regular and Special Sessions of the Georgia General Assembly. The statutes are subject to changes by the Georgia Code Commission, Westlaw.¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal tax law due to their tax,² eminent domain,³ and police powers.⁴ “It is the duty of the county governing authorities to erect or repair, when necessary, their respective courthouses and jails and all other necessary county buildings and to furnish each with all the furniture necessary for the different rooms, offices, or cells.”⁵ Counties may contract for the construction or repair of public works.⁶ Counties may dispose “of any real property which may lawfully be disposed of”⁷ by advertising and selling to the highest bidder.⁸ An attorney general opinion has said that counties may lease “unserviceable” county property “provided that the relationship . . . is merely one of landlord and tenant.”⁹

Counties are authorized to enter into lease-purchase contracts:¹⁰

(a) Each county or municipality in this state shall be authorized to enter into multiyear lease, purchase, or lease-purchase contracts of all kinds for the acquisition of goods, materials, real and personal property, services, and supplies, provided that any such contract shall contain provisions for the following:

(1) The contract shall terminate absolutely and without further obligation on the part of the county or municipality at the close of the calendar or fiscal year in which it was executed and at the close of each succeeding calendar or fiscal year for which it may be renewed as provided in this Code section;

(2) The contract may provide for automatic renewal unless positive action is taken by the county or municipality to terminate such contract, and the nature of such action shall be determined by the county or municipality and specified in the contract;

(3) The contract shall state the total obligation of the county or municipality for the calendar or fiscal year of execution and shall further state the total obligation which will be incurred in each calendar or fiscal year renewal term, if renewed; and

(4) The contract shall provide that title to any supplies, materials, equipment, or other personal property shall remain in the vendor until fully paid for by the county or municipality.

(b) In addition to the provisions enumerated in subsection (a) of this Code section, any contract authorized by this Code section may include:

(1) A provision which requires that the contract will terminate immediately and absolutely at such time as appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of the county or municipality under the contract; or

¹Counties in Georgia have home rule powers. Ga. Const. art. 9, § 2, ¶1.

²*Id.* § 4, ¶1.

³*Id.* § 2, ¶5.

⁴*Id.* § 2, ¶3.

⁵Ga. Code Ann. § 36-9-5; *see also id.* § 36-9-7 (duty to provide supplies for offices of the officers in the courthouse of the county).

⁶*Id.* §§ 36-10-2.1, 36-10-2.2; 36-91-20 (bidding and contract requirements) (ch. requirements not applicable to projects costing less than \$100,000).

⁷*Id.* § 36-9-2.

⁸*Id.* § 36-9-3. There are numerous details and exceptions including an exception for the “sale, transfer or conveyance to a nonprofit corporation in order to effectuate a lease-purchase transaction under section 36-60-13 (*see infra* note 10).” *Id.*

⁹U77-2 Op. Att’y Gen. (Ga. Jan. 14, 1977) (unofficial) (available on Lexis, States library, Ga. file).

¹⁰Ga. Code Ann. § 36-60-13.

- (2) Any other provision reasonably necessary to protect the interests of the county or municipality.
- (c) Any contract developed under this Code section containing the provisions enumerated in subsection (a) of this Code section shall be deemed to obligate the county or municipality only for those sums payable during the calendar or fiscal year of execution or, in the event of a renewal by the county or municipality, for those sums payable in the individual calendar or fiscal year renewal term.
- (d) No contract developed and executed pursuant to this Code section shall be deemed to create a debt of the county or municipality for the payment of any sum beyond the calendar or fiscal year of execution or, in the event of a renewal, beyond the calendar or fiscal year of such renewal.
- (e) No contract developed and executed pursuant to this Code section may be delivered if the principal portion of such contract, when added to the amount of debt incurred by any county or municipality pursuant to Article IX, Section V, Paragraph I of the Constitution of Georgia, exceeds 10 percent of the assessed value of all taxable property within such county or municipality.
- (f) No contract developed and executed pursuant to this Code section may be delivered if the real or personal property being so financed has been the subject of a referendum which failed to receive the approval of the voters of the county or municipality within the immediately preceding four calendar years, unless such real or personal property is required to be financed pursuant to a federal or state court order, or imminent threat thereof, as certified by the governing authority of the county or municipality.
- (g) No contract developed and executed pursuant to this Code section with respect to the acquisition of real property may be delivered unless a public hearing has been held by the county or municipality after two weeks' notice published in a newspaper of general circulation within the county or municipality.
- (h)
- (1) On or after July 1, 2000, no contract developed and executed or renewed, refinanced, or restructured pursuant to this Code section with respect to real property may be delivered if the lesser of either of the following is exceeded:
- (A) The average annual payments on the aggregate of all such outstanding contracts exceed 7.5 percent of the governmental fund revenues of the county or municipality for the calendar year preceding the delivery of such contract plus any available special county 1 percent sales and use tax proceeds collected pursuant to Code Section 48-8-111; or
- (B) The outstanding principal balance on the aggregate of all such outstanding contracts exceeds \$25 million; provided, however, that with respect to any county or municipality in which, prior to July 1, 2000, the outstanding principal balance on the aggregate of outstanding contracts exceeds \$25 million, such outstanding contracts may be renewed, refinanced, or restructured, but no new contracts shall be developed and executed until the outstanding principal balance on such outstanding contracts has been reduced so that the \$25 million limitation of this subparagraph, or the limitation in subparagraph (A) of this paragraph, whichever is lower, is not exceeded.
- (2) Paragraph (1) of this subsection shall not apply to contracts developed and executed or renewed, refinanced, or restructured pursuant to this Code section which are for projects or facilities:
- (A) For the housing of court services, where any other state law or laws authorize the project or facility to be financed and paid for from the collection of fines rather than from tax revenues; or
- (B) Which have been previously approved in the most recent referendum calling for the levy of a special county 1 percent sales and use tax pursuant to Part 1 of Article 3 of Chapter 8 of Title 48.
- (i) Any such contract may provide for the payment by the county or municipality of interest or the allocation of a portion of the contract payment to interest, provided that the contract is in compliance with this Code section.
- (j) Nothing in this Code section shall restrict counties or municipalities from executing reasonable contracts arising out of their proprietary functions.

The Court of Appeals has held that the provision of a multiyear computer lease which provided that the county's obligation to make lease payments was "absolute and unconditional in all events," and which further provided that the county "intends to continue the lease term through the original term and all of the renewal terms and to pay the lease purchase payments hereunder" did not comply with § 36-60-13(a)(1).¹¹ The events in this case occurred prior to amendments of this section. This statute allowed multiyear lease purchase contracts without voter approval in certain strictly limited circumstances.

Counties are authorized to accept title to property subject to lease-purchase or installment purchase contracts and they are authorized to transfer title back to the vendor in the event the contract is not consummated.¹²

In *Daniel v. Douglas County*, defendant owned property sought by Douglas County for a public park. The county was to make annual payments for five years and upon the fifth payment, make an additional payment of ten dollars to purchase the property. Defendant asserted that the option to purchase was not exercised. The court held the agreement was an installment sale and granted relief of specific performance to the county.¹³

Energy Performance Contracting

State agencies and educational institutions, counties, municipalities and school districts¹⁴ may enter into lease-purchase agreements to finance the costs of a guaranteed energy savings performance contract¹⁵ for a period of time not to exceed 20 years, subject to numerous restrictions.¹⁶

Municipalities

Municipalities¹⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁸ eminent domain¹⁹ and police powers.²⁰ The legislation concerning lease-purchasing by counties is also applicable to municipalities, allowing lease-purchase contracts without voter approval in certain strictly limited circumstances.²¹ Municipalities may "accept by gift, acquire, construct, [and] lease," streets, parks and public buildings.²² Municipalities are authorized "to acquire by gift [or] by purchase, . . . to construct [and] to improve . . . any water or sewage system."²³ Municipalities are also authorized "to enter into valid and binding lease agreements" for libraries,²⁴ botanical gardens²⁵ and zoos.²⁶ Municipalities with populations of at least 200,000 may purchase or acquire real property "partly for cash, with the balance on time or deferred payments" and may secure the "note or claim for deferred payments

¹¹Waskoff v. Douglas County, 488 S.E.2d 722, (Ga. App. 1997).

¹²Ga. Code Ann. § 36-60-15.

¹³401 S.E.2d 508 (Ga. 1991).

¹⁴Ga. Code Ann. § 50-37-2.

¹⁵*Id.* § 50-37-3.

¹⁶*Id.* § 50-37-4. Ga. Const. Art. 7, § 4, ¶ 12 authorizes the General Assembly to authorize state governmental entities to incur debt for the purpose of entering into multiyear contracts for energy efficiency or conservation improvement projects.

¹⁷Municipalities for purposes of this discussion are cities, towns, municipalities and villages. Ga. Code Ann. § 36-30-1. Municipalities also have home rule powers. Ga. Code Ann. § 36-35-1 to -8.

¹⁸Ga. Const. art. 9, § 4, ¶ 1.

¹⁹*Id.* § 2, ¶ 5.

²⁰*Id.* § 2, ¶ 3.

²¹*See, supra*, text accompanying notes 10 and 11.

²²Ga. Code Ann. § 36-34-3.

²³*Id.* § 36-34-5.

²⁴*Id.* § 36-34-5.1 (with nonprofit corporations classified as public foundations under the Internal Revenue Code).

²⁵*Id.* § 36-34-5.2 (municipalities with a population in excess of 300,000).

²⁶*Id.* § 36-34-5.3 (municipalities with a population in excess of 300,000).

and interest thereon with mortgages or deed of trust” as long as not “a charge against the general credit of the city.”²⁷ Municipalities may contract for the construction or repair of public works.²⁸ Municipalities may dispose of real and personal property if certain public bidding procedures are followed.²⁹

Municipalities are authorized to accept title to property subject to lease-purchase or installment purchase contracts and they are authorized to transfer title back to the vendor in the event the contract is not consummated.³⁰

Energy Performance Contracting

Municipalities may enter into lease-purchase agreements to finance the costs of a guaranteed energy savings performance contract for a period of time not to exceed 20 years, subject to numerous restrictions.³¹

School Districts

School districts³² qualify as tax-exempt issuers for federal income tax purposes due to their tax³³ and eminent domain powers.³⁴ School districts may “purchase, lease or rent school sites,” and may “purchase maps, globes and school furniture.”³⁵ School districts have the “authority to enter into contracts and lease agreements for the use of any structure, building or facilities” with the Georgia Education Authority.³⁶ All public school construction contracts in excess of \$100,000 must be publicly advertised and awarded through an open and competitive process, regardless of the funding source.³⁷ The authority has the power to “acquire by purchase, lease, or otherwise and to hold, lease, and dispose of real and personal property.”³⁸ The property, income and interest paid on the bonds of the authority are exempt from taxation within the state.³⁹

Schools are additionally authorized to enter into lease-purchase contracts:

(b) Except as otherwise provided in this Code section, each county, independent, or area school system in this state shall be authorized to enter into multiyear lease, purchase, or lease purchase contracts of all kinds for the acquisition of goods, materials, real and personal property, services, and supplies, provided that any such contract shall contain provisions for the following:

(1) The contract shall terminate absolutely and without further obligation on the part of the school system at the close of the calendar year in which it was executed and at the close of each succeeding calendar year for which it may be renewed as provided in this Code section;

²⁷*Id.* § 36-37-6.2(b).

²⁸*Id.* §§ 36-10-2.1, 36-10-2.2; 36-91-20 (bidding and contract requirements) (municipalities shall execute and enter into contracts in the manner provided in applicable local legislation or by ordinance); 36-91-22 (ch. requirements not applicable to projects costing less than \$100,000).

²⁹*Id.* § 36-37-6(a); *see also id.* § 36-37-6.1 (municipalities with a population in excess of 300,000).

³⁰*Id.* § 36-60-15.

³¹*See, supra*, notes 14-16 and accompanying text.

³²School districts for purposes of this discussion are county boards of education. *Id.* § 20-2-50. This discussion excludes independent school systems.

³³Ga. Const. art. 9, § 5, ¶6.

³⁴Ga. Code Ann. § 20-2-521.

³⁵*Id.* § 20-2-520.

³⁶*Id.* § 20-2-553(5).

³⁷*Id.* § 20-2-520.

³⁸*Id.* § 20-2-553(2).

³⁹*Id.* § 20-2-571.

- (2) The contract may provide for automatic renewal unless positive action is taken by the school system to terminate such contract, and the nature of such action shall be determined by the school system and specified in the contract;
- (3) The contract shall state the total obligation of the school system for the calendar year of execution and shall further state the total obligation which will be incurred in each calendar year renewal term, if renewed;
- (4) The total combined annual payments for contracts under this Code section and contracts of such school system under Article IX, Section III, Paragraph I of the Constitution in any calendar year, excluding guaranteed energy savings contracts, shall not exceed an amount equal to 7.5 percent of the total local revenue collected for maintenance and operation of the school system in the most recently completed fiscal year; provided, however, that the foregoing limitation shall not apply to contracts with other public educational entities, including school systems in this state, for the education of students; and
- (5) For each guaranteed energy savings contract, a school system shall document the historical energy cost of each structure affected for a period of at least one year prior to the date of the contract and shall document the monthly energy cost and monthly energy savings of each affected structure for the life of the contract.
- (c) In addition to the provisions enumerated in subsection (b) of this Code section, any contract authorized by this Code section may include:
- (1) A provision which requires that the contract will terminate immediately and absolutely at such time as appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of the school system under the contract; or
- (2) Any other provisions reasonably necessary to protect the interests of the school system.
- (d) Any contract developed under this Code section containing the provisions enumerated in subsection (b) of this Code section shall be deemed to obligate the school system only for those sums payable during the calendar year of execution or, in the event of a renewal by the school system, for those sums payable in the individual calendar year renewal term.
- (e) No contract developed and executed pursuant to this Code section shall be deemed to create a debt of the school system for the payment of any sum beyond the calendar year of execution or, in the event of a renewal, beyond the calendar year of such renewal.
- (f) Any such contract may provide for the payment by the school system of interest or the allocation of a portion of the contract payment to interest, provided that the contract is in compliance with this Code section.
- (g) When any local board of education on or after July 1, 1990 submits to the electors of its local school district the proposed issuance of any bonded debt and such proposal is defeated by the electors, that school system shall be prohibited for a period of four calendar years immediately following such election from entering into any multiyear contract for the lease, purchase, or lease purchase of any goods, materials, real or personal property, services, or supplies which are the same as or substantially similar to items which were proposed to be funded through such proposed issuance of bonded debt.
- (h) Nothing in this Code section shall restrict school systems from executing reasonable contracts arising out of their proprietary functions.
- (i) Each school system in this state is authorized to accept the title to property subject to a contract for lease purchase or installment purchase and is authorized to transfer title back to the vendor in the name of the school district in the event that the contract is not fully consummated.
- (j) Any contract developed under this Code section shall comply with the applicable provisions of the Official Code of Georgia Annotated, and regulations thereunder, relating to state allocated capital outlay funds and entitlements.⁴⁰

⁴⁰*Id.* § 20-2-506 (b).

School districts and counties have the authority under sections 36-9-3 and 20-2-520 to enter into intergovernmental contracts whereby the school district leases real property from the county for use as a site for a public school or other educational purpose.⁴¹

School districts have authority to enter into lease purchase contracts for alteration of facilities to reduce energy consumption and operating costs, subject to numerous restrictions.⁴² Contracts shall terminate at the end of each year except that contracts may provide for automatic renewal unless positive action is taken to terminate the contract.⁴³ Such contracts may also provide that the contract will terminate immediately and absolutely at such time as appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of the school system under the contract.⁴⁴

Energy Performance Contracting

Educational institutions may enter into lease-purchase agreements to finance the costs of a guaranteed energy savings performance contract for a period of time not to exceed 20 years, subject to numerous restrictions.⁴⁵

Fire Districts

There is no statutory framework covering fire districts. Special districts for providing local government services are authorized by the constitution⁴⁶ and 159 of them have been created by statute,⁴⁷ contiguous with the counties, but they do not appear to operate independently of county or municipal government.

Hospital Authorities

Hospital authorities⁴⁸ qualify as tax-exempt issuers for federal income tax purposes due to their eminent domain power.⁴⁹ Hospital authorities are authorized to “acquire by purchase, lease, or otherwise and to operate projects.”⁵⁰

⁴¹Op. Att’y Gen. No. 98-13 (1998).

⁴²Ga. Code Ann. § 20-2-506.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*See, supra*, notes 14-16 and accompanying text.

⁴⁶Ga. Const. Art. 9, § 2, ¶ 6.

⁴⁷Ga. Code Ann. § 48-8-110.1.

⁴⁸Hospital authorities are created in each county and municipality, but shall not exercise powers until authorized by resolution of the county or municipality. *Id.* § 31-7-72.

⁴⁹*Id.* § 31-7-75(12).

⁵⁰*Id.* § 31-7-75(4). “‘Project’ includes the acquisition, construction, and equipping of hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities for the use of patients and officers and employees of any institution under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community and all utilities and facilities deemed by the authority necessary or convenient for the efficient operation thereof. Such term may also include any such institutions, utilities, and facilities located outside the city or county in which the authority is located, provided that the acquisition, construction, equipping, and operation thereof is requested or approved by the governing bodies of such city and county in which the project is located and by the board of any hospital authorities located within such city and county or provided that the acquisition, construction, equipping, and operation is to be located in the area of operation of the authority.” *Id.* § 31-7-71(5).

State Entities

Concerning real property, the state properties commission is authorized to “provide or perform acquisition related services to or for all state entities,”⁵¹ with certain exceptions.⁵²

The commission may rent or lease administrative space (on behalf of the commission or state entity, including the Board of Regents of the University System of Georgia) from any private person, firm, or corporation for a term not to exceed 20 years and

[a] multiyear lease resulting from a sale and lease back shall be treated as a conveyance of real property by the state and shall be reviewed for approval or disapproval by the General Assembly and Governor in the same manner as a conveyance of state properties provided for in Code Section 50-16-39.⁵³

* * *

No multiyear lease or rental agreement shall be entered into under the provisions of this Code section until the Georgia State Financing and Investment Commission has established the fiscal policies and multiyear contract value authority for the current and future fiscal years. Any multiyear lease or rental agreement entered into that is not in compliance with such fiscal policies and multiyear contract value authority shall be void and of no effect.⁵⁴

At the beginning of each fiscal year, a budget unit's appropriations shall be encumbered for the estimated payments for any multiyear lease and rental agreements in that fiscal year. The commission shall have the right to terminate, without further obligation, any multiyear lease or rental agreement if the commission determines that adequate funds will not be available for the payment obligations of the commission under the agreement. The commission's determination regarding the availability of funds for its obligations shall be conclusive and binding on all parties to the multiyear lease or rental agreement.”⁵⁵

Construction and public works contracts exceeding a total expenditure of \$100,000 shall be negotiated by the Department of Administrative Services: contracts valued under \$100,000 shall be reviewed and approved by the department.⁵⁶

The Department of Administrative Services oversees acquisition of all equipment and other personal property, including technology, by state governmental entities in the executive branch,⁵⁷ including lease-purchases, and requires use of a standard form agreement for multi-year contracts.⁵⁸

(a) The Department of Administrative Services shall be authorized to execute on behalf of all state agencies subject to this part multiyear lease, purchase, or lease purchase contracts of all kinds for the acquisition of goods, materials, services, and supplies, provided that any such contract shall be executed only

⁵¹*Id.* § 50-16-34(18). Entity means “any and all constitutional offices, as well as all authorities, departments, divisions, boards, bureaus, commissions, agencies, instrumentalities, or institutions of the state.” *Id.* § 50-16-31.

⁵²*Id.* Exceptions include, among others, the Dept. of Transportation, the Bd. of Regents of the University System of Georgia. *Id.*

⁵³*Id.* § 50-16-41(c).

⁵⁴*Id.* § 50-16-41(l)(2).

⁵⁵*Id.* § 50-16-41(l)(3).

⁵⁶*Id.* § 50-5-72. This section does not apply to the Dept. of Transportation or the university system. *Id.* The Georgia Technology Authority oversees technology for the state, but contracts for the acquisition of related equipment for agencies is contracted through the Dept. of Admin. Services. *Id.* § 50-25-4(a)(26).

⁵⁷*Id.* § 50-5-51. State authorities are exempted from this oversight unless specifically stated otherwise in the authority’s authorizing legislation.

⁵⁸*Id.* § 50-5-64. There are comprehensive guidelines to working with the state purchasing division on the department of administrative services website, <http://doas.ga.gov/state-purchasing>, and in the Georgia Procurement Manual online at: <http://doas.ga.gov/state-purchasing/law-administrative-rules-and-policies>.

on a standard form developed by the department for such use; and provided, further, that the standard form contract shall contain provisions for the following:

(1) The contract shall terminate absolutely and without further obligation on the part of the user agency or the department at the close of the fiscal year in which it was executed and at the close of each succeeding fiscal year for which it may be renewed as provided in this Code section;

(2) The contract may be renewed only by a positive action taken by the user agency or by the department on behalf of the user agency, and the nature of such action shall be determined by the department and specified in its standard contract;

(3) The contract shall terminate immediately and absolutely at such time as appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of the user agency under the contract. The determination of the occurrence of such unavailability of funds shall be made by the user agency in its sole discretion and shall be conclusive;

(4) The contract shall state the total obligation of the user agency for the fiscal year of execution and shall further state the total obligation which will be incurred in each fiscal year renewal term, if renewed; and

(5) The contract shall provide that title to any supplies, materials, or equipment shall remain in the vendor until fully paid for by the user agency.

(b) Any standard contract developed hereunder containing the provisions enumerated in subsection (a) of this Code section shall be deemed to obligate the user agency only for those sums payable during the fiscal year of execution or, in the event of a renewal by the user agency, for those sums payable in the individual fiscal year renewal term.

(c) No contract developed and executed pursuant to this Code section shall be deemed to create a debt of the state for the payment of any sum beyond the fiscal year of execution or, in the event of a renewal, beyond the fiscal year of such renewal.

(d) Any such contract may provide for the payment by the user agency of interest or the allocation of a portion of the contract payment to interest, provided that the contract is in compliance with this Code section.⁵⁹

Rules adopted by the Department of Administrative Services are similar to the statutory requirements:

3.6.2. Requirements for Multi-Year Agreements

Multi-year agreement refers to any contract which exceeds twelve months and/or will cover more than one fiscal year. To avoid pledging the state's credit, the state entity almost always must divide the multi-year agreement into two or more contract terms. The most common multi-year structure is to define an initial term of twelve months or less followed by up to four one-year renewal terms which may be exercised by the state entity. No contract may exceed five years without prior written approval from SPD.

When determining beginning and ending dates of the initial contract term, the state entity must consider both its needs and its budget. To ensure the contract dates comply with state policy prohibiting the pledging of the state's credit, the state entity must set aside sufficient funds to meet the entire financial obligation of the initial term of the contract when the contract is signed. Thereafter, the state entity must ensure sufficient funds are available prior to exercising any renewal option. It may be necessary to structure the end of the initial term to coincide with the end of the state's fiscal year so that renewal terms will align with the state's fiscal year for budgetary reasons. Open contracts (or contracts that do not commit the state entity to spending any money) are an exception to this requirement.

⁵⁹*Id.* § 50-5-64.

State entities are authorized to enter into multi-year lease, purchase, or lease purchase contracts for the acquisition of goods, materials, equipment, services, and supplies. However, the multi-year agreements must be structured as follows:

A contract for supplies services or equipment may be entered into for any period of time deemed to be in the best interest of the state, provided the term of the contract and conditions of renewals or extension, if any, are included in the solicitation and funds are available for the first fiscal year at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability and appropriation of funds.

The contract may be renewed only by a positive action taken by the state entity and the nature of such action shall be specified in the contract (i.e., no automatic renewals).

No contract developed and executed shall create a debt of the state for the payment of any sum beyond the fiscal year of execution or, in the event of a renewal, beyond the fiscal year of such renewal.

The contract shall state the total obligation of the user state entity for the fiscal year of execution and shall further state the total obligation, which will be incurred in each fiscal year renewal term, if renewed.

The contract shall terminate immediately at such time as appropriated and otherwise un-obligated funds are no longer available to satisfy the obligations of the state entity under the contract. The determination of the occurrence of such unavailability of funds shall be made by the state entity in its sole discretion and shall be conclusive.

For lease financing agreements, the contract may provide for the payment by the state entity of interest or the allocation of a portion of the contract payment to interest.⁶⁰

Departments, agencies, and institutions are authorized to accept the title to property which is subject to a lease-purchase or installment purchase contract upon execution of the standard agreement form [authorized by section 50-5-64] by the Department of Administrative Services.⁶¹

State agency contracts with individuals or persons must contain a certification that the individual or person will not engage in the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana during the performance of the contract when the contract involves an expenditure by the state agency of at least \$25,000.00.⁶²

The department of administrative services may delegate its procurement powers to agency personnel.⁶³

Competitive bidding is required generally for contracts exceeding \$100,000.⁶⁴

Agencies and departments using public funds must obtain needed goods and services from the correctional industries administration when such goods are certified by the Department of Administration.⁶⁵

⁶⁰Ga. Proc. Man. 3.6.2 (V 7 May 2018).

⁶¹*Id.* § 50-5-65.

⁶²*Id.* § 50-24-4. The term “person” means a corporation, a partnership, a business trust, an association, a firm, or any other legal entity except an individual. *Id.* § 50-24-2.

⁶³*Id.* § 50-5-53.

⁶⁴*Id.* § 50-5-67.

The lease or purchase of automobiles is governed by rules and regulations promulgated by the Office of Planning and Budget.⁶⁶

The government of the university system and its individual institutions, including junior colleges, is vested in the Board of Regents of the University System of Georgia.⁶⁷ Acquisition of real property by the regents shall be approved by the State Properties Commission.⁶⁸

State agencies and the Board of Regents of the University of Georgia⁶⁹ may enter into lease-purchase agreements for “benefits based funding projects” in which “the payments to vendors depend upon the realization of specified savings or revenue gains attributable solely to the improvements.”⁷⁰

(b) An agency shall be authorized to enter into multiyear lease, purchase, or lease purchase contracts of all kinds for the acquisition of equipment, goods, materials, personal property, improvements to real property, services, construction services, renovation services, and supplies as benefits based funding projects; provided, however, that a condition precedent to the award of the contract is a competitive solicitation in compliance with any applicable purchasing laws now or hereafter enacted, including without limitation the provisions of this chapter and Chapter 25 of this title; and provided, further, that the contract shall contain provisions for the following:

(1) The contract shall terminate absolutely and without further obligation on the part of the agency at the close of the fiscal year in which it was executed and at the close of each succeeding fiscal year for which it may be renewed;

(2) The contract may be renewed only by a positive action taken by the agency;

(3) In addition to any other remedies available to the agency, the contract shall provide that at such time as the agency determines that actual savings or incremental revenue gains are not being generated to satisfy the obligations under the contract, the vendor shall be required to remedy the deficit in actual savings or incremental revenue gains by remitting to the state an amount equal to the deficit. The vendor shall also be required to provide at contract execution and upon execution of any contract renewals an energy savings guarantee bond, a bank letter of credit, escrowed funds, a corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the agency equal to the value of the project's annual savings or revenue gains;

(4) The contract shall state the total obligation of the agency for repayment for the fiscal year of execution and shall state the total obligation for repayment which will be incurred in each fiscal year renewal term, if renewed; and

(5) The term of the contract, including any renewal periods, may not extend past the date that is ten years from the date of the completion of the project that is the subject of the contract.

(c) Any contract developed under this Code section containing the provisions enumerated in subsection (b) of this Code section shall be deemed to obligate the agency only for those sums payable during the fiscal year of execution or, in the event of a renewal by the agency, for those sums payable in the

⁶⁵*Id.* § 50-5-73.

⁶⁶*Id.* §§ 45-12-73(12), 50-19-6. The Department of Administrative Services participates in overseeing the procurement process.
<http://doas.ga.gov/assets/Fleet%20Management/Fleet%20Management%20Rules%20Policies%20and%20Compliance/GeorgiaFleetManual.pdf>.

⁶⁷Ga. Const. Art. 8, § 4, ¶ 1.

⁶⁸Ga. Code Ann. § 20-3-58; § 50-16-183.

⁶⁹Ga. Code Ann. § 50-5-77(1) (“Agency means every state department, agency, board, bureau, and commission including without limitation the Board of Regents of the University System of Georgia”).

⁷⁰*Id.* § 50-5-77.

individual fiscal year renewal term and only to the extent that savings or enhanced revenues are attributable to the benefits based funding project calculated using the measurement tool and, where applicable, sums remitted by the vendor or surety to remedy a deficit in guaranteed savings or revenue gains.

(d) No contract developed and executed pursuant to this Code section shall be deemed to create a debt of the state for the payment of any sum beyond the fiscal year of execution or, in the event of a renewal, beyond the fiscal year of such renewal.

(e) Any such contract may provide for the payment by the agency of interest or the allocation of a portion of the contract payment to interest, provided that the contract is in compliance with this Code section.

(f) During the term of the contract, including any renewal periods, the agency shall, using the measurement tool, periodically calculate the total amount of the savings or enhanced revenues attributable to the implementation of the benefits based funding project. To the extent that savings or enhanced revenues are realized, the agency shall transfer from its budget into the special dedicated fund an amount up to but not to exceed the amount owed on the contract for the then current fiscal year term's obligation to provide for payments, or, where applicable, sums remitted by the vendor or surety to remedy a deficit in guaranteed savings or revenue gains may be transferred to the special dedicated fund by the agency.

(g) During the term of the contract, including any renewal periods, the agency shall, using the measurement tool, calculate the total amount of the savings or enhanced revenues attributable to the implementation of the benefits based funding project during the then current fiscal year at least 30 days prior to the end of the then current fiscal year. If the agency renews the contract and to the extent that savings or enhanced revenues are realized in excess of the amount due on the contract in the then current fiscal year term, the agency shall transfer prior to the end of the then current fiscal year from its budget into the special dedicated fund an amount up to but not to exceed the next fiscal year's obligation to provide for future payments.

(h) Promptly upon nonrenewal, termination, or expiration of the contract, any moneys remaining in the special dedicated fund shall be deposited in the general fund of the state.

(i) Each agency is authorized to accept title to property subject to the benefits based funding contract and is authorized to transfer title back to the vendor in the event the contract is not fully consummated.

(j) Payments to which a vendor is entitled under the contract may not be assigned without the approval of the agency. In its discretion, the agency may agree that the vendor may assign the payments to which it is entitled under the benefits based funding contract to a third party, provided that the agency will be made party to the assignment agreement and that any such assignment agreement will not alter the obligations of the agency under the contract, specifically including, but not limited to, the provisions required by subsection (b) of this Code section; and provided that the vendor, at the time of the request that the agency agree to an assignment of payments, must provide to the agency an energy savings guarantee bond, a bank letter of credit, escrowed funds, a corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the agency equal to the guaranteed savings for the total project duration including any anticipated renewal periods and the energy savings guarantee bond, bank letter of credit, escrowed funds, corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the agency must remain in force for the entire project duration including any renewal periods. As savings are realized and verified by the measurement tool during the term of the contract including renewal periods, the value of the energy savings guarantee bond, bank letter of credit, escrowed funds, corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the agency may decrease proportionately.

(k) The external oversight committee shall have the responsibility to direct the authority⁷¹ to perform reviews and to recommend approval of all benefits based funding projects advising:

- (1) The overall feasibility of the benefits based funding project;

⁷¹“Authority” means the Georgia Environmental Finance Authority. *Id.*

- (2) The measurement tool;
- (3) The projected savings or enhanced revenues; and
- (4) The dollars to be set aside for vendor payments.

(l) At the recommendation of the authority, each benefits based funding project and the proposed contract shall be approved by the external oversight committee prior to execution of the contract and shall be subject to further review by the authority or the external oversight committee at any time.

(m) Each agency shall prepare and certify an annual report on all contracts entered into pursuant to this Code section, describing the benefits based funding projects, the progress of the projects, the consolidated savings or enhanced revenues of such projects, and such other information as may be relevant. This annual report shall be sent to the authority on behalf of the external oversight committee at a date determined by the authority. The authority shall review and consolidate all agency reports and submit a consolidated report to the Governor, the General Assembly, and the external oversight committee.⁷²

The Department of Public Safety is authorized to acquire equipment, personal property and quarters, but it appears that any such acquisition of assets needs to be coordinated with the department of administrative services.⁷³

The Department of Transportation has the power of eminent domain and may “purchase, . . . sell, lease, or otherwise acquire . . . any property . . . for public road and other transportation purposes”⁷⁴

Any contract, contractual obligation, contractual undertaking, contractual arrangement, or agreement by which the state or any of its departments, boards, bureaus, commissions, authorities, or other agencies is obligated to, or may become obligated to, expend more than \$ 5,000.00 shall be voidable by the state unless:

(1) The same is approved by one of the following:

(A) The Department of Administrative Services pursuant to Article 3 of Chapter 5 of Title 50;

(B) The State Properties Commission created by Articles 2 through 5 of Chapter 16 of Title 50; or

(C) The Office of Planning and Budget, as provided in [Code Section 45-12-131](#); or

(2) The same is exempt, as provided in [Code Section 45-12-132](#).⁷⁵

Ga. Code Ann. § 45-12-132 exempts “[c]ontracts approved by the Department of Transportation, the State Board of Education, the State Board of the Technical College System of Georgia, or the Board of Regents of the University System of Georgia.”

It appears that real property lease-purchases are financed through authorities such as the Georgia Higher Education Facilities Authority⁷⁶ or the Georgia Building Authority.⁷⁷

Energy Performance Contracting

⁷²*Id.* § 50-5-77.

⁷³*Id.* §§ 35-2-13, 35-2-40, 35-2-49, 35-2-50.

⁷⁴*Id.* § 32-2-2(a)(8).

⁷⁵*Id.* § 45-12-130.

⁷⁶*Id.* § 20-16-3. (The Higher Education Facilities Authority needs self-liquidating revenue sources. *Id.* § 20-16-5.)

⁷⁷*Id.* § 50-9-3.

State agencies and educational institutions, counties, municipalities and school districts may enter into lease-purchase agreements to finance the costs of a guaranteed energy savings performance contract for a period of time not to exceed 20 years, subject to numerous restrictions.⁷⁸

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.⁷⁹ Counties, municipalities, school districts and other political subdivisions of the state are constitutionally limited in the amount of debt which they may incur.⁸⁰ However, contracts entered into between intergovernmental entities⁸¹ are not subject to constitutional debt limitations.⁸²

“One council may not, by ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government.”⁸³ Contracts developed and executed by boards of education are required to “terminate absolutely and without further obligation on the part of the school system at the close of the calendar year in which it was executed and at the close of each succeeding calendar year for which it may be renewed.” Such contracts may include a provision for automatic renewal unless positive action is taken by the school system to terminate such contract, and the nature of such action shall be determined by the school system and specified in the contract.⁸⁴

In *McElmurray v. Richmond County*,⁸⁵ the court held that a lease by the county of a building created debt in the county because the lease bound “future governing authorities without their approval.”⁸⁶ The lease did not have a nonappropriation or funding-out clause. In *Richmond County v. McElmurray*,⁸⁷ the court struck down the restructured lease financing in which the lease contract was for one year with automatic renewal for nine additional years unless the county notifies the lessor within ninety days prior to the annual expiration date of its intention not to renew.⁸⁸ The court noted that if the lease were allowed “to continue for a number of years public officials would be forced to continue it in effect to avoid moral and pecuniary loss to the public and county government by refusing to continue the agreement and it would always require affirmative action on their part to prevent it from amounting to a ten year lease and a debt payable to ten years in a purchase of a public building.”⁸⁹

⁷⁸See, *supra*, notes 14-16 and accompanying text.

⁷⁹Ga. Const. art. 9, § 4.

⁸⁰Ga. Const. art. 9, § 5, ¶1(a) (requires majority voter approval). School districts have been included as “political subdivisions.” *Miles v. State*, 101 S.E.2d 173, 178 (Ga. Ct. App. 1957).

⁸¹Ga. Const. art. 9, § 3, ¶1.

⁸²*Building Authority of Fulton County v. State*, 321 S.E.2d 97 (Ga. 1984). But see *Nations v. Downtown Dev. Auth.*, 338 S.E.2d 240 (Ga. 1985) (contract not “intergovernmental” in nature; subject to debt limitations); *Nations v. Downtown Dev. Auth.*, 345 S.E.2d 581 (Ga. 1986) (restructured financing validated under *Fulton County* structure); *Bauerband v. Jackson County* (Ga. Sup. Ct. 2004) (County’s one-year term annually renewable lease-purchase agreement with nonprofit entity that will issue certificates of participation to finance construction of courthouse project will not create unconstitutional non-voter-approved debt, notwithstanding the argument that county may, in the future, be obligated to reauthorize the lease in order to avoid terminating the arrangement that provides for the county’s courthouse). In *Berry v. City of East Point*, 277 Ga. App. 649, 627 S.E.2d 391 (2006), the court upheld from challenge a financing for sewer improvements financed by an authority and leased to the city, which included a full faith and credit obligation of the city to pay rents, including an obligation to levy taxes for payment of such rents, since it was a permissible intergovernmental contract.

⁸³Ga. Code Ann. § 36-30-3(a). This provision is also applicable to counties. *McElmurray v. Richmond County*, 153 S.E.2d 427, 428 (Ga. 1967).

⁸⁴Ga. Code Ann. § 20-2-506(b)(1) and (2).

⁸⁵153 S.E.2d 427 (Ga. 1967).

⁸⁶*Id.* at 428.

⁸⁷156 S.E.2d 53 (Ga. 1967).

⁸⁸*Id.* at 54. See also 74-115 Op. Att’y Gen. (Ga. Aug. 23, 1974).

⁸⁹*Id.* at 55. The court noted that “[w]hether or not the monthly sums paid as rent are “reasonable” apparently was not passed

The attorney general has opined that a lease by a school board of school buses would not on its face be illegal because it gave the board three one-year renewal options with a purchase option at the end.⁹⁰ However, the same opinion cautioned that lease rental payments should reflect fair rental value of the property or the lease may be held invalid as a conditional sale.⁹¹ The attorney general has also opined that a multi-year obligation with an automatic termination upon an event of nonappropriation would create debt and that the use of a nonsubstitution provision would also create debt.⁹²

In *Barkley v. City of Rome*,⁹³ the court recognized the constitutionality of Ga. Code Ann. § 36-60-13. This section authorizes counties and municipalities to enter into multi-year lease-purchase contracts for the acquisition of goods so long as such contracts provide that the county's or municipality's obligation shall terminate absolutely and without further obligation on the part of the county or municipality at the close of the calendar year in which it was executed and at the close of each succeeding year for which it may be renewed; [and] it states the total obligation of the county or municipality for the calendar year of execution as well as the total obligation which will be incurred in each calendar year renewal term, if renewed.⁹⁴

Interest Rate Limitations

Bonds, notes, certificates, or obligations of any kind⁹⁵ issued by any county, municipality, school district, or other political subdivision of the state⁹⁶ are exempt from “[a]ll laws of this state governing usury or prescribing or limiting interest rates to be borne by bonds.”⁹⁷

The interest rate or rates to be borne by any bonds of such county, municipality, school district or other political subdivision of the state shall be fixed by the governing body in the resolution or ordinance adopted by such governing body to authorize the issuance of any such bonds.⁹⁸

Any multiyear or lease purchase contract executed by the Department of Administrative Services for the acquisition of goods on behalf of a state agency “may provide for the payment by the user agency of interest or the allocation of a portion of the contract payment to interest, provided that the contract is in compliance with . . . Code section [50-5-64].”⁹⁹ The legal rate of interest generally is 7 percent per annum simple interest where the rate percent is not established by written contract.¹⁰⁰

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

upon by the lower court.” *Id.*

⁹⁰65-33 Op. Att’y Gen. (Ga. Aug. 11, 1965) (unofficial).

⁹¹*Id.*

⁹²74-115 Op. Att’y Gen. (Ga. Aug. 23, 1974).

⁹³381 S.E.2d 34 (Ga. 1989); *but see* Renfroe v. City of Atlanta, 78 S.E. 449 (Ga. 1913). *See also* Elcan Investments v. Kirk, 371 S.E.2d 146 (Ga. Ct. App. 1988) (a lessee’s power, pursuant to its lease agreement, to terminate the lease at any time kept the lease from being a sale with security interest and the lease in question was not, therefore, covered by the repossession provisions of Article 9 of the Georgia Uniform Commercial Code).

⁹⁴381 S.E.2d at 35 (Ga. 1989). *See, supra*, notes 10 and 11 and text accompanying.

⁹⁵Ga. Code Ann. § 36-82-121(1). General obligation bonds requiring voter approval are not included in this definition.

⁹⁶*Id.* § 36-82-121(3).

⁹⁷*Id.* § 36-82-122(a)(1).

⁹⁸*Id.* § 36-82-122(b).

⁹⁹*Id.* § 50-5-64. *See, supra*, State Entities section, note 58 and accompanying text.

¹⁰⁰*Id.* § 7-4-2(a)(1)(A).

HAWAII 2019

Current through the End of the 2018 Second Special Session, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain,³ and police powers.⁴ Counties are empowered “to purchase and otherwise acquire, lease and hold real and personal property . . . except that . . . no property bordering the ocean shall be sold or otherwise disposed of; and [that] all proceeds from the sale of park lands shall be expended only for the acquisition of property for park and recreation purposes.”⁵ Counties may “[c]onstruct, purchase, take on lease, lease, sublease, or in any other manner acquire, manage, maintain, or dispose of buildings for county purposes.”⁶

Energy Performance Contracting

Counties may enter into lease-purchase contracts for energy conservation measures for public facilities, subject to numerous restrictions.⁷

Municipalities

Municipalities do not exist as separate subdivisions of the state.

School Districts

“The [state] board of education shall have the power . . . to formulate statewide educational policy and appoint the superintendent of education as the chief executive officer of the public school system.”⁸ No enumeration of any tax, eminent domain or police powers for school districts was found.

Fire Districts

There is no statutory framework for fire districts.

Hospital Districts

There is no statutory framework for hospital districts.

State Entities

Financing agreements, which include lease-purchase agreements by definition,⁹ are governed by Hawaii Revised Statutes title 5, chapter 37D *Management of Financing Agreements*. Sections of this

¹Four counties exist, exclusive of the City and County of Honolulu (Honolulu). Honolulu and the counties of Hawaii, Maui and Kauai are home rule. Hawaii Const. Art. VIII, §2. The county of Kalawao is not a home rule county and is not addressed herein. Hawaii Rev. Stat. § 326-34.

²Hawaii Const. Art. VIII, § 3 permits the counties of Hawaii, Maui, Kauai and Honolulu to levy delegated and real property taxes.

³Hawaii Rev. Stat. § 46-61.

⁴*Id.* § 46-1.5.

⁵*Id.* § 46-1.5(16).

⁶*Id.* § 46-1.5(19)(A).

⁷*Id.* § 36-41. Counties are included within the definition of agency for purposes of this section. *Id.*

⁸Hawaii Const. art. X. § 3.

⁹Hawaii Rev. Stat. § 37D-1. Financing agreement means “any lease purchase agreement . . . to finance the improvement,

chapter are set out below. A reading of the chapter shows that the University of Hawaii and the Hawaii Health Systems Corporation, which are discussed more fully, *infra*, have fewer restrictions imposed on them by chapter 37D than other agencies.

(a) There is hereby established and authorized the financing agreement program of the State. Any agency desiring to acquire or improve projects through the financing agreement program established and authorized by this chapter shall submit a written request to the department providing any information that the department shall require. Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, only with the approval by the attorney general as to form and legality and upon the written request of one or more agencies may the department enter into a financing agreement in accordance with this chapter, and only with the approval by the attorney general as to form and legality, and by the director as to fiscal responsibility, and upon the written request of an agency, the agency may enter into a financing agreement in accordance with this chapter, except that [the department of education may enter into a financing agreement in accordance with section 36-32 with the concurrence of the director and with the approval of the attorney general as to form and legality; and that]* the board of regents of the University of Hawaii may enter into a financing agreement in accordance with this chapter without the approval of the director and of the attorney general as to form and legality if the principal amount of the financing agreement does not exceed \$3,000,000. A financing agreement may be entered into by the department on behalf of one or more agencies, or by an agency, at any time (before or after commencement or completion of any improvements or acquisitions to be financed) and shall be upon terms and conditions the department finds to be advantageous. In each case of a written request by the judiciary to participate in the financing agreement program, the department shall implement the request; provided that the related financing agreement shall be upon terms and conditions the department finds to be advantageous. Any financing agreement entered into by the department without the approval, or by an agency without the approvals required by this section shall be void and of no effect. A single financing agreement entered into by the department may finance a single item or multiple items of property to be used by multiple agencies or may finance a single item or multiple items of property to be used by a single agency. If the financing agreement is by the department, the department shall bill any agency that benefits from property acquired with the proceeds of a financing agreement for the agency's pro rata share of:

(1) The department's costs of administration of the financing agreement program; and

(2) The financing costs, including the principal and interest components of the financing agreement and insurance premiums, on a monthly or other periodic basis, and may deposit payments received in connection with the billings with a trustee as security for the financing agreement. Any agency receiving such a bill shall be authorized and shall pay the amounts billed from available moneys. If a financing agreement is by an agency, the agency shall deposit on a monthly or other periodic basis with the department, payments from available moneys with respect to the agency's financing costs, including the principal and interest components of the financing agreement and insurance premiums, which payments the department may deposit with a trustee as security for the financing agreement. The department may bill an agency for the department's costs of administering the agency's payments and the agency receiving such a bill shall be authorized to and shall pay the amounts billed from available moneys.

(b) Financing agreements shall be subject to the following limitations:

(1) Amounts payable by an agency to or upon the direction of the department in respect to a project and by the department or an agency under a financing agreement shall be limited to available moneys. In no circumstance shall the department or an agency be obligated to pay amounts due under a financing agreement from any source other than available moneys. If, by reason of insufficient available moneys or other reason, amounts due under a financing agreement are not paid when due, the lender may exercise any property right that the department or the agency has granted to it in the financing agreement, against the property that was purchased with the proceeds of the financing agreement, and apply the amounts so received toward payments scheduled to be made by the department or the agency under the financing agreement;

use, or acquisition of real or personal property that is or will be owned or operated by one or more agencies of the State, the department, or any agency, or to refinance previously executed financing agreements including certificates of participation relating thereto." *Id.*

(2) No property rights may be granted in property unless the property is being acquired, is to be substantially improved, is to be refinanced with the proceeds of a financing agreement, or is land on which the property is located;

(3) Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, and as otherwise provided in this section with respect to the department of education and the University of Hawaii, and except as provided in chapter 323F as to the Hawaii health systems corporation and its regional system boards, an agency shall not have the power to enter into a financing agreement, except as authorized by this chapter, and nothing in this chapter shall be construed to authorize the sale, lease, or other disposition of property owned by an agency;

(4) Except as otherwise provided in this section with respect to the department of education and the University of Hawaii, the sale, assignment, or other disposition of any financing agreements, including certificates of participation relating thereto, shall require the approval of the director; and

(5) The department or the agency proposing to enter into a financing agreement shall not be subject to chapter 103D [competitive bidding] and any and all other requirements of law for competitive bidding for financing agreements.¹⁰

* * *

Financing agreements shall:

(1) Not be obligations for which the full faith and credit of the State, the department, or any agency are pledged; and

(2) Have no claim or lien on any revenues or other moneys of the State, the department, or any agency except moneys appropriated or otherwise held in trust for that purpose.

Financing agreements entered into under this chapter shall not constitute "bonds" within the meaning of section 12 of article VII of the Constitution of the State. No holder or holders of any financing agreement entered into under this chapter shall have the right to compel any exercise of taxing power of the State, the department, or any agency to pay the financing agreements or the interest thereon and no moneys other than amounts appropriated or otherwise held in trust for that purpose shall be required to be applied to the payment thereof. Each financing agreement issued under this chapter shall recite in substance that the agreement, including the interest component thereof, shall not be an obligation for which the full faith and credit of the State, the department, or any agency are pledged, and that the financing agreement shall have no claim or lien on any revenues or other moneys of the State, the department, or any agency except moneys appropriated or otherwise held in trust for that purpose.¹¹

* * *

(a) To the extent practicable, financing agreements issued pursuant to this chapter shall be issued to comply with requirements imposed by applicable federal law providing that the interest on financing agreements shall be excluded from gross income for federal income tax purposes, except as certain minimum taxes or environmental taxes may apply. The director and, with the approval of the director, the head of an agency may:

(1) Enter into agreements;

(2) Establish funds or accounts;

¹⁰*Id.* § 37D-2. Agency "means the judiciary, any executive department, independent commission, board, authority, bureau, office, other establishment of the State (except the legislature and its agencies), or public corporation that is supported in whole or in part by state funds, or any agent thereof, authorized by law to expend available moneys; provided that the Hawaii health systems corporation and its regional system boards shall not be governed by this chapter for any financing agreement unless it elects to be. *Id.* § 37D-1 [emphasis added] [Repeal of bracketed language is scheduled to take effect July 1, 2023. 2013 Hawaii Laws Act 157 (S.B. 458).] *Id.* § 37D-3 provides an extensive list of related agreements that can be entered into, including trust agreements with certificates of participation.

¹¹*Id.* § 37D-5.

(3) Make rebate payments to the federal government; and

(4) Take any action required to comply with applicable federal tax law.

Nothing in this chapter shall prohibit the issuance of financing agreements, the interest on which may be included in gross income for federal income tax purposes.

(b) To ensure that interest on a financing agreement issued pursuant to this chapter that is excluded from gross income for federal income tax purposes, except as provided in subsection (a), on the date of issuance shall continue to be excluded, no state officer or employee shall authorize or allow any change, amendment, or modification to a financing agreement that would affect the exclusion of interest on the financing agreement from gross income for federal income tax purposes unless the change, amendment, or modification shall have received the prior approval of the director. Failure to receive the approval of the director shall render any change, amendment, or modification void.¹²

* * *

All real and personal property owned or operated by the State, the department, or any agency, and any interests created in or transfer or recording of the property or any interest in the property, and payments made under the financing agreements to which the property is subject shall be exempt from all state, county, and municipal taxation, and fees and charges of every kind. Financing agreements issued pursuant to this chapter and the income therefrom, including without limitation the interest component of any lease payments, shall be exempt from all taxation by the State or any county or other political subdivision thereof, except inheritance, transfer, and estate taxes.¹³

The Department of Education is authorized to enter into lease-purchase agreements for the acquisition of school facilities “with the concurrence of the director of finance.”¹⁴

The University of Hawaii is a public corporate body and the board of regents has power to operate and manage the university.¹⁵ The board of regents may “(p)urchase or otherwise acquire lands, buildings, appliances, and other property for the purposes of the university.”¹⁶ The board of regents of the University of Hawaii may enter into a financing agreement in accordance with chapter 37D without the approval of the director of state finance and of the attorney general as to form and legality if the principal amount of the financing agreement does not exceed \$3,000,000.¹⁷

The Hawaii Health Systems Corporation is an agency of the state divided into five regional systems.¹⁸ The Hawaii Health Systems Corporation and each regional system are authorized to enter into financing agreements,¹⁹ and are exempted from Chapter 37D as to “financing agreements of \$5,000,000 or less; provided further that the aggregate value of financing agreements per fiscal year shall not exceed \$25,000,000.”²⁰

¹²*Id.* § 37D-6.

¹³*Id.* § 37D-8.

¹⁴*Id.* § 302A-1506.

¹⁵Hawaii Const. art. X, §§ 5, 6.

¹⁶Hawaii Rev. Stat. § 304A-105(a)(4).

¹⁷*Id.* § 37D-2(a).

¹⁸*Id.* § 323F-2. The regional systems are (1) the Oahu regional health care system; (2) the Kauai regional health care system; (3) the Maui regional health care system; (4) the east Hawaii regional health care system, comprising the Puna district, north Hilo district, south Hilo district, Hamakua district, and Kau district; and (5) the west Hawaii regional health care system, comprising the north Kohala district, south Kohala district, north Kona district, and south Kona district.”

¹⁹*Id.* § 323F-7(c).

²⁰*Id.* § 323F-7(d).

Energy Performance Contracting

State agencies may enter into energy savings performance contracts subject to numerous restrictions.²¹

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.²²

A political subdivision's funded debt is constitutionally limited to "[a] sum equal to fifteen percent of the total of the assessed values for tax rate purposes of real property"²³

The Hawaii Supreme Court held that financing agreements in accordance with Chapter 37D, which (i) contain a non-appropriation clause, and (ii) state clearly that the agreements are not unconditional obligations of the state, are not "bonds" within the meaning of article VIII, §12 and do not count towards the debt ceiling of the constitution.²⁴

Interest Rate Limitation

"When there is no express written contract fixing a different rate of interest, interest shall be allowed at a rate of ten percent a year . . . [f]or money due on any bond, bill, promissory note, or other instrument of writing, or for any money lent, after it becomes due"²⁵ "With respect to any transaction it shall be lawful to stipulate by written contract for any rate of interest not otherwise prohibited by law."²⁶

²¹*Id.* § 36-41. "'Agency' means any executive department, independent commission, board, bureau, office, or other establishment of the State or any county government, the judiciary, the University of Hawaii, or any quasi-public institution that is supported in whole or in part by state or county funds." *See also* § 196-30 which provides:

Public buildings; benchmarks; retro-commissioning guidelines; energy savings performance contracts. (a) By December 31, 2010, each state department with responsibilities for the design and construction of public buildings and facilities shall benchmark every existing public building that is either larger than five thousand square feet or uses more than eight thousand kilowatt-hours of electricity or energy per year and shall use the benchmark as a basis for determining the State's investment in improving the efficiency of its own building stock. Benchmarking shall be conducted using the ENERGY STAR portfolio management or equivalent tool. The energy resources coordinator shall provide training to affected departments on the ENERGY STAR portfolio management or equivalent tool.

(b) Public buildings shall be retro-commissioned no less often than every five years. The energy resources coordinator shall establish retro-commissioning guidelines by January 1, 2010.

(c) Departments may enter into energy savings performance contracts with a third party to cover the capital costs of energy-efficiency measures and distributed generation provided the terms of the energy savings performance contracts conform to the benchmark standard. The comptroller may review and exempt specific projects as appropriate to take into account cost-effectiveness.

Energy savings performance contracts shall be executed according to state guidelines issued by the comptroller, and the contracts shall be reviewed by the comptroller. To expedite energy savings performance contracting for public buildings, the department of accounting and general services shall develop a master energy savings performance contracts agreement that any department may use to contract with an energy savings performance contracts provider for energy-efficiency and renewable energy services.

(d) For existing public buildings that undergo a major retrofit or renovation, the department or departments responsible for design and construction shall make investments in efficiency; provided that the cost of the measures shall be recouped within twenty years.

²²Hawaii Const. art. VII, § 13

²³*Id.*; *see* 65 Op. Att'y Gen. 4 (Hawaii 1965).

²⁴In re ANZAI, 936 P.2d 637 (Hawaii 1997).

²⁵Hawaii Rev. Stat. § 478-2.

²⁶*Id.* § 478-4(c).

Miscellaneous

Under the Hawaii Public Procurement Code, which does not apply to contracts covered by chapter 37D *Management of Financing Agreements*,²⁷ contracts awarded pursuant to competitive sealed bidding,²⁸ competitive sealed proposal,²⁹ and sole source procurement³⁰

shall neither be binding nor have any force and effect of law unless the comptroller, the director of finance of a county, or the respective chief financial officers of the department of education, the judiciary, or the legislative branches of the State or county, as the case may be, endorses thereon a certificate that there is an appropriation or balance of an appropriation over and above all outstanding contracts, sufficient to cover the amount required by the contract; provided that if the contract is a multi-term contract, the comptroller, director of finance, or chief financial officer shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts, that is sufficient to cover the amount required to be paid under the contract during the fiscal year or remaining portion of the fiscal year of each term of the multi-year contract³¹

Statutes governing security interests provide:

Any security interest created by a governmental unit pursuant to any authorizing statute is perfected by the adoption of the measure or measures from the date on which the measure takes effect without the need for any physical delivery, filing, or recording in any office.³²

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

²⁷*Id.* § 103D-102(b)(4)(k).

²⁸*Id.* § 103D-302.

²⁹*Id.* § 103D-303.

³⁰*Id.* § 103D-306.

³¹*Id.* § 103D-309.

³²*Id.* § 39-162. Bonds “means any bonds, notes, and other instruments of indebtedness, or lease, lease purchase, or certificates of participation, or other evidence of indebtedness for which a security interest is granted or a pledge made upon revenue or other property to provide for payment or security.” Governmental unit “means the State of Hawaii, and any state department, board, commission, officer, authority, agency, public corporation, or instrumentality, or the judiciary.” Measure “means any act, certificate, resolution, statute, or other enactment authorizing the issuance of bonds or authorizing an indenture with respect to bonds pursuant to an authorizing statute.” *Id.* § 39-161.

IDAHO 2019 REVISION

The Statutes and Constitution are current through the 2018 Second Regular Session of the 64th Idaho Legislature, Westlawⁱ

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ A county may “purchase and hold lands”⁴ and may “make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers.”⁵ Counties “may purchase, [and] lease . . . real or personal property . . . for the use and purpose of a public park.”⁶ Counties may use the emergency communications fees only to pay for the purchase, lease or maintenance of emergency communications equipment.⁷ Counties may levy taxes to provide hospitals, clinics, nursing homes and other care facilities and equipment by purchase, lease or otherwise acquire.⁸

Counties may lease any property belonging to the county “without public auction for a term not exceeding five years at such rental as may be determined upon by the unanimous vote of [the Board of County Commissioners], or at public auction to the highest bidder for a term not exceeding thirty years . . .”⁹

Counties and other political subdivisions of the state

and regional airport authorities as defined by law, if operating an airport, may acquire, construct, install, and equip land, facilities, buildings, projects or other property, which are hereby deemed to be for a public purpose, to be financed for, or to be leased, sold or otherwise disposed of to persons, associations or corporations, or to be held by the subdivision or regional airport authority, and may in the manner prescribed by law issue revenue and special facility bonds to finance the costs thereof; provided that any such bonds shall be payable solely from fees, charges, rents, payments, grants, or any other revenues derived from the airport or any of its facilities, structures, systems, or projects, or from any land, facilities, buildings, projects or other property financed by such bonds, and shall not be secured by the full faith and credit or the taxing power of the subdivision or regional airport authority. No provision of this constitution including, but not limited to, sections 3 and 4 of article VIII and section 4 of article XII, shall be construed as a limitation upon the authority granted under this section.¹⁰

The purchasing power of the board of county commissioners and the power to contract for purchase may be delegated to another elected official or an employee of the county.¹¹ The purchase and lease of personal property, where the expenditure is in excess of \$50,000, is subject to public bidding statutes.¹² The public bidding statutes do not apply to real property, or to personal property when the procurement duplicates the price and substance of a contract for like goods and services that has been competitively bid by the state, a subdivision, or the federal government.¹³

¹Idaho Code § 31-811.

²*Id.* § 7-701.

³Idaho Const. art. XII, § 2.

⁴Idaho Code § 31-604(2).

⁵*Id.* § 31-604(3).

⁶*Id.* § 31-806.

⁷*Id.* §§ 31-4804, -4804a.

⁸*Id.* § 31-3503.

⁹*Id.* § 31-836. There are numerous exceptions. *Id.* See also *id.* § 31-3515; *id.* § 31-3515A (both set forth procedures for the lease of a county hospital by the county as lessor).

¹⁰Idaho Const. art. VIII, 3E; Idaho Code § 50-1035.

¹¹*Id.* § 31-602.

¹²*Id.* § 67-2806.

¹³*Id.* § 67-2803.

Energy Performance Contracting

Counties may enter into lease-purchase agreements for the purchase and installation of energy cost savings measures in existing public facilities, subject to numerous restrictions.¹⁴

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for federal income tax purposes due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸ Municipalities may “contract and be contracted with”¹⁹ and may “acquire, hold, lease, and convey property, real and personal.”²⁰ Like counties, municipalities may acquire property and incur debt without voter approval.²¹ Municipalities may acquire and equip electrical generating, transmission and distribution facilities with bonds payable from rates, charges, and revenues of the electrical system if no tax revenues are pledged or put at risk for repayment.²²

The purchase and lease of personal property, where the expenditure is in excess of \$25,000, is subject to public bidding statutes.²³ The public bidding statutes do not apply to real property, or to personal property when the procurement duplicates the price and substance of a contract for like goods and services that has been competitively bid by the state, a subdivision, or the federal government.²⁴

Energy Performance Contracting

Municipalities may enter into lease-purchase agreements for the purchase and installation of energy cost savings measures in existing public facilities, subject to numerous restrictions.²⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ A school district may “hold and convey real and personal property necessary to its establishment, extension and existence.”²⁸ School districts may “rent to or from others, school buildings or other property used, or to be used, for school purposes.”²⁹ School districts may “contract for the construction, repair or improvement of any real property, or the acquisition, purchase or repair of any equipment, or other personal property necessary for the operation of the school district.”³⁰

¹⁴*Id.* § 67-5711D.

¹⁵*Id.* § 50-101.

¹⁶*Id.* § 50-235.

¹⁷*Id.* § 7-701.

¹⁸Idaho Const. art. XII, § 2.

¹⁹Idaho Code § 50-301.

²⁰*Id.*

²¹*See, supra*, note 10 and accompanying text.

²²Idaho Const. art. VIII, § 3D.

²³Idaho Code § 67-2806.

²⁴*Id.* § 67-2803.

²⁵*Id.* § 67-5711D.

²⁶*Id.* § 33-802.

²⁷*Id.* § 7-701.

²⁸*Id.* § 33-301.

²⁹*Id.* § 33-601(1).

³⁰*Id.* § 33-601(2). Public bidding procedures must be followed. *Id.* (citing title 67, ch. 28 wherein expenditures of less than \$50,000 are exempted from bidding).

School districts also have authority to acquire or dispose of property, remove buildings, sell and convey property and sell personal property, subject to various limitations.³¹

School boards may enter into lease-purchase agreements for goods, equipment, buses or portable classrooms provided the agreement is in writing and meets all of the following requirements:

- (1) The annual lease payments shall reflect reasonable compensation for use;
- (2) No penalty shall be imposed on the school district for proper cancellation of the lease;
- (3) The right to exercise the option to purchase shall be at the sole discretion of the school district; and
- (4) The cost of purchase shall not exceed the reasonable value of the goods, equipment, buses or portable classrooms as of the time the option to purchase is exercised.³²

School districts may “purchase or lease, and maintain and operate school buses and vans.”³³

Pursuant to Idaho Code Section 33-901, the board of trustees of a school district may create a school plant facilities reserve fund and use such fund for the lease-purchase for any of the purposes for which bonds may be issued.

Energy Performance Contracting

School districts may enter into lease-purchase agreements for the purchase and installation of energy cost savings measures in existing public facilities, subject to numerous restrictions.³⁴

Fire Districts

Fire protection districts³⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their taxation powers.³⁶ Fire protection districts are authorized to “acquire” real and personal property³⁷ and to sell real and personal property.³⁸ Provisions of the purchasing law apply to all political subdivisions.³⁹

Hospital Districts

Hospital districts⁴⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴¹ and eminent domain⁴² powers.

The state’s constitution provides:

³¹*Id.* § 33-601(3) to -601(6).

³²*Id.* § 33-601A. “Portable classroom” means a facility which is not so particular to real estate that an interest arises under real estate law. *Id.*

³³*Id.* § 33-1501.

³⁴*Id.* § 67-5711D.

³⁵Fire protection districts are governmental subdivisions of the state. *Id.* § 31-1416.

³⁶*Id.* § 31-1417(3).

³⁷*Id.* § 31-1419.

³⁸*Id.* § 31-1420.

³⁹*Id.* §§ 2801 to 2809. *See, supra*, notes 12-13 and accompanying text.

⁴⁰“A ‘hospital district’ is one to furnish general hospital services, and together with such hospital services, nursing home services, or medical clinic services to the general public and all other such services as may be necessary for the care of the injured, maimed, sick, disabled, convalescent or long-term care patients.” *Id.* § 39-1319.

⁴¹*Id.* § 39-1331(e).

⁴²*Id.* § 39-1331(j).

Provided that no ad valorem tax revenues shall be used for activities authorized by this section, public hospitals, ancillary to their operations and in furtherance of health care needs in their service areas, may: (i) incur indebtedness or liability to purchase, contract, lease or construct or otherwise acquire facilities, equipment, technology and real property for health care operations as provided by law; (ii) acquire, construct, install and equip facilities or projects to be financed for, or to be leased, sold or otherwise disposed of to persons, associations or corporations other than municipal corporations and may, in the manner prescribed by law, finance the costs thereof; (iii) engage in shared services and other joint or cooperative ventures; (iv) enter into joint ventures and partnerships; (v) form or be a shareholder of corporations or a member of limited liability companies; (vi) have members of its governing body or its officers or administrators serve as directors, managers, officers or employees of any venture, association, partnership, corporation or limited liability company as authorized by this section; (vii) own interests in partnerships, corporations and limited liability companies. Any obligations incurred pursuant to this section shall be payable solely from charges, rents or payments derived from the existing facilities and the facilities or projects financed thereby and shall not be secured by the full faith and credit or the taxing power of the county, hospital taxing district, the state, or any other political subdivision; and provided further, that any county or public hospital taxing district contracting such indebtedness shall own its just proportion to the whole amount so invested. The authority granted by this section shall be exercised for the delivery of health care and related service and with the prior approval of the governing body of the county, hospital district or other governing body of a public hospital. No provisions of this Constitution including, but not limited to Sections 3 and 4 of Article VIII, and Section 4 of Article XII, shall be construed as a limitation upon the authority granted under this section.⁴³ [Emphasis added.]

Hospital districts are authorized to purchase, acquire, and dispose of real and personal property.⁴⁴

Whenever the board of the hospital district shall by resolution determine that it is in the interest of said district and in the public interest or necessity to purchase, contract, lease or construct or otherwise acquire facilities, equipment, technology and real property for health care operations or make any contract with the United States or other persons or corporations, public or private, municipalities or governmental subdivisions to carry out the said public works, acquisitions, improvements, objects or purposes of said district requiring the creation of an indebtedness payable out of taxes of five hundred thousand dollars (\$500,000) or more, and in any event when the indebtedness will exceed the income and revenue provided for the year, the board shall order the submission of the proposition of issuing such obligations or bonds or creating other indebtedness payable out of taxes to the qualified electors of the district at an election held, subject to the provisions of section 34-106, Idaho Code, for that purpose . . .⁴⁵

No election shall be required for any lease or other transaction entered into between the hospital district and the Idaho health facilities authority. Notwithstanding any other provision, the hospital district shall be entitled to enter into a lease or other transaction regardless of the amount involved with the Idaho health facilities authority upon determination by the board of the hospital district that it is in the interest of the hospital district and best interests of the public to enter into such lease or other transaction.⁴⁶

The Health Facilities Authority (IHFA)⁴⁷ may acquire and lease properties and assist public hospitals and institutions in financing the acquisition of facilities and equipment.⁴⁸

Counties may lease without public auction “any property belonging to the county” to any hospital district for use in furthering the purposes of the district for any term not to exceed 99 years.⁴⁹

Provisions of the purchasing law apply to all political subdivisions.⁵⁰

⁴³Idaho Const. art. VIII, § 3C (emphasis added).

⁴⁴Idaho Code § 39-1331(d).

⁴⁵*Id.* § 39-1339(1).

⁴⁶*Id.* § 39-1339(2).

⁴⁷The IHFA is a public instrumentality managed by gubernatorial appointees. Idaho Code. § 39-1444.

⁴⁸*Id.* §§ 39-1441 to 39-1460.

⁴⁹*Id.* § 31-836.

⁵⁰*Id.* §§ 2801 to 2809. *See, supra*, notes 12 - 13 and accompanying text.

State Entities

The Department of Administration has authority to make lease agreements “for facilities to be used by the various state departments, agencies and institutions in the state of Idaho.”⁵¹ The Idaho State Building Authority has primary responsibility for the construction and maintenance of office space and related facilities for agencies and departments of the state.⁵² The Department of Administration has authority to manage multi-agency facilities constructed, acquired or refurbished through the state building authority.⁵³

The Division of Public Works⁵⁴ is within the Department of Administration.⁵⁵

When a facility of the state of Idaho is authorized by concurrent resolution, and a maximum cost for the facility has been set by concurrent resolution, the administrator of the division of public works may enter into lease-purchase or other time-purchase agreements with the Idaho state building authority or other party for the facility.⁵⁶

The director of the department of administration shall have exclusive control of the exterior, grounds and systems of the capitol building. The director, in consultation with the governor, the presiding officers of the legislature and the commission created by this chapter, shall have exclusive authority to equip, maintain, and operate such exterior, grounds and systems. For the purposes of this section, “systems” means electrical, HVAC (heating, ventilating, air-conditioning) and telecommunication systems used in the capitol building.⁵⁷

The administrator of the Division of Purchasing is responsible for acquiring all property for state agencies⁵⁸ and is authorized to “enter into contracts, including leases and rentals, for periods of time exceeding one (1) year, provided that such contracts contain no penalty to or restriction upon the state in the event cancellation is necessitated by a lack of funding for any such contract.”⁵⁹

Unless a specific exemption is granted by the administrator or unless otherwise exempt by these rules, a lease purchase option may be exercised only if the lease containing the purchase option was awarded using the competitive process. Before exercising such an option, the buyer shall meet all applicable requirements of Section 67-5721, Idaho Code, including providing notice of the exercise of option as a sole source or competitively bidding the property by soliciting bids for new or used property.⁶⁰

The office of information services controls and approves acquisition of telecommunications⁶¹ equipment and facilities for all departments and institutions of state government except that for

⁵¹*Id.* §§ 67-5708, 5708a.

⁵²*Id.* tit. 67, ch. 64.

⁵³*Id.*

⁵⁴Public works are defined to include “(a) Any new building, alteration, repair, demolition or improvement of any land, building, structure including utilities, or remodeling or renovation of existing buildings, or other physical facilities, to make physical changes necessitated by changes in the program, to meet standards required by applicable codes, to correct other conditions hazardous to health and safety of persons which are not covered by codes, or to effect a permanent improvement to the facility for any reason including aesthetics or appearance; (b) Site improvement or developments which constitute permanent improvements to real property; (c) Purchase and installation of fixed equipment necessary for the operation of new, remodeled, or renovated buildings and other physical facilities for the conduct of programs initially housed therein to include any equipment that is made a permanent fixture of the building;” *Id.* § 67-5710B.

⁵⁵*Id.* § 67-5705.

⁵⁶*Id.* § 67-5708.

⁵⁷*Id.* § 67-1603.

⁵⁸“Agency” means “all officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding: (a) The legislative and judicial branches of government; (b) The governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction; and (c) A state institution of higher education that complies with the provisions of section 67-9225, Idaho Code.” *Id.* § 67-9203.

⁵⁹*Id.* § 67-9205(10). Such authority may be delegated. *Id.* § 67-9206.

⁶⁰Idaho Admin. Code 38.05.01.101.

⁶¹Telecommunications means “all present and future forms of hardware, software or services used or required for

institutions of higher education, for elected officers in the executive branch, and for the legislative and judicial branches, it acts as a coordinator.⁶² The Idaho technology authority within the office of information services reviews and approves large-scale information technology and telecommunications projects for state agencies.⁶³

The acquisition of telecommunications equipment and information technology as well as other property is covered by rules⁶⁴ promulgated by the department of administrative services to supplement statutes. The department of purchasing is revising terms and conditions for information technology solicitations/acquisitions.⁶⁵

Property not available under an open contract and expected to cost less than \$10,000 is exempt.⁶⁶

The state board of correction appears to have broad authority to control property used by it and is authorized to enter into lease-purchase agreements with private prison contractors.⁶⁷

Institutions of higher education may establish procedures for procuring property substantially in compliance with the state procurement act, but are required to use state open contracts, if available.⁶⁸

Institutions of higher education may lease-purchase dormitories:

The state board of education and board of regents of the University of Idaho, acting as the board of regents of the University of Idaho, or as the board of trustees of the Lewis-Clark State College, or as the board of trustees of the Boise State University, or as the board of trustees of the Idaho State University are hereby authorized to enter into contracts with persons, firms and corporations, for the purpose of providing dormitory and housing facilities for the students of said institutions; for the purposes the board may contract for the leasing and purchase of lands and buildings and for the purchase and installation of fixtures, furniture, furnishings and equipment in such buildings; the board may contract to pay as rent or otherwise a sum sufficient to pay, on the amortization plan, the principal and interest thereon, of the purchase-price of lands and buildings, such contracts to run not over twenty (20) years; the rate of interest on the principal on any purchase shall not exceed seven percent (7%) per annum payable semiannually or annually.⁶⁹

The board of trustees of Idaho State University, Lewis-Clark State College, and Boise State University (by reference) are vested with title to real and personal property and are empowered “to acquire by purchase or exchange, any property which in the judgment of the board is needful for the operation of [the University].”⁷⁰

The University of Idaho is governed by the state board of education which also constitutes the board of regents of the university.⁷¹ The regents have general supervision of the university.⁷² The board

transmitting voice, data, video or images over a distance.” Information technology means “all present forms of computer hardware, computer software or services used or required for automated data processing, computer related office automation or telecommunications.” Idaho Code Ann. § 67-831.

⁶²*Id.* § 67-827A.

⁶³*Id.* § 67-833; Idaho Admin. Code 38.05.01.033.

⁶⁴Idaho Admin. Code 38.05.01.

⁶⁵<https://purchasing.idaho.gov/information-for-vendors/>.

⁶⁶Idaho Admin. Code 38.05.01.044.08.

⁶⁷Idaho Code § 20-209.

⁶⁸*Id.* § 67-9225. “State institution of higher education” means Boise State University, , Idaho State University or Lewis-Clark State College. *Id.* § 67-9203(16).

⁶⁹*Id.* § 33-3701.

⁷⁰*Id.* § 33-3005 (Idaho St. Univ.); § 33-3104 (Lewis-Clark St. Univ.); § 33-4005 (Boise St. Univ.) The schools may dispose of any property. *Id.*

⁷¹*Id.* § 33-2802.

⁷²Idaho Const. art. IX, §10.

of regents is authorized “to expend the income of the university fund as they [sic] may deem expedient for the erection of . . . buildings and the purchase of apparatus....”⁷³

Purchases of equipment, data processing software and equipment, and all contracts for consulting or professional services either in total or through time purchase or other financing agreements, between \$500,000 and \$999,999.99 require prior approval by the State Board of Education Executive Director. The Executive Director of the State Board of Education must be expressly advised when the recommended bid is other than the lowest qualified bid. Purchases exceeding \$1,000,000 require prior approval of the full State Board of Education.⁷⁴

Energy Performance Contracting

The director of administration may enter into energy performance contracts financed as lease-purchase agreements for the purchase and installation cost-savings measures, subject to numerous restrictions.⁷⁵

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.⁷⁶ “No county, city . . . or school district or other subdivision of the state . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof.”⁷⁷ In *O’Bryant v. City of Idaho Falls*,⁷⁸ a nonprofit cooperative association was created for the establishment of a natural gas system and service to the area of the city. The articles of incorporation provided that upon the payment of all indebtedness incurred by the cooperative for the acquisition of the system, the system would be conveyed to the city. The city also granted the cooperative a thirty-year gas service franchise. The city also approved all candidates for election to the board of the cooperative. The court held that the whole plan was a scheme to do indirectly what the city could not do directly.⁷⁹ The court held that the cooperative was an alter ego

⁷³Idaho Code § 33-2802.

⁷⁴<https://www.uidaho.edu/finance/controller/contracts-and-purchasing-services/forms>.

⁷⁵*Id.* § 67-5711D(7).

⁷⁶Idaho Const. art. VII, § 11.

⁷⁷Idaho Const. art. VIII, § 3. This section does not apply to ordinary and necessary expenses, but courts have variously interpreted what constitutes an ordinary and necessary expense. *See, e.g.*, *Thomas v. Glindeman*, 195 P. 92 (Idaho 1921) (repair and maintenance of streets is ordinary and necessary); *Petrie v. Common School Dist. No. 5*, 255 P. 318 (Idaho 1927) (contract for school building addition and furniture creates indebtedness); *Board of County Commissioners v. Idaho Health Facilities Authority*, 831 P.2d 588 (Idaho 1975) (improvements to hospital structure is an ordinary and necessary expense); *Asson v. City of Burley*, 670 P.2d 839 (Idaho 1983) (ordinary means “regular, usual, normal, common, often recurring . . . not characterized by peculiar or unusual circumstances”); *Hanson v. City of Idaho Falls*, 446 P.2d 634 (Idaho 1968) (“An expense is ordinary if in the ordinary course of municipal business, or maintenance of municipal property, it may be and is likely to become necessary”); *City of Pocatello v. Peterson*, 473 P.2d 644 (Idaho 1970) (city’s twenty-year lease of new air terminal held ordinary and necessary). In *City of Boise v. Frazier*, 137 P.3d 388, 2006 WL 941956 (Idaho 2006) (expansion of airport parking facilities is not an ordinary and necessary expense), the court appears to have re-established a much more conservative standard for ordinary and necessary. It returns to an 1897 case in holding that in order for an expenditure to qualify as “necessary” under the proviso clause of Article VIII, § 3 there must exist a necessity for making the expenditure at or during such year. An impact on public safety appears necessary to create the requisite urgency for the action. In the case of *In Re: Validity Of The Power Sales Agreement*, 237 P.3d 1200 (Idaho 2010), the court expanded the *Frazier* holding to require a two-thirds voter approval of long-term contracts for the purchase of electric power by the City of Idaho Falls from the Bonneville Power Administration. In *Challis v. Consent of the Governed Caucus*, 361P.3d 485 (Idaho 2015), the court held that a metering and telemetry upgrade to a proposed water system project was not a “necessary” expense. *See, infra*, note 87 and accompanying text for a discussion of Greater Boise Auditorium District v. Frazier and the availability of a nonappropriation lease structure now in Idaho.

⁷⁸303 P.2d 672 (Idaho 1956).

⁷⁹*Id.* at 679.

of the city and therefore the scheme must comply with the debt limitations of article VIII, section 3 of the constitution.⁸⁰ Even though it only involved a pledge of the revenues and the system, the court noted that article VIII, section 3 covers “indebtedness, or liability.”⁸¹

In *Williams v. City of Emmett*,⁸² the city entered into a lease-purchase agreement for the use and acquisition of a street sprinkler. The term of the agreement was three years with rental to be paid from a special assessment. The court held that liability for the aggregate sum was incurred at the execution of the lease and was thus in excess of revenues for that year in violation of the debt limitation.⁸³

In *Lind v. Rockland School District No. 382*,⁸⁴ the Supreme Court of Idaho upheld an election on a supplemental levy. The district court had voided the supplemental levy. In promoting the election the school district had indicated that the monies would be used for the lease-purchase of a new K-12 school, although no lease-purchase agreement existed and this purpose was not stated in the notice of election. The court did not reach the issue of whether expenditure of levy monies for lease-purchase of a building was constitutional, since it is not until the district commits or expends such funds that a justiciable controversy would exist.⁸⁵

In *Idaho Branch, Inc. of the Associated General Contractors of America, Inc. v. Nampa Highway District No. 1*,⁸⁶ gravel contractors’ constitutional challenge against highway districts was dismissed for (a) plaintiffs’ failure to show that the district’s purchase of a rock crusher with dedicated highway funds was unconstitutional under Article VII, Section 17 which prohibits highway districts from purchasing major items with dedicated funds and (b) because the contractors failed to show that constitutional limitations on incurring indebtedness or liability exceeding yearly incomes and revenues pursuant to Article VIII, section 3 of the Idaho Constitution protected any interest or right the contractors may have had in engaging in the competitive bidding process to supply gravel. The court never reached the merits of whether the installment contract violated constitutional debt limitations in Article VIII, Section 3.

In *Greater Boise Auditorium District v. Frazier*,⁸⁷ the Idaho Supreme Court held that, due to its “genuine non-appropriation provisions,” a lease with an option to purchase did not subject the District to greater liabilities than it has the funds to pay for in the year in which it was entered, and, therefore, the lease did not violate Article VIII, Section 3 of the Idaho Constitution. The structure of the lease financing reviewed by the court had a reserve fund, funded up front to cover additional liabilities that might arise. It could be for default interest, insurance premiums advanced,

⁸⁰*Id.* at 678.

⁸¹*Id.* at 679. There have been successive amendments to Idaho Const. art. VIII, § 3 allowing the use of the special fund doctrine.

⁸²6 P.2d 475 (Idaho 1931).

⁸³*Id.* at 477.

⁸⁴*Lind v. Rockland School Dist. No. 382*, 821 P.2d 983 (Idaho 1991).

⁸⁵It is customary in Idaho to have lease-purchase transactions confirmed by the courts pursuant to the Idaho Judicial Confirmation Law, Title 7, Chapter 13, Idaho Code. On August 5, 2002, the Idaho District Court of the Fifth Judicial District, for the County of Blaine, issued its Findings of Fact, Conclusions of Law, and Judgment finding, among other things, that a lease-purchase transaction subject to nonappropriation and payable from a supplemental levy approved by the Blaine County School District No. 61 voters was valid and the district has the power under the Constitution and laws of the State of Idaho to enter into the transaction documents, which included a trust agreement for the execution and delivery of up to \$24,000,000 of certificates of participation. However, on August 26, 2002, in a judicial confirmation proceeding, the Idaho District Court of the Fourth Judicial District, for Ada County, entered a judgment determining, among other matters, that a proposed lease-purchase agreement of the City of Boise, Idaho, was invalid as constituting unconstitutional “indebtedness or liability” exceeding the City’s revenues for the year, although the lease-purchase agreement would have been subject to annual appropriation of funds at the sole option of the City. Neither of the confirmation proceedings were appealed to the Idaho Supreme Court.

⁸⁶*Idaho Branch, Inc. v. Nampa Highway District 1*, 846 P.2d 239 (Idaho Ct. App. 1993).

⁸⁷360 P.3d 275 (Idaho 2015).

maintenance expenses advanced or liability expenses. Every financial obligation was either subject to appropriation or payable from the advance funded reserve fund.⁸⁸

Interest Rate Limitations

“When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on” money due by express contract, money after the same becomes due and money lent.⁸⁹

The rate of interest provided in section 63-3045⁹⁰ shall be paid by any taxing district, supported in whole or in part from tax revenues, on all purchases, leases, rentals, contracts for services, construction, repairs and remodeling.⁹¹ These provisions seem to be applicable only to delinquent payments.

Miscellaneous

Public entities may issue lease-purchase obligations in registered form.⁹²

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁸⁸One possible approach, where every financial obligations must be subject to appropriation, is to have a requirement, to the extent that funds are not available in the year incurred to make payment of the additional rent, for the additional rent obligation to be payable the following year, but subject to appropriation, with standard nonappropriation being triggered for failure to appropriate said additional rent the following year. One has to make sure that the final term is extended in the documents, if there is an amount of additional rent incurred in the final year, which does not get paid, so that the appropriation of the additional rent for the year following the normal lease termination date has to occur for them to get the end of lease term possession. Beware that any maximum statutory lease term limit is not exceeded.

⁸⁹Idaho Code § 28-22-104.

⁹⁰Id. § 63-3045 (set at 2 percent per annum plus the rate determined under section 1274(d) of the Internal Revenue Code, by the Secretary of the Treasury of the United States at the mid-term federal rate as it applies on September 15 of the immediately preceding calendar year rounded to the nearest whole number.)

⁹¹Id. § 67-2302(9).

⁹²Id. §§ 57-901 to 57-914 (Registered Public Obligations Act of Idaho).

ILLINOIS 2019

Current through P.A. 100-1173 of the 2018 Reg. Sess., Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase and hold the real and personal estate necessary for the uses of the county”⁵ and may “make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.”⁶ Counties may “sell and convey or lease any real or personal estate owned by the county.”⁷ “A county . . . may purchase or lease any real estate or personal property for public purposes under contracts providing for payment in installments over a period of time of not more than 20 years in the case of real estate, and not more than 10 years in the case of personal property.”⁸ Subject to numerous restrictions, counties have the power to enter into lease agreements with the Public Building Commission.⁹

Energy Performance Contracting

Counties may enter into a lease-purchase agreement with a qualified provider or with a third party for the funding or financing of the purchase and installation of energy conservation measures, subject to specific requirements.¹⁰ These then become valid, if otherwise properly executed, whether or not an appropriation is first included in any annual or supplemental budget adopted.¹¹

Municipalities

Municipalities¹² qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹³ eminent domain¹⁴ and police powers.¹⁵

. . . [E]ach municipality having a population of less than 1,000,000 . . . shall have the express power to purchase or lease either real estate or personal property for public purposes through contracts which provide for the consideration for such purchase or lease to be paid through installments to be made at stated intervals during a certain period of time, but, in no case, shall such contracts provide for the consideration to be paid during a period of time in excess of twenty years¹⁶

¹Counties with a chief executive officer elected by county electors and any municipality which has a population of more than 25,000 are “home rule units.” Ill. Const. art. VII, § 6(a).

²Ill. Comp. Stat. Ann. ch. 55, § 5/5-1024.

³*Id.* ch. 605, § 5/6-804.

⁴*Id.* ch. 55, § 5/5-1005.

⁵*Id.* § 5/5-1005.1.

⁶*Id.* § 5/5-1005.3.

⁷*Id.* § 5/5-1005.2.

⁸*Id.* § 5/5-1083. *See, infra*, notes 43-45 and accompanying text.

⁹*Id.* §§ 5/5-1105, 5/6-1005, 5/6-24008. Reference to the Public Building Commission Act may be found at Ill. Comp. Stat. Ann. ch. 50, §§ 20/1 to 20/24.

¹⁰*Id.* ch. 50 § 515/25.

¹¹*Id.*

¹²Municipalities for purposes of this discussion are “cities, villages and incorporated towns.” Ill. Const. art. VII, § 1. Any municipality with a population of more than 25,000 is a “home rule unit”; other municipalities may elect home rule. *Id.* art. VII, § 6(a).

¹³Ill. Comp. Stat. Ann. ch. 65, § 5/8-3-1.

¹⁴*Id.* § 5/11-61-1.

¹⁵*Id.* § 5/11-60-1.

¹⁶*Id.* § 5/11-61-3.

This section is “not a limit upon any municipality which is a home rule unit.”¹⁷

[E]ach municipality having a population of less than 500,000 . . . [has] the power by ordinance adopted by an affirmative vote of two-thirds of the elected corporate authorities . . . [t]o purchase or lease real or personal property for public purposes pursuant to contracts or leases which provide for the consideration . . . to be paid in annual installments during a period not exceeding twenty years; . . . [t]o lease as lessee and to purchase real . . . or personal property for public purposes pursuant to a lease or purchase agreement which . . . may provide that the municipality may, at its option, purchase the property which is subject to the agreement or lease upon terms wherein payments previously made, or a portion of them, are deducted from the purchase price of the property as provided for in such lease or agreement.¹⁸

“Whenever . . . a municipality enters into a lease or purchase agreement, the governing body . . . shall provide by ordinance for the levy and collection of a direct annual tax sufficient to pay the annual installments or rent.”¹⁹ “[E]ach municipality may enter into leases and agreements as provided herein and such leases . . . may be made and the obligation and expense thereunder incurred without making a previous appropriation therefor.”²⁰

Upon petition of electors equal in number of 10 percent or more of the total registered voters in the municipality, an election on adoption of such ordinance shall be held.²¹

Whenever “a majority” of votes in a referendum election is received in favor of the ordinance, “the corporate authorities shall have the authority granted to them” in such ordinance.²²

Subject to numerous provisions, municipalities are authorized to lease property from the public building commission “for any . . . corporate purposes, for any period of time not exceeding twenty years.”²³

“The corporate authorities of each municipality may enter into a lease for a period of not to exceed five years for such equipment and machinery as may be required for corporate purposes when authorized by the affirmative vote of two-thirds of the corporate authorities.”²⁴

Energy Performance Contracting

Municipalities may enter into a lease-purchase agreement with a qualified provider or with a third party for the funding or financing of the purchase and installation of energy conservation measures, subject to specific requirements.²⁵ These then become valid, if otherwise properly executed, whether or not an appropriation is first included in any annual or supplemental budget adopted.²⁶

¹⁷*Id.*

¹⁸*Id.* § 5/11-76.1-1.

¹⁹*Id.* § 5/11-76.1-2. Such ordinances must be published pursuant to *id.* § 5/11-76.1-3.

²⁰*Id.* § 5/11-76.1-2.

²¹*Id.* § 5/11-76.1-4.

²²*Id.*

²³*Id.* § 5/11-79-1.

²⁴*Id.* § 5/11-76-6.

²⁵*Id.* ch. 50, § 515/25.

²⁶*Id.*

School Districts

School districts²⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁸ and eminent domain powers.²⁹

School districts have the power:

To obtain personal property, when authorized by an affirmative vote of 2/3 of the members of the board, by lease, with or without an option to purchase, for a period not to exceed 5 years or by purchase under an installment contract extending over a period of not more than 5 years, with interest at a rate not to exceed the maximum rate authorized by the Bond Authorization Act, as amended³⁰ at the time of the making of the contract; provided that the term of guaranteed energy savings contracts as defined in Article 19b of the School Code³¹ may exceed 5 years. For the purpose of this Section, personal property shall include computer hardware and software and all equipment, fixtures, renovations, and improvements to existing facilities of the district necessary to accommodate computers.³²

School districts having a population of not fewer than 1,000 and not more than 500,000 inhabitants may “contract for the purchase of buses to be paid for within three years of the date of the resolution or over such longer period of time as does not exceed the depreciable life of the vehicle”³³ and “enter into a lease for a period of not to exceed 5 years for such equipment and machinery as may be required for corporate purposes when authorized by the affirmative vote of two-thirds of the members of the board of education.”³⁴

Taxes may be levied and pledged for educational facilities and computer technology acquired by lease, lease-purchase or installment contract.³⁵

School districts may also “lease, for a period [of] not exceeding ninety-nine years, any building, rooms, grounds and appurtenances to be used by the district for the use of schools or for school administration purposes; and to pay for the use of such leased property in accordance with the terms of the lease.”³⁶ “The board shall not make or renew any lease for a term longer than ten years, nor alter the terms of any lease whose unexpired term may exceed ten years without the vote of two-thirds of the full membership of the board.”³⁷ “They may “purchase . . . sites or office facilities . . . by contract for deed” provided such contract does not exceed ten years in length and interest does not exceed at any time 6 percent per annum.”³⁸

²⁷School districts for purposes of the survey, unless otherwise noted, are (a) school districts having a population of less than 1000 inhabitants, (b) school districts having a population of 1000 to 500,000 inhabitants and (c) school districts having a population in excess of 500,000.

²⁸Ill. Comp. Stat. Ann. ch. 105, § 5/17-2, *id.* § 5/32-4.16, *id.* § 5/34-53.

²⁹*Id.* ch. 105, § 5/16-6 (2006).

³⁰The Interest Rate Section, herein, addresses such limitations.

³¹*See, infra*, notes 47-48 and accompanying text.

³²Ill. Comp. Stat. Ann. ch. 105, § 5/10-.25a.

³³*Id.* § 5/10-23.4.

³⁴*Id.* § 5/10-23.4a. It appears that this statute may be intended to apply to only fair market value leases, however, it could be held applicable to a lease-purchase agreement as well.

³⁵*Id.* § 5/17-2.2c. The school board, by resolution, may levy an annual tax not to exceed .05% upon the value of the taxable property for the purpose of leasing educational facilities or computer technology. The levy may be increased to .10% “upon the approval of a proposition to effect such increase by a majority of the electors voting on that proposition at a regular scheduled election. Such proposition may be initiated by resolution of the school board and shall be certified by the secretary to the proper election authorities for submission in accordance with the general election law.” *Id.*

³⁶*Id.* § 5/10-22.12.

³⁷*Id.*

³⁸*Id.* § 5/10-22.35A. *See, infra*, note 117 and accompanying text, which appears to override the interest rate limit.

School districts, including special charter districts, may lease from any public building commission³⁹ “any real or personal property for the purpose of securing office or other space for its administrative or educational functions for a period of time not exceeding 40 years”⁴⁰

School districts in cities having a population exceeding 500,000⁴¹ may rent “buildings, rooms and grounds for the use of schools or for the purpose of school administration.”⁴² Such districts may also “lease from any public building commission . . . any real or personal property for the purpose of securing space for its school purposes or office or other space for its administrative functions for a period of time not exceeding 40 years”⁴³ and may “pay for the use of this leased property in accordance with the terms of the lease and with the provisions of the Public Building Commission Act.”⁴⁴

Such lease may be entered into without making a previous appropriation for the expense thereby incurred; provided, however, that if the board undertakes to pay all or any part of the costs of operating and maintaining the property of a public building commission as authorized in subparagraph (4) of this Section, such expenses of operation and maintenance shall be included in the annual budget of such board annually during the term of such undertaking.⁴⁵

The “state education purchasing entity” may designate a contract as a master contract for use of school districts.⁴⁶

Energy Performance Contracting Measures

School districts may enter into a lease-purchase agreement with a qualified provider or with a third party for the funding or financing of the purchase and installation of energy conservation measures, subject to specific requirements.⁴⁷ Such contracts are valid whether or not an appropriation is included in any annual or supplemental budget adopted by the school district.⁴⁸

Fire Districts

Fire districts⁴⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁵⁰ and eminent domain powers.⁵¹ Fire protection districts have “all powers necessary or appropriate in order that they may engage in the acquisition, establishment, maintenance and operation of fire stations, facilities, vehicles, apparatus and equipment”⁵²

The trustees have express power to purchase either real estate or personal property to be used for the purposes of the fire protection district through contracts which provide for the consideration for such purchase to be paid through installments to be made at stated intervals during a certain period of time, but, in no case, shall such contracts provide for the consideration to be paid during a period of time in excess of 25 years.⁵³

³⁹See *id.* ch. 50, §§ 20/1 to 20/24.

⁴⁰*Id.* ch.105, § 5/22-17.

⁴¹*Id.* § 5/34-1.

⁴²*Id.* § 5/34-21(a)(1).

⁴³*Id.* § 5/34-21.1(1).

⁴⁴*Id.* § 5/34-21.1(2).

⁴⁵*Id.* § 5/34-21.1(3).

⁴⁶*Id.* § 5/28A-15.

⁴⁷*Id.* § 5/19b-5.

⁴⁸*Id.*

⁴⁹“Fire protection districts” are municipal corporations. Ill. Comp. Stat. Ann. ch. 70, § 705/1.

⁵⁰*Id.* § 705/14.

⁵¹*Id.* § 705/10.

⁵²*Id.* § 705/1.

⁵³*Id.* § 705/6.

Hospital Districts

Hospital districts⁵⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,⁵⁵ and eminent domain powers.⁵⁶ Hospital districts may acquire real and personal property by lease.⁵⁷

State Entities

Purchasing is generally decentralized in Illinois, but “[a]ll leases for real property or capital improvements, including office and storage space, buildings, and other facilities for State agencies”⁵⁸ are subject to the provisions of Article 40 of the Illinois Procurement Code⁵⁹ and Title 44 of the Illinois Administrative Code. Among other restrictions, leases are generally limited to a term of ten years and such leases for more than one fiscal year must recite that they are subject to appropriation and cancellation.⁶⁰

Language suggested by the comptroller is set forth below:

Obligations of the State shall cease immediately without penalty or further payment being required if, in any fiscal year, the Illinois General Assembly or federal funding source fails to appropriate or otherwise make available funds for this lease.⁶¹

The Illinois Department of Central Management Services may “lease [with an option to purchase] or purchase office and storage space, buildings, land, and other facilities for all State agencies, authorities, boards, commissions, departments, institutions, and bodies politic and all other administrative units or outgrowths of the executive branch of State government except the Constitutional officers, the State Board of Education and the State colleges and universities and their governing bodies” for a term not to exceed five years, subject to disapproval by the general assembly and other restrictions.⁶²

The Joint Committee on Legislative Support Services is authorized “to coordinate all leases and rental of real property” for the legislative support services agencies.⁶³

Since 1998, with few exceptions,⁶⁴ state entities in the executive branch acquire personal property pursuant to extensive provisions of the Illinois Procurement Code⁶⁵ and title 44 of the Illinois

⁵⁴Hospital districts are municipal corporations. Ill. Comp. Stat. Ann. ch. 70, § 910/15. The provisions of the act authorizing the creation of hospital districts are ineffective in counties with a population exceeding one million persons. *Id.* § 910/4.

⁵⁵*Id.* § 910/20.

⁵⁶*Id.* § 910/15, subsection 2.

⁵⁷*Id.*

⁵⁸“State agency” means and includes all boards, commissions, agencies, institutions, authorities, and bodies politic and corporate of the State, created by or in accordance with the constitution or statute, of the executive branch of State government and does include colleges, universities, and institutions under the jurisdiction of the governing boards of the University of Illinois, Southern Illinois University, Illinois State University, Eastern Illinois University, Northern Illinois University, Western Illinois University, Chicago State University, Governor State University, Northeastern Illinois University, and the Board of Higher Education. However, this term does not apply to public employee retirement systems or investment boards that are subject to fiduciary duties imposed by the Illinois Pension Code or to the University of Illinois Foundation. “State agency” does not include units of local government, school districts, community colleges under the Public Community College Act, and the Illinois Comprehensive Health Insurance Board. *Id.* ch. 30, § 500/1-15.100.

⁵⁹*Id.* § 500/40-5 (real property and capital improvement leases).

⁶⁰*Id.* § 500/40-25.

⁶¹74 Ill. Adm. Code 290.1205.

⁶²Ill. Comp. Stat. Ann. ch. 20 § 405/405-300.

⁶³Ill. Comp. Stat. Ann. ch. 25 § 130/1-4.

Administrative Code. Under the procurement code the term “contract” is defined to include “contracts for financing through use of installment or lease-purchase arrangements.”⁶⁶ Contracts are entered into by “state purchasing officers” at various state agencies⁶⁷ under the supervision of a chief procurement officer.⁶⁸ The duration of contracts is generally limited to ten years⁶⁹ and all must “recite that they are subject to termination and cancellation in any year for which the General Assembly fails to make an appropriation to make payments under the terms of the contract.”⁷⁰

Small purchases of supplies not exceeding \$10,000 and of construction not exceeding \$30,000 may be made without competitive sealed bidding, subject to modification by rules.⁷¹ Sole source contracts may be awarded.⁷²

Numerous prohibitions and disclosures relating to procurement ethics, such as conflicts of interest, fair dealing, political contributions, lobbying, and discrimination, apply to entities doing business with the state.⁷³ Violations of these requirements may render a contract void or voidable by the chief procurement officer.⁷⁴

The Department of Management Services maintains the “Illinois Procurement Bulletin” online with links to information for specific state entities such as institutions of higher education.⁷⁵ Regulations list the requirements of leases with specificity:

Leases for Personal Property [*See Agency Note and bracketed commentary at end of this Section.*]

a) Definition.

Included are agreements for the rental of personal property.

b) In addition to complying with the requirements of Section 290.1203, leases for personal property must contain:

- 1) Lessor's name and address.
- 2) Leasing Agency's name.
- 3) Beginning and ending dates of agreement.
- 4) Description of personal property (where applicable, serial numbers should be included).
- 5) Monthly and annual payment amounts, where applicable.
- 6) Where the agreement is for more than one fiscal year, a subject to appropriation clause.
- 7) Signature of lessor and authorized agency representative.
- 8) Maximum or estimated amount to be paid, where applicable. (See Section 290.1203(e)).
- 9) Execution date. (See Section 290.1203(c)).
- 10) Bribery clause certification. (See Section 290.1203(b)).

⁶⁴Ill. Comp. Stat. Ann. ch. 30 § 500/1-30; *id.* § 500/1-15.100 (exemption of legislative and judicial branches); *see id.* § 500/1-10 (miscellaneous exceptions).

⁶⁵*Id.* § 500/1-1 to § 500/99-5.

⁶⁶*Id.* § 500/1-15.30.

⁶⁷*Id.* § 500/10-10. (Chief procurement officers are appointed for the Capital Development board, Illinois Department of Transportation and Public Institutions of Higher Education, and all other procurement needs of State agencies.) *Id.* § 500/10-20.

⁶⁸*Id.*; *id.* § 500/1-15.15.

⁶⁹*Id.* § 500/20-60. (The length of lease for capital improvements and real property is governed by section 40-25; the length of energy savings leases is governed by section 25-45.)

⁷⁰*Id.*

⁷¹*Id.* § 500/20-20.

⁷²*Id.* § 500/20-25.

⁷³*Id.* §§ 500/50-1 to -80.

⁷⁴*Id.* §§ 500/50-60.

⁷⁵<https://www2.illinois.gov/cpo/pathwaytoprocurement/pages/default.aspx>.

- 11) For multi-year agreements, the Governor's approval, where required by Section 35.7b, of the Civil Administrative Code of Illinois (Ill. Rev. Stat. 1987, ch. 127, par. 35.7b). [The statute on which this requirement is based has been repealed.]
- 12) The maximum or estimated annual amount, where subject to calculation.
- 13) Federal Taxpayer Identification Number and legal status disclosure certification (See Section 290 - Appendix B (16)).
- 14) Bid-rigging/bid rotating certification, where applicable (See Section 290.1203 (k)).
- 15) Educational loan certification (See Section 290.1203 (l)).
- 16) Such other provisions as may be specifically required by law.
- 17) Any other information deemed necessary or advisable by the agency or the Attorney General.

AGENCY NOTE: These requirements also apply to multi-year lease, lease-purchase and installment purchase agreements for electronic data processing, telecommunications and duplicating equipment which are authorized by Section 5.1 of the Illinois Purchasing Act. [Appears to relate to agreements entered into prior to adaptation of the Procurement Code in 1998.]⁷⁶

The state has authorized a master contract program.⁷⁷

Additional miscellaneous statutes:

§ 24.1. The item "electronic data processing" means, and when used in an appropriation act, includes all expenditures incurred for the lease, rental or purchase of electronic data processing equipment and related devices, supplies, services, material and space therefor, and personal services needed, including expenditures for the acquisition of electronic data processing equipment under multi-year lease, lease-purchase or installment purchase contracts for terms of not more than 7 years. Funds appropriated for electronic data processing may be expended to pay any penalty resulting from the cancellation of a multi-year agreement or contract required because funds are not appropriated for the continuation of the multi-year agreement or contract.⁷⁸

§ 20. The item "equipment," when used in an appropriation act, shall mean and include all expenditures for library books, and expenditures, having a unit value exceeding \$100, for the acquisition, replacement or increase of visible tangible personal property of a non-consumable nature, including livestock, whether by purchase, lease-purchase or installment purchase contract. In addition, the "option price" under a bona fide lease with option to purchase is properly payable from the item "equipment".

The item "equipment" does not include expenditures pursuant to multi-year lease, lease-purchase or installment purchase contracts for duplicating equipment authorized by Section 5.1 of "The Illinois Purchasing Act", approved July 11, 1957, as now or hereafter amended,¹ and does not include any expenditure in connection with the repair, maintenance or improvement of real property.⁷⁹

Higher Education

The Board of Higher Education oversees planning for public institutions of higher education⁸⁰ and submits its analysis and recommendations on budget proposals for the operation and capital needs of the institutions to the governor and to the General Assembly,⁸¹ but individual institutions are covered by the state procurement code⁸² and retain other statutory grants of power.⁸³ In addition to having the same

⁷⁶4 Ill. Adm. Code 290.1206.

⁷⁷Ill. Comp. Stat. Ann. ch. 30, § 525/1 to 525/6.

⁷⁸*Id.* ch. 30, § 105/24.1.

⁷⁹*Id.* ch. 30, § 105/20.

⁸⁰"Public institutions of higher education" include The University of Illinois; Southern Illinois University; Chicago State University; Eastern Illinois University; Governors State University; Illinois State University; Northeastern Illinois University; Northern Illinois University; and Western Illinois University. *Id.* ch. 110, § 205/1.

⁸¹*Id.* ch. 110, § 205/8.

⁸²*Id.* ch. 30, § 500/1-13.

⁸³*Id.* ch. 110, § 205/10.

powers as agencies, institutions of higher education have other statutory powers. Institutions of higher education have the power of eminent domain.⁸⁴

The University of Illinois board of trustees has police powers⁸⁵ and the power to “provide for the requisite buildings, apparatus, and conveniences”⁸⁶ and to “acquire any interests in land, buildings, or facilities by purchase, including installments payable over a period allowed by law, by lease over a term of such duration as the Board of Trustees shall determine, or by exercise of the power of eminent domain,”⁸⁷ and to lease with an option to purchase “lands, buildings or facilities which will support scientific research and development in such areas as high technology, super computing [sic], microelectronics, biotechnology, robotics, physics and engineering” for a period not to exceed 18 years.⁸⁸ The lease shall recite that it is subject to termination and cancellation in any year for which the General Assembly fails to make an appropriation to pay the rent payable under the terms of the lease.⁸⁹ Leases exceeding five years must be approved by the Illinois Board of Higher Education.⁹⁰

(T)he trustees, in the exercise of any of the powers conferred by this Act, shall not create any liability or indebtedness in excess of the funds in the hands of the treasurer of the University at the time of creating such liability or indebtedness, and which may be specially and properly applied to the payment of the same.⁹¹

Other, individual state universities, have power, pursuant to virtually identical code provisions, to “acquire by purchase, eminent domain or otherwise” real and personal property⁹² and to lease with an option to purchase for a term not to exceed 18 years “lands, buildings or facilities which will support scientific research and development in such areas as high technology, super computing (sic), microelectronics, biotechnology, robotics, physics and engineering.”⁹³ Such a lease shall recite that it is subject to termination and cancellation in any year for which the General Assembly fails to make an appropriation to pay the rent payable under the terms of the lease.⁹⁴ Such leases exceeding a term of five years must have the approval of the Illinois Board of Higher Education.⁹⁵

Public institutions of higher education may construct and operate new housing projects but must seek “prior determination by and approval of the General Assembly that the specific project or acquisition of property is in the public interest,”⁹⁶ and, although found in the Board of Governors State Colleges and Universities Revenue Bond Act,⁹⁷ the issuance of bonds does not seem to be required to

(a)cquire by purchase or otherwise, construct, equip, complete, remodel, operate, control, and manage student residence halls, dormitories, dining halls, student union buildings, field houses, stadiums, and any other revenue-producing buildings of such type and character as the Board or its successor shall from time to time find a necessity therefor exists and as may be required for the good and benefit of any of the State Colleges or

⁸⁴*Id.* ch. 105, § 5/16-6; ch. 735, § 30/15-5-20.

⁸⁵*Id.* ch. 110, § 305/7; *id.* § 305/1.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²*See* ch. 110, §§ 660/5-40 to 45 (Chicago State University); *id.* §§ 665/10-40 to -45 (Eastern Illinois University); *id.* §§ 670/15-40 to -45 (Governors State University); *id.* §§ 675/20-40 to -45 (Illinois State University); *id.* §§ 680/25-40 to -45 (Northeastern Illinois University); *id.* §§ 685/30-40 to -45 (Northern Illinois University); *id.* §§ 690/35-40 to -45 (Western Illinois University).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.* ch. 110, § 15/1.

⁹⁷*Id.* ch. 110, §§ 610/1 to 615/7.

State Universities under its jurisdiction and for that purpose may acquire property of any kind and description whether real, personal or mixed, by gift, purchase or otherwise. . . .⁹⁸

The University of Illinois Construction Financing Act⁹⁹ appears to allow the creation of financing transactions with trust agreements and leasing of financed projects to the university.

Capital improvements of non-instructional facilities in excess of \$2 million must be approved by the Board of Higher Education.¹⁰⁰

The State University Certificate of Participation Act¹⁰¹ expired on December 31, 2014, however, refunding of certificates of participation issued prior to December 31, 2014, is permitted.¹⁰²

Energy Performance Contracting

The boards of trustees of public universities may enter into a lease-purchase agreement for the funding or financing of the purchase and installation of energy conservation measures by a qualified provider.¹⁰³

State purchasing officers may enter into “energy conservation program contracts or energy savings contracts or leases that provide for utility cost savings,” for a period not to exceed 15 years.¹⁰⁴

Debt Limitations

The State’s authority to incur debt is constitutionally limited.¹⁰⁵ Counties,¹⁰⁶ municipalities,¹⁰⁷ school districts,¹⁰⁸ fire districts¹⁰⁹ and hospital districts¹¹⁰ are statutorily limited in the amount of debt which they may incur. There appears to be no applicable case law construing these provisions.¹¹¹ The indebtedness incurred through lease-purchase agreements by counties¹¹² may not, when aggregated with existing indebtedness, exceed 5.75 percent on the value on the taxable property of the county.¹¹³ The indebtedness incurred through lease-purchase agreements by municipalities¹¹⁴ may not, when aggregated with existing indebtedness, exceed 8.625 percent on the value on the taxable property of the city.¹¹⁵ A

⁹⁸*Id.* ch. 110, § 610/1(a).

⁹⁹*Id.* ch.110, §§ 415/0.01 to 415/3.

¹⁰⁰*Id.* ch.110, 205/8.

¹⁰¹*Id.* ch. 110, §§ 73/1 to 73/90.

¹⁰²*Id.* ch. 110, § 73/90.

¹⁰³*Id.* ch. 110, § 62/25.

¹⁰⁴*Id.* ch. 30, § 500/25-45.

¹⁰⁵Ill. Const. art. IX, § 9.

¹⁰⁶Ill. Comp. Stat. Ann. ch. 50, § 405/1. *See, also, id.* ch 55, §§ 5/6-1005 and 5/6-24008.

¹⁰⁷*Id.* ch. 65, § 5/8-5-1 to § 5/8-5-16. [65 5/11-61-3]

¹⁰⁸*Id.* ch. 105, § 5/19-1(a); Const. art. VII, § 8 (limiting the term of any ad valorem debt to 40 years).

¹⁰⁹Ill. Comp. Stat. Ann. ch. 70, § 705/12; Ill. Const. art. VII, § 8 (limiting the term of any ad valorem debt to 40 years).

¹¹⁰*Id.* ch. 70, § 910/21.2; Ill Const. art. VII, § 8 (limiting the term of any ad valorem debt to 40 years).

¹¹¹Formerly debt limitations were embodied in Ill. Const. art. IX, § 12 (1870), which provided that debt could not be incurred “in any manner” or “for any purpose” to an amount exceeding 5 percent of the taxable property within the subdivision seeking to incur the debt. In *People ex rel. Adamowski v. Public Bldg. Comm’n*, 11 Ill.2d 125, 142 N.E.2d 67, 74 (1957), the court in construing Ill. Const. art. IX, § 12, in relation to the leasing by a municipality of a building from the commission stated that “where a contract calls for the payment of annual installments an indebtedness is at once created for the aggregate of all the installments.” The court’s opinion does not indicate whether a nonappropriation clause was included in the lease-purchase agreement. *See also* Op. Att’y Gen. 24 (Ill. March 9, 1979) (upheld nonappropriation lease by the state). *See also, Berger v. Howlett*, 182 N.E.2d 673 (1962) (upheld lease financing between a state building authority and the state where rental payments were derivable from appropriated funds of state or any other rental revenues received should state not pay rentals).

¹¹²When made pursuant to Ill. Comp. Stat. Ann. ch. 55, § 5/5-1083.

¹¹³*Id.* ch. 55, §§ 5/5-1012, 5/5-1083.

¹¹⁴When made pursuant to *id.* ch. 65, § 5/11-61-3.

¹¹⁵*Id.* § 5/8-5-1.

“governmental unit” under the Local Government Debt Reform Act is defined to include counties, municipalities, school districts, fire protection districts, and hospital districts¹¹⁶ and section 350/17 provides as follows:

§ 17. Leases and installment contracts.

(a) Interest not debt; debt on leases and installment contracts. Interest on bonds shall not be included in any computation of indebtedness of a governmental unit for the purpose of any statutory provision or limitation. For bonds consisting of leases and installment or financing contracts, (1) that portion of payments made by a governmental unit under the terms of a bond designated as interest in the bond or the ordinance authorizing such bond shall be treated as interest for purposes of this Section, (2) were portions of payments due under the terms of a bond have not been designated as interest in the bond or the ordinance authorizing such bond; and all or a portion of such payments is to be used for the payment of principal of and interest on other bonds of the governmental unit or bonds issued by another unit of local government, such as a public building commission, the payments equal to interest due on such corresponding bonds shall be treated as interest for purposes of this Section, and (3) where portions of payments due under the terms of a bond have not been designated as interest in the bond or ordinance authorizing such bond and no portion of any such payment is to be used for the payment of principal of and interest on other bonds of the governmental unit or another unit of local government, a portion of each payment due under the terms of such bond shall be treated as interest for purposes of this Section; such portion shall be equal in amount to the interest that would have been paid on a notional obligation of the governmental unit (bearing interest at the highest rate permitted by law for bonds of the governmental unit at the time the bond was issued or, if no such limit existed, 12 percent) on which the payments of principal and interest were due at the same times and in the same amounts as payments are due under the terms of the bonds. The rule set forth in this Section shall be applicable to all interest no matter when earned or accrued or at what interval paid, and whether or not a bond bears interest which compounds at certain intervals. For purposes of bonds sold at amounts less than 95% of their stated value at maturity, interest for purposes of this Section includes the difference between the amount received for the sale of the bonds and their stated value at maturity.

This subsection may be made applicable to bonds issued prior to the effective date of this Act by passage of an ordinance to such effect by the governing body of a governmental unit.

(b) Purchase or lease of property. The governing body of each governmental unit may purchase or lease either real or personal property, including investments, investment agreements, or investment services, through agreements that provide that the consideration for the purchase or lease may be paid through installments made at stated intervals for a period of no more than 20 years or another period of time authorized by law, whichever is greater; provided, however, that investments, investment agreements, or investment services purchased in connection with a bond issue may be paid through installments made at stated intervals for a period of time not in excess of the maximum term of such bond issue. Each governmental unit may issue certificates evidencing the indebtedness incurred under the lease or agreement. The governing body may provide for the treasurer, comptroller, finance officer, or other officer of the governing body charged with financial administration to act as counter-party to any such lease or agreement, as nominee lessor or seller. When the lease or agreement is executed by the officer of the governmental unit authorized by the governing body to bind the governmental unit thereon by the execution thereof and is filed with and executed by the nominee lessor or seller, the lease or agreement shall be sufficiently executed so as to permit the governmental unit to issue certificates evidencing the indebtedness incurred under the lease or agreement. The certificates shall be valid whether or not an appropriation with respect thereto is included in any annual or supplemental budget adopted by the governmental unit. From time to time, as the governing body executes contracts for the purpose of acquiring and constructing the services or real or personal property that is a part of the subject of the lease or agreement, including financial, legal, architectural, and engineering services related to the lease or agreement, the governing body shall order the contracts filed with its nominee officer, and that officer shall identify the contracts to the lease or agreement; that identification shall permit the payment of the contract from the proceeds of the certificates; and the nominee officer shall duly apply or cause to be applied proceeds of the certificates to the payment of the contracts. The governing body of each governmental unit may sell, lease, convey, and reacquire either real or personal property, or any interest in real or personal property, upon any terms and conditions and in any manner, as the governing body shall determine, if the governmental unit will lease, acquire by purchase agreement, or otherwise reacquire the property, as authorized by this subsection or any other applicable law.

¹¹⁶*Id.* ch. 30, § 350/3(i).

All indebtedness incurred under this subsection, when aggregated with the existing indebtedness of the governmental unit, may not exceed the debt limits provided by applicable law.

Interest Rate Limitations

Notwithstanding the provisions of any other law to the contrary, any public corporation [which is not home rule] may agree or contract to pay interest on bonds or other evidences of indebtedness . . . at an interest rate or rates not exceeding the greater of 9 percent per annum or 125 percent of the rate for the most recent date shown in the 20 G.O. Bonds Index of average municipal bond yields as published in the most recent edition of *The Bond Buyer* . . . at the time the contract is made for the sale of the bonds or other evidences of indebtedness¹¹⁷

Bonds or other evidences of indebtedness means “any instrument providing for the payment of money executed by . . . a public corporation . . . including, without limitation of the foregoing, bonds, notes, contracts, leases, certificates and tax anticipation warrants.”¹¹⁸

Miscellaneous

An intermediate appellate court in Illinois held that the real estate -- which is owned by a for-profit corporation and leased to a charitable, non-profit corporation -- and the improvements constructed thereon by the non-profit corporation and used by it are *not exempt* from real estate taxation.¹¹⁹

The Local Government Debt Reform Act¹²⁰ provides:

A governmental unit may pledge, as security for the payment of its bonds, (1) revenues derived from the operation of any utility system or revenue producing enterprise, (2) moneys deposited or to be deposited into any special fund of the governmental unit, (3) grants or other revenues or taxes expected to be received by the governmental unit from the State or federal government, including taxes imposed by the governmental unit pursuant to grant of authority by the State, such as sales or use taxes or utility taxes, (4) special assessments to be collected with respect to a local improvement financed with the proceeds of bonds, or (5) payments to be made by another governmental unit pursuant to a service, user or other similar agreement with such governmental unit.¹²¹

“Bonds” are defined by the act to include “any instrument evidencing the obligation to pay money authorized or issued by or on behalf of a governmental unit under applicable law, including without limitation, bonds, notes, installment or financing contracts, leases”¹²²

The Local Government Debt Reform Act provides that capitalized interest is permitted for a period not exceeding the greater of two years or a period ending six months after the established date of completion of the project. In addition, it is lawful for the governing body to appropriate money for the payment of interest during the period which they actually can capitalize interest.¹²³

¹¹⁷*Id.* ch. 30, § 305/2 (formerly ch. 17, § 6602). Counties, cities, villages, incorporated towns and school districts are “public corporations.” *Id.* § 305/1. In response to an intermediate appellate court ruling in *Bates v. Board of Education*, 538 N.E. 2d 1299 (Ill. Ct. App. 1989), *rev’d*, 555 N.E. 2d 1 (Ill. 1990), that section 6602 must give way to a lower maximum interest rate set forth in a specific school bond statute, the Illinois Legislature passed Senate Bill 529 which specifically amended over 200 statutes to allow the rates permitted in section 6602. 1989 Ill. Legis. Serv. Public Acts 86-4.

¹¹⁸*Id.* ch. 30, § 305/1(b).

¹¹⁹*Coles-Cumberland Professional Development Corporation v. Department of Revenue of the State of Illinois*, 672 N.E. 2d 391 (Ill. App. 4 Dist. 1996).

¹²⁰Ill. Comp. Stat. Ann. ch. 30, §§ 350/1 to 350/18.

¹²¹*Id.* § 350/13.

¹²²*Id.* § 350/3.

¹²³*Id.* § 350/9.

Fire districts and hospital districts are covered by the Illinois Municipal Budget Law.¹²⁴ In *Diversified Computer Services, Inc. v. Town of York*,¹²⁵ the intermediate court held that section 3 of this act requires the entire amount owed on a multiyear contract to be appropriated in the first year for the contract to be valid. The court, in *Grassini v. DuPage Tp*,¹²⁶ chose not to follow *Diversified* in a case relating to a four year employment contract, finding the employment contract nonbinding on other grounds. It said the municipal budget law does not preclude municipal corporations from incurring debts to be paid in the future.

In *The Board of Trustees of Chicago State University v. Siemens Building Technologies, Inc.*,¹²⁷ the court in evaluating a breach of contract claim relating to an agreement for energy conservation measures between a university and an equipment provider, held that the university could not sue for reimbursement of a savings shortfall before the end of the guarantee period specified by statute although it noted that the parties could contract for greater protections. Additionally, it upheld the use of “hell or high water” financing clauses making lease payments unconditional.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹²⁴Ill. Comp. Stat. Ann. ch. 50, § 330/1 to 330/5. Counties, municipalities and school districts are exempted from application of the act. *Id.* § 330/2.

¹²⁵433 N.E. 2d 726 (Ill. Ct. App. 1982).

¹²⁶665 N.E. 2d 860 (Ill. Ct. App. 1996).

¹²⁷900 N.E. 2d 414 (Ill. Ct. App. 2008).

INDIANA 2019

The Statutes and Constitution are current with all Legislation of the 2018 Second Regular Session and First Special Session of the 120th General Assembly, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties are authorized to lease or lease-purchase “structures, transportation projects, or systems”⁵ from corporations, individuals, associations, partnerships or firms.⁶ Leases without purchase options in the county are limited to a term of ten years, however, the term may be longer if approved by the department of local government finance,⁷ and “must provide that the lease is subject to annual appropriation.”⁸ A lease may provide for an option in the county “to renew the lease for a further term or to purchase the property.”⁹ “[T]he terms and conditions of the purchase must be specified in the lease”¹⁰ The county must not lease-purchase a structure unless it receives a “petition signed by fifty or more taxpayers”¹¹ of the county and “determines, after investigation, that the structure . . . is needed.”¹² If the proposed lease is to build a structure on county-owned land, then the land must be conveyed to the lessor in “fee simple” at “fair market value” as determined by two appraisers.¹³ The lease “may not provide for payment of any rental if a . . . new structure is to be constructed until it is complete and ready for occupancy.”¹⁴ The lease may provide that the county pay “all taxes and assessments, maintain insurance for the benefit of the lessor, and assume all responsibilities for repair and alterations during the term of the lease.”¹⁵ All proposed leases must be available for public inspection¹⁶ and are subject to public hearing before execution.¹⁷ If ten or more taxpayers object to the lease, they may file a petition for a hearing before the department of local government finance.¹⁸ This petition must be filed within thirty days of publication of notice of the execution of the lease.¹⁹ Counties are required to make

¹Counties have home rule powers. Ind. Code Ann. § 36-1-3-4, -5.

²*Id.*

³*Id.* § 36-1-4-5.

⁴*Id.* §§ 36-8-2-2 to -4.

⁵*Id.* § 36-1-10-1. *See generally Id.* §§ 36-1-10-1 to -21. The provisions in notes 5-26 apply to counties and municipalities, but not school districts. These provisions also apply to a convention and visitors bureau (*Id.* § 36-1-10-1(a)(2)), and to buildings used in connection with the operation of a “political subdivision” or “parking facilit[ies]” and include “the site, the equipment and appurtenances to the building(s) or parking facilit[ies].” *Id.* § 36-1-10-2. “Structure” means (1) a building used in connection with the operation of a political subdivision; or (2) a parking facility and the term includes the site, the equipment, and appurtenances to the building or parking facility. “System” means: (1) a computer (as defined in IC 36-8-15-4); (2) a communications system (as defined in IC 36-8-15-3(1)); or (3) mobile or remote equipment that is coordinated by or linked with a computer or communications system. “Transportation project” means a road or highway project jointly undertaken by the Indiana department of transportation and any county through which a toll road project under IC 8-15-2 passes. A transportation project must be located within an area described in IC 8-15-2-1(a)(3) or IC 8-15-2-1(a)(4). *Id.*

⁶*Id.* § 36-1-10-3. Property may also be leased from a limited liability company. *Id.*

⁷*Id.* § 36-1-10-5(1).

⁸*Id.* § 36-1-10-5(2). It should be noted, however, that a later provision requires (subject to certain restrictions) that a “political subdivision or agency that executes a lease under this chapter shall make an annual appropriation and tax levy at a rate to provide sufficient money to pay the rental stipulated in the lease.” *Id.* § 36-1-10-17.

⁹*Id.* § 36-1-10-9(a).

¹⁰*Id.* Such leases are limited to a term of fifty years. *Id.* § 36-1-10-6.

¹¹*Id.* § 36-1-10-7(a)(1).

¹²*Id.* § 36-1-10-7(a)(2).

¹³*Id.* § 36-1-10-11.

¹⁴*Id.* § 36-1-10-12(a).

¹⁵*Id.* § 36-1-10-12(c).

¹⁶*Id.* § 36-1-10-13.

¹⁷*Id.* Notice must be published stating the “date, place, and hour of the hearing and provide a summary of the principal terms of the lease.” *Id.* § 36-1-10-13(b).

¹⁸*Id.* § 36-1-10-14.

¹⁹*Id.* §§ 36-1-10-14, -15.

an “annual appropriation and tax levy at a rate to provide sufficient money to pay the rental . . . stipulated in the lease.”²⁰

Structures, transportation projects, and systems leased by a lessor contracting with the political subdivision or agency under this chapter are exempt from all state, county, and other taxes. However, the rental paid to a lessor under the terms of a lease is subject to taxation.²¹

Counties are also empowered to sell or lease real and personal property.²² However, “[a] disposing agent may lease property rather than sell . . . only if the disposing agent determines that a lease . . . would be in the best interest of [the] political subdivision.”²³ Counties are expressly authorized to utilize the sale-leaseback or sale-buyback methods of property transfers.²⁴

Energy Performance Contracting

Counties may contract for “conservation measures”²⁵ and must comply with numerous restrictions. “Installment payment contracts” for conservation measures must be paid in installments not to exceed the lesser of twenty years or the average life of the conservation measure.²⁶ Reports concerning the lease must be filed with the department of local government finance.²⁷

Municipalities

Municipalities²⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²⁹ eminent domain³⁰ and police powers.³¹ The provisions on lease-purchasing, property disposal and energy performance contracting by counties apply to municipalities.³² Particular statutes apply to the purchase and lease of parking facilities.³³

School Districts

School districts³⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁵ and eminent domain powers.³⁶ School districts may “acquire, construct, erect, maintain, hold, and . . . contract for such construction, erection, or maintenance of such real estate, real estate improvements, or

²⁰*Id.* § 36-1-10-17(a). A political subdivision or agency that executes a lease for a transportation project may only levy a tax under this section for an amount necessary to restore debt service reserve funds and may not levy a tax for lease rental payments. *Id.* § 36-1-10-17(d).

²¹*Id.* § 36-1-10-18.

²²*Id.* §§ 36-1-11-1 to -17.

²³*Id.* § 36-1-11-10.

²⁴*Id.* § 36-1-11-4.1.

²⁵*Id.* §§ 36-1-12.5-0.5 to -12. “Conservation measure” is extensively defined at *id.* § 36-1-12.5-1(a), but essentially relates to alterations designed to reduce energy consumption costs or other operating costs.

²⁶*Id.* § 36-1-12.5-7.

²⁷*Id.* §§ 5-1-18-1 to 5-1-18-12.

²⁸Municipalities are classed by population into first, second and third class cities and towns. *Id.* § 36-4-1-1. . . Municipalities have home rule powers. *Id.* §§ 36-1-3-4, -5.

²⁹*Id.*

³⁰*Id.* § 36-1-4-5.

³¹*Id.* §§ 36-8-2-2 to -4.

³²*See, supra*, notes 5-26 and accompanying text.

³³*Id.* § 36-9-11-8.

³⁴School districts are called “school corporations” and include a “(1) school city; (2) school town; (3) metropolitan school district; (4) consolidated school corporation; (5) county school corporation; (6) community school corporation; and (7) united school corporation.” Ind. Code Ann. § 20-26-2-4.

³⁵*Id.* § 20-26-5-4(14).

³⁶*Id.* § 20-26-5-4(4).

any interest in either, as the governing body deems necessary for school purposes.”³⁷ These may be acquired “by purchase, either outright for cash, (or under conditional sales or purchase money contracts providing for a retention of a security interest by the seller. . .) . . . or by lease with or without option to purchase.”³⁸ School districts may “acquire such personal property or any interest therein as the governing body deems necessary for school purposes.”³⁹ Personal property may be taken by “purchase . . . by gift, by devise, by loan, or by lease with or without option to purchase.”⁴⁰

A school district may purchase buses “under the terms of a security agreement.”⁴¹

Before a security agreement is executed, an appropriation for the amount of the purchase price must be made. The appropriation is made in the same manner as any other appropriation, except that the amount of the appropriation is not limited by the amount of funds available at the time of the execution or the amount of funds to be raised by a tax levy effective at the time of the execution. A petition to borrow, a notice to taxpayers, or other formality is not necessary, except:

- (1) as specifically provided in this chapter; and
- (2) as may be required by law for the issuance of general obligation bonds.⁴²

The statutory scheme appears to provide that such security agreements take the form of notes as follows:

- (a) If a school corporation requires funds to purchase a school bus for cash, the school corporation may, instead of issuing general obligation bonds, negotiate for and borrow funds or purchase the school bus on an installment conditional sales contract or a promissory note secured by the school bus.
- (b) To effect a loan, the school corporation shall execute a negotiable note or notes to the lender. The notes may not extend for more than six (6) years.
- (c) Before a note described in this section is executed, an appropriation for the amount of the purchase price of the school bus and any incidental expenses connected with the purchase or the loan, must be made in the same manner as other appropriations are made, except that the amount of the appropriation is not limited by the amount of funds available at the time of the loan or purchase or by the amount of funds to be raised by a tax levy effective at the time of the loan.
- (d) A petition to borrow, a notice to taxpayers, or other formality is not necessary to borrow funds under this section except as specifically provided in this chapter.”⁴³

The statutory scheme for bus purchases financed with such security agreements complies with certain procurement requirements as follows:

- (a) The purchase of a school bus shall be made in the same manner as provided by law for the purchase of school supplies by a school corporation.
- (b) If a school bus is purchased under a security agreement, the required notice to bidders or solicitation of bids must set:
 - (1) the length of time the security agreement shall run; and
 - (2) the terms of the security agreement, including the security agreement price and interest rate.
- (c) The low bid for a security agreement shall be determined by adding to each bidding price the net interest cost and then comparing the totals of the price and interest on each bid. A separate statement of each price

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* § 20-26-5-4(5).

⁴⁰*Id.*

⁴¹*Id.* § 20-27-4-1.

⁴²*Id.* § 20-27-4-3.

⁴³*Id.* § 20-27-4-5.

shall be made to enable the governing body to determine the advisability of purchasing a school bus under a security agreement.⁴⁴

School districts may enter into leases for the acquisition and financing of school buses.⁴⁵

School districts are authorized to lease school buildings for a term not to exceed fifty years⁴⁶ from a “corporation organized under the laws of the State of Indiana, or duly admitted to do business in the State of Indiana, or with a religious organization (or the organization’s agent) which is exempt from federal income taxation under section 501 [26 U.S.C. § 501] of the Internal Revenue Code.”⁴⁷ The term “school building” includes the site, equipment and “appurtenances to the building, such as heating facilities, water supply, sewage disposal, landscaping, walks, drives, and playgrounds.” Such leases shall “have an option to renew the lease for a further term on like conditions; and to purchase the property.”⁴⁸ The lease must specify the “terms and conditions of the purchase” and may be “subject to approval of the department of local government finance.”⁴⁹ The lease must be made available for public inspection and is subject to a public hearing prior to its execution.⁵⁰ The lease may be challenged by ten or more taxpayers who “will be affected by the proposed lease” by filing a petition within thirty days after publication of notice of the execution of the lease.⁵¹

School districts may also enter into leases and lease-purchase agreements with not-for-profit corporations⁵² which are “organized under the laws of the State of Indiana solely for the purpose of acquiring a site, erecting thereon a suitable school building.”⁵³ While the general requirements⁵⁴ are similar, these leases limit the lessor to “return of capital actually invested, plus interest or dividends on outstanding securities or loans, not to exceed five percent per annum and the cost of maintaining its corporate existence and keeping its property free of encumbrance.”⁵⁵ Lessor corporations may also acquire and finance existing school buildings.⁵⁶

Petitioners sought to intervene in a hearing before the Property Tax Control Board on an application by a school district in connection with a lease rental project. The project concerned a lease of a school building. The court held that only the school district [school corporation] and the State Board were parties to the hearing, and as such, denied the petitioners their request to intervene.⁵⁷

Energy Performance Contracting

School districts may contract for “conservation measures”⁵⁸ and must comply with numerous restrictions. “Installment payment contracts” for conservation measures must be paid in installments not

⁴⁴*Id.* § 20-27-4-6.

⁴⁵*Id.* § 20-27-4-7.

⁴⁶*Id.* § 20-47-3-3.

⁴⁷*Id.* § 20-47-3-4. Numerous requirements are set forth *id.* §§ 20-47-3-1 to -18, including a petition signed by fifty or more patrons of the school district and investigation and approval by the governing body is also required. *Id.* § 20-47-3-3

⁴⁸*Id.* § 20-47-3-5.

⁴⁹*Id.*

⁵⁰*Id.* § 20-47-3-9.

⁵¹*Id.* § 20-47-3-11.

⁵²*Id.* § 20-47-2-6. These financings are subject to numerous restrictions set forth in *Id.* §§ 20-47-2-1 to -23.

⁵³*Id.* 20-47-2-6.

⁵⁴Leases between school districts and not-for-profit corporations are limited to a term of thirty years and must provide the school district with an option to renew the lease or purchase the property after six years from the time of execution of the lease. *Id.* §§ 20-47-2-5, -7.

⁵⁵*Id.* § 20-47-2-6.

⁵⁶*Id.* § 20-47-4-6.

⁵⁷*Boshart v. State Board of Tax Commissioners*, 672 N.E.2d 499 (1996).

⁵⁸*Ind. Code Ann.* §§ 36-1-12.5-0.5 to -12. “Conservation measure” is extensively defined at *Id.* § 36.1-12.5-1(a), but essentially relates to alterations designed to reduce energy consumption costs or other operating costs.

to exceed the lesser of twenty years or the average life of the conservation measure.⁵⁹ Reports concerning the lease must be filed with the department of local government finance.⁶⁰

Hospital Districts

There is a health and hospital corporation of Marion County⁶¹ which is a municipal corporation with taxation,⁶² eminent domain⁶³ and police powers.⁶⁴ It may “acquire” real and personal property by lease.⁶⁵ This appears to be the only health and hospital corporation authorized by the general assembly. Health and hospital corporations do not appear to be covered by general statutory provisions relating to the leasing and lease-purchasing of structures and energy conservation measures.⁶⁶

County Building Authority

All counties, municipalities, school districts and health corporations are authorized to enter into leases and lease-purchase agreements with a county building authority (CBA).⁶⁷ Created by the county seat municipality and the county, a county building authority is a “separate municipal corporation.”⁶⁸ The authority may “purchase, lease, acquire, equip, operate, maintain, and manage land or government buildings”⁶⁹ and may “[l]ease all or part of land government buildings, or systems to eligible entities.”⁷⁰ The lease is limited to a term of forty years⁷¹ and may or may not provide the entity with an option to renew the term or purchase the property.⁷² Public hearings with notice requirements are required before execution of the lease⁷³ and ten or more taxpayers may contest its validity by petition filed within thirty days after publication of notice of execution of the lease.⁷⁴ If the governmental entity desires to have a building “constructed, reconstructed, or renovated” it may sell or lease the land or building to the authority.⁷⁵

Fire Districts

Fire districts⁷⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax powers.⁷⁷ Fire districts are authorized to “purchase or rent” property.⁷⁸

After a sufficient appropriation for the purchase of firefighting apparatus and equipment, including housing, is made and is available, the district's fiscal officer, with the approval of the board and the county fiscal body, may purchase the firefighting apparatus and equipment for the district on an installment conditional sale or mortgage contract running for a period not exceeding fifteen (15) years.

⁵⁹*Id.* § 36-1-12.5-7.

⁶⁰*Id.* §§ 5-1-18-1 to 5-1-18-12.

⁶¹*Id.* § 16-22-8-6.

⁶²*Id.* § 16-22-8-34(9).

⁶³*Id.* § 16-22-8-6(3).

⁶⁴*Id.* § 16-22-8-34.

⁶⁵*Id.* § 16-22-8-6(3).

⁶⁶*Id.* 36-1-10-1. *See, supra*, notes 5-26 and accompanying text.

⁶⁷*Id.* §§ 36-9-13-1 to -41.

⁶⁸*Id.* § 36-9-13-4.

⁶⁹*Id.* § 36-9-13-22(1).

⁷⁰*Id.* § 36-9-13-22(2).

⁷¹*Id.* § 36-9-13-23.

⁷²*Id.* §§ 36-9-13-24, -25. The lease may not require that the entity purchase the lease property nor may it obligate the entity to creditors or bondholders of the County Building Authority. *Id.* § 36-9-13-25(a).

⁷³*Id.* § 36-9-13-27.

⁷⁴*Id.* § 36-9-13-28.

⁷⁵*Id.* § 36-9-13-29.

⁷⁶Fire districts are municipal corporations within the meaning of the state constitution and general statutes. *Id.* § 36-8-11-16.

⁷⁷*Id.* § 36-8-11-15(17).

⁷⁸*Id.* § 36-8-11-15(20).

The purchase shall be amortized in equal or approximately equal installments payable on January 1 and July 1 each year.⁷⁹

As a municipal corporation, a fire district would be subject to general statutory provisions relating to the leasing and lease-purchasing of structures.⁸⁰

State Entities

The Department of Administration facilitates purchasing and contracting for all agencies except the Department of Transportation.⁸¹

State agencies⁸² “may acquire [real] property⁸³ from the owner of the property under a contract between the agency and the owner of the property.”⁸⁴ Agencies may rent property for more than four years, but not more than ten years.⁸⁵ Specific provisions apply to public works contracts involving leases where the state has an option to buy real property.⁸⁶

The Department of Transportation may “acquire by purchase” or “lease” property in the name of the state and may enter into leases with the Indiana finance authority for toll roads and bridges.⁸⁷

Financing for state facilities may be provided by the Indiana finance authority.⁸⁸

The acquisition of personal property is covered by title 5, article 17, chapter 1 of the Indiana Code entitled Purchases and Leases of Personal Property by State Agencies:⁸⁹

(a) This chapter applies to leases of equipment whether or not title passes from the lessor to the lessee. The term “purchaser” as used in this chapter includes persons who make leases for equipment.

(b) Any person, officer, board, commissioner, department, commission, or purchasing agent (designated as purchaser in this chapter) duly authorized and empowered by law or delegated and entrusted with authority to make purchases of material or materials, equipment, goods, and supplies, except current

⁷⁹*Id.* § 36-8-11-26.

⁸⁰*Id.* 36-1-10-1. *See, supra*, notes 5-26 and accompanying text.

⁸¹<http://www.in.gov/idoa/2354.htm>.

⁸²Ind. Code Ann. § 4-20.5-1-3. “(a) “Agency,” except as provided in subsections (b) and (c), refers to any of the following: (1) An agency, a board, a bureau, a commission, a committee, a department, a division, an instrumentality, an office, or an officer of the state; (2) An entity that holds title to or possesses property in the name of, or on behalf of, the state. (b) For purposes of the following statutes, “agency” has the meaning set forth in IC 4-13-1-1 [this statute excludes the judicial and legislative branches of government] . . . ; (c) “Agency” does not include a state educational institution.”

⁸³*Id.* § 4-20.5-1-11. “(P)roperty” means real property or an interest in real property, including the following: (1) Any ownership interest in real property. (2) A leasehold” The term does not include personal property or an interest in personal property. *Id.*

⁸⁴*Id.* § 4-20.5-3-2.

⁸⁵*Id.* § 4-20.5-5-7.

⁸⁶*Id.* § 5-16-1-1.1 (Indiana finance authority acquisition of health care facilities).

⁸⁷*Id.* § 8-23-2-6. The Department of Transportation also has authority to enter into leases pursuant Ind. Code Ann. Chap. 8-14.5-5.

⁸⁸*Id.* § 5-1.2-5-2.

⁸⁹Ind. Code Ann. §§ 5-17-1 to -11. Except that certain state entities are exempted from this chapter. This chapter does not apply to “(1) purchases or leases made by the Indiana department of transportation;

(2) purchases made under IC 5-22 [dispositions of surplus property by a governmental body];

(3) state educational institutions;

(4) the legislative department of state government; or

(5) the judicial department of state government;

except that copies of purchase orders or leases shall be kept on file and be open to public inspection. *Id.* § 5-17-1-8.1. The statutory provisions of this title are supplemental to other laws relating to the purchases of goods and lease of equipment by the state. *Id.* subsection (a).

utility bills, or leases of equipment, for any unit of the state shall comply with the requirements of this chapter whenever the total amount of any purchase exceeds ten thousand dollars (\$10,000) or total annual rental payment under any lease exceeds five thousand dollars (\$5,000).

(c) In all cases of purchase of materials and supplies where the total amount of any such purchase does not exceed the sum of ten thousand dollars (\$10,000), and in all cases of the lease of equipment where the annual rental payment does not exceed five thousand dollars (\$5,000), the purchaser or lessee may buy or lease in the open market without the giving of notice or the receiving of bids.

(d) All purchases of similar materials, equipment, goods, and supplies by any government unit from a person during a six (6) month period under subsection (c) may not exceed ten thousand dollars (\$10,000), and the total annual rental payments to a person under all leases for equipment under subsection (c) may not exceed five thousand dollars (\$5,000).

(e) Materials, equipment, goods, and supplies may be purchased, or such equipment may be leased, from the United States government or any agency, division, or instrumentality thereof, without the giving of notice or the receiving of bids.⁹⁰

Bidding requirements apply,⁹¹ and the use of forms prescribed by the state board of accounts is required:

A purchaser may not make any purchase or contract for the purchase of any material, equipment, goods, or supplies or the lease of equipment unless the bid, offer, proposal, estimate, or contract of any person, firm, limited liability company, or corporation offering any and all such articles for sale or equipment for lease is executed upon the forms prescribed by the state board of accounts setting forth the quantity, quality, and purchase or lease price of every article and thing proposed for sale or lease.⁹²

Certain procedural requirements apply:

Within thirty (30) days after the acceptance of any bid, offer, proposal, estimate, or contract for purchase of materials, equipment, goods, and supplies, or lease of equipment, the purchaser or purchasers shall:

(1) deliver in person or mail to the seller or lessor the original of each purchase order or lease;

(2) retain a copy for his own records; and

(3) when any purchase or lease is made for the state or any agency or instrumentality thereof, file a copy of the purchase order or lease with the disbursing officer for the unit.⁹³

Leases under this chapter are subject to payment of gross retail tax.⁹⁴

Sec. 1. (a) A trustee on a board of trustees of any benevolent, scientific, or educational institution, or any correctional facility of the state, shall not:

(1) borrow money upon the credit of the state;

(2) contract any indebtedness on the credit of the state; or

(3) make expenditures for improvements for an institution or correctional facility in any way; unless the loan or expenditure of money is first authorized by an act of the general assembly.

(b) A trustee who violates this section:

(1) commits a Class C infraction; and

(2) forfeits the trustee's office.⁹⁵

⁹⁰*Id.* § 5-17-1-1.

⁹¹*Id.* § 5-17-1-2.

⁹²*Id.* § 5-17-1-3.

⁹³*Id.* § 5-17-1-4.

⁹⁴*Id.* § 5-17-1-11 (citing 5-22-16-4(b)).

⁹⁵*Id.* § 4-10-14-1.

Extensive approval requirements are applicable to contracts entered into by state agencies, such as approval by the commissioner of the Indiana department of administration, the director of the budget agency and the attorney general.⁹⁶ In contracts with a governmental body, except contracts in which a political subdivision is a party, a prospective contractor must certify it has not violated laws regulating commercial telephone solicitation.⁹⁷

Regulations provide that a contract for lease may contain an option to purchase, however:

(1) exercise of the option is:

- (A) at the sole discretion of Indiana; and
- (B) not subject to agreement or acceptance by the contractor;

(2) provision of the option must be part of any solicitation;

(3) a means of computing the cost of the item to Indiana at fixed intervals, should it exercise its option, that is not more than the actual resale or fair market value of the item at the time of exercising the option must be part of the agreement;

(4) Indiana must have the right to cancel the lease or rental agreement, at fixed intervals, without penalty; and

(5) exercise of the option to purchase must be subject to the approval of the commissioner and the state budget director.⁹⁸

Regarding installment contracts, regulations provide:

(e) A using agency may not enter into an installment sales contract unless the contract contains the following:

(1) A contract clause that permits the department to cancel the contract if the budget director makes a written determination that funds are not appropriated or otherwise available to support continuation of the contract.

(2) Other contract terms that the commissioner may require.⁹⁹

The Indiana Office of Technology (IOT) reviews all state requisitions for information technology, regardless of the size of the request or whether it is a small part of a contract for something else.¹⁰⁰ Contractors providing information technology related products or services to the State must comply with IOT standards, policies, and guidelines.¹⁰¹

A governmental body¹⁰² may adopt supplementary rules to regulate purchases¹⁰³ of the governmental body.¹⁰⁴

⁹⁶*Id.* §§ 4-13-2-14.1 to 14.20.

⁹⁷*Id.* § 5-22-3-7.

⁹⁸25 Ind. Admin. Code 1.1-1-16 (d). Current with amendments received through the Indiana Weekly Collection, January 2, 2019.

⁹⁹*Id.* § 1.1-1-16 (e).

¹⁰⁰*Go to:* www.in.gov/iot/2394.htm. Click on the hyperlink: 07-06 Procurements for Other Agencies; Ind. Code Ann. § 4-13.1-2-1,-2.

¹⁰¹*Id.*

¹⁰²*Id.* § 5-22-2-13. "Governmental body" means an agency, a board, a branch, a bureau, a commission, a council, a department, an institution, an office, or another establishment of any of the following: (1) The executive branch; (2) The judicial branch; (3) The legislative branch; (4) A political subdivision. The public purchasing article does not apply to the commission for higher education or state educational institutions and other enumerated entities except in limited situations. *Id.* § 5-22-1-2.

¹⁰³"Purchase" means "buy, procure, rent, lease or otherwise acquire" *Id.* § 5-22-2-24.

¹⁰⁴*Id.* § 5-22-3-3.

A governmental body “shall purchase” supplies produced by the department of corrections if certain conditions are met.¹⁰⁵ State educational institutions may engage in projects to acquire land, buildings, or facilities by lease-purchase.¹⁰⁶ Projects for which the principal value exceeds two million dollars are subject to certain restrictions:¹⁰⁷

(a) Subject to this section, in addition to projects authorized by the general assembly, the board of trustees of a state educational institution may engage in a project to:

(1) construct buildings or facilities of a cost greater than two million dollars (\$2,000,000); or

(2) purchase or lease-purchase land, buildings, or facilities the principal value of which exceeds two million dollars (\$2,000,000);

only if there are funds available for the project, the project meets any of the applicable conditions, and the project is reviewed by the commission for higher education and approved by the governor upon recommendation of the budget agency. The review by the commission for higher education must be completed not later than ninety (90) days after the project is submitted for review.

(b) If:

(1) any part of the cost of a project described in subsection (a) is paid by state appropriated funds or by mandatory student fees assessed all students for the project; and

(2) the project is to:

(A) construct new buildings or facilities of a cost greater than two million dollars (\$2,000,000); or

(B) purchase or lease-purchase land, buildings, or facilities the principal value of which exceedstwo million dollars (\$2,000,000);

the project must also be approved by the general assembly.

(c) This section does not limit the board of trustees in supplementing a project approved by the general assembly from gifts or other available funds so long as approval for the expansion of the project is given by the governor on review by the commission for higher education and recommendation of the budget agency.

(d) The review and approval requirements of this section do not apply to a project to:

(1) construct buildings or facilities; or

(2) purchase or lease-purchase land, buildings, or facilities;

if the project involves the expansion or improvement of housing for students undertaken entirely by a fraternity or sorority at the state educational institution.¹⁰⁸

State educational institutions¹⁰⁹ are authorized to acquire or improve real and personal property:

¹⁰⁵*Id.* §§ 5-22-11-1 to -3.

¹⁰⁶*Id.* §§ 21-33-3-1 to -10.

¹⁰⁷*Id.* § 21-33-3-5.

¹⁰⁸*Id.*

¹⁰⁹*Id.* § 21-7-13-32. (a) "State educational institution" means any university, college, or other educational institution: (1) existing on or after March 29, 1971; (2) in Indiana; (3) that provides programs of (A) collegiate or university education; or (B) other postsecondary education; and (4) that is supported in whole or in part by appropriations made by the general assembly. (b) The term refers to the following: (1) Ball State University. (2) Indiana State University. (3) Indiana University. (4) Ivy Tech Community College. (5) Purdue University. (6) University of Southern Indiana. (7) Vincennes University.

(a) The board of trustees of a state educational institution may:

(1) acquire, under this article or any other applicable law, by:

(A) purchase (for cash or on contract);

(B) lease or sublease for a period not exceeding forty (40) years that the board of trustees approves;

(C) condemnation;

(D) trade or exchange;

(E) gift, devise, or bequest; or

(F) other means; and

(2) improve;

real property (improved or unimproved) and personal property that the board of trustees determines necessary for the purposes set forth in subsection (b) on the terms and conditions and subject to the liens and encumbrances that the board of trustees approves.

(b) Any action may be taken under subsection (a) that the board of trustees of the state educational institution considers necessary for:

(1) carrying on the educational research, the public service programs, or the statutory responsibilities of the state educational institution and the various divisions of the state educational institution under the jurisdiction of the board of trustees; or

(2) managing, operating, or servicing the state educational institution.¹¹⁰

Regarding building facilities, there are particular requirements for certain lessors:

(a) A lessor leasing fifty percent (50%) or more of a building facility or building facilities:

(1) to a state educational institution or to more than one (1) state educational institution jointly pursuant to sections 4 and 5 of this chapter for a term of five (5) years or more; and

(2) that are to be acquired or constructed and erected by the lessor;

shall, before commencing the acquisition or construction and erection, obtain approval of the plans and specifications for the building facility or building facilities by the lessee or lessees and also by any other public agencies that are required to approve plans and specifications for similar building facilities acquired or constructed and erected by the lessee or lessees.

(b) The lessor shall take bids and enter into a contract or contracts for the construction and erection of the building facility or building facilities in accordance with the same procedures required by law to be followed by the lessee or lessees in the acquisition or construction and erection of similar building facilities.¹¹¹

Institutions of higher education may obtain financing for educational facility projects through the Indiana finance authority.¹¹²

¹¹⁰*Id.* § 21-34-3-4.

¹¹¹*Id.* § 21-34-3-6.

¹¹²*Id.* § 5-1.2-8-1.

Energy Performance Contracting

State educational institutions may enter into energy performance contracts subject to numerous restrictions, but prior approval of the general assembly is not required.¹¹³

The Indiana finance authority established by Indiana Code section 5-1.2-3-1 may enter into guaranteed energy cost savings contracts on behalf of “any agency, board, bureau, commission, committee, council, department, office, or other authority of the executive, including the administrative, department of state government” subject to numerous restrictions.¹¹⁴

Debt Limitations

The state is constitutionally limited in the debt it can incur,¹¹⁵ and counties, municipalities, school districts, the health and hospital corporation of Marion County, and fire districts are constitutionally and statutorily limited in the amount of debt which they can incur.¹¹⁶ In *Jefferson School Tp. v. Jefferson School Tp. Building Co.*,¹¹⁷ the court upheld a lease-purchase for a term of twenty-six years between a school and a building company.¹¹⁸ The court said that a municipal corporation may contract for services or goods to be supplied in the future as long as the rental was “fair and reasonable”¹¹⁹ and the payments were “paid out of current revenues”¹²⁰ so that “present indebtedness [was] not created in the aggregate sum of all the annual payments.”¹²¹ This case has been followed¹²² and results in an abatement structure similar to California abatement leases. Nonappropriation leases with an option to renew in the governmental entity or a nonappropriation clause are also permissible.

Lease rental payments payable during a calendar year may be paid by the state if the political subdivision fails to pay any of its debt service obligations when due:

Sec. 10. (a) As used in this section, “debt service obligations of a political subdivision” refers to:

- (1) the principal and interest payable during a calendar year on bonds; and
- (2) lease rental payments payable during a calendar year on leases;

of a political subdivision payable from ad valorem property taxes.

(b) Political subdivisions are required by law to fully fund the payment of their debt obligations in an amount sufficient to pay any debt service or lease rentals on outstanding obligations, regardless of any reduction in property tax collections due to the application of tax credits granted under this chapter.

(c) Upon the failure of a political subdivision to pay any of the political subdivision's debt service obligations during a calendar year when due, the treasurer of state, upon being notified of the failure by a claimant, shall pay the unpaid debt service obligations that are due from money in the possession of the state that would otherwise be available for distribution to the political subdivision under any other law, deducting the payment from the amount distributed. A deduction under this subsection must be made:

¹¹³*Id.* §§ 21-33-4-1 to -6.

¹¹⁴*Id.* § 4-13.6-1-9 (defining “governmental body” and §§ 4-13.6-8-1 to -10 (energy cost savings contracts)).

¹¹⁵Ind. Const. art. 10, §§ 3, 5.

¹¹⁶Ind. Const. art. 13, § 1; Ind. Code Ann. § 36-1-15-2. For a historical article tracing the trends in Indiana law on this subject, see Note, Municipalities: Constitutional Limitations on Indebtedness, 25 Ind. L.J. 325 (1950).

¹¹⁷10 N.E.2d 608 (Ind. 1937).

¹¹⁸*Id.* at 611.

¹¹⁹*Id.*

¹²⁰*Id.* at 609.

¹²¹*Id.* at 610.

¹²²See *Teperich v. North Judson-San Pierre High School Bldg. Corp.*, 275 N.E.2d 814 (Ind. 1971), cert. denied, 407 U.S. 921 (1972); *Book v. Indianapolis-Marion Bldg. Auth.*, 126 N.E.2d 5, 10 (Ind. 1955); *Protsman v. Jefferson-Craig Consol. School Corp.*, 109 N.E.2d 889, 892 (Ind. 1953).

(1) first from local income tax distributions under IC 6-3.6-9; and

(2) second from any other undistributed funds of the political subdivision in the possession of the state.

(d) This section shall be interpreted liberally so that the state shall to the extent legally valid ensure that the debt service obligations of each political subdivision are paid when due. However, this section does not create a debt of the state.¹²³

Interest Rate Limitations

“Any bonds, notes, or warrants, whether payable from property taxes, revenues, or any other source, are not subject to the maximum interest rate limitations contained in any law enacted before December 31, 1982,” if issued by the state, counties, municipalities school districts, or other political subdivision.¹²⁴

Sec. 7. (a) This section does not apply to bonds, notes, or warrants for which a political subdivision:

(1) after June 30, 2008, makes a preliminary determination as described in section 3.1 or 3.5 of this chapter or a decision as described in section 5 of this chapter; or

(2) in the case of bonds, notes, or warrants not subject to section 3.1, 3.5, or 5 of this chapter, adopts a resolution or ordinance authorizing the bonds, notes, or warrants after June 30, 2008.

(b) When the proper officers of a political subdivision decide to issue any bonds, notes, or warrants which will be payable from property taxes and which will bear interest in excess of eight percent (8%) per annum, the political subdivision shall submit the matter to the department of local government finance for review. The department of local government finance may either approve or disapprove the rate of interest.

(c) This section does not apply to a school corporation.¹²⁵

Miscellaneous

Public construction performed under leases containing an option to purchase must comply with public construction statutes.¹²⁶

Leases approved by the department of local government finance prior to execution are paid with a tax levy outside any tax limitation.¹²⁷ All leases payable outside the tax limitations are subject to a petition and remonstrance process¹²⁸ if (1) total lease payments will exceed the lesser of \$12 million dollars or an amount equal to 1% of the total gross assessed value of property within the political subdivision on the last assessment date, if that amount is at least one million dollars¹²⁹ and (2) 500 persons¹³⁰ petition for the process to apply within 30 days of notice of intent to enter into a lease.¹³¹

¹²³Ind. Code Ann. § 6-1.1-20.6-10.

¹²⁴*Id.* § 5-1-14-1(a).

¹²⁵*Id.* § 6-1.1-20-7. Bond includes a “lease.” *Id.* § 6-1.1-20-1. “As used in this chapter, “lease” means a lease by a political subdivision of any project with lease rentals payable from property taxes that are exempt from the levy limitations of IC 6-1.1-18.5 or (before January 1, 2009) IC 20-45-3.” *Id.* § 6-1.1-20-1.3.

¹²⁶*Id.* § 36-1-12-2.

¹²⁷*Id.* § 6-1.1-18.5-8 (counties, municipalities and any taxing unit except a school corporation).

¹²⁸*Id.* § 6-1.1-20-3.2.

¹²⁹*Id.* § 6-1.1-20-1.1.

¹³⁰“Persons” are either the owners of real property or registered voters residing within the political subdivision. This section was amended in response to *Jones v. Womacks*, 852 N.E.2d 1035 (Ind. Ct. App. 2006) which held that the prior version violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it restricted the right to participate in the petition and remonstrance process to owners of real property living within the political subdivision. It now gives persons

Petition and remonstrance process, if applicable, is a 60 day contest. The side which obtains the most valid signatures of taxpayers within the jurisdiction wins.¹³²

Sec. 9. (a) When the proper officers of a political subdivision decide to issue bonds payable from property taxes to finance a public improvement or enter into a lease rental agreement payable from property taxes to finance a public improvement, they shall adopt an ordinance or resolution which sets forth their determination to issue the bonds or enter into the lease rental agreement. Except as provided in subsection (b), the political subdivision may not advertise for or receive bids for the construction of the improvement until the expiration of:

(1) the time period within which taxpayers may file a petition:

(A) for review of or a remonstrance against the proposed issue or lease, in the case of a proposed issue or lease that is subject to section 3.1 of this chapter; or

(B) to initiate the local public question process, in the case of a proposed issue or lease that is subject to section 3.5 of this chapter; or

(2) the time period during which a petition for review of the proposed issue or lease is pending before the department of local government finance (in the case of bonds or a lease for which a petition for review may be filed with the department of local government finance).

(b) This subsection does not apply to bonds or lease rental agreements for which a political subdivision:

(1) after June 30, 2008, makes:

(A) a preliminary determination as described in section 3.1 or 3.5 of this chapter; or

(B) a decision as described in section 5 of this chapter; or

(2) in the case of bonds or lease rental agreements not subject to section 3.1 or 3.5 of this chapter and not subject to section 5 of this chapter, adopts a resolution or ordinance authorizing the bonds or lease rental agreement after June 30, 2008.

When a petition for review of a proposed issue is pending before the department of local government finance, the department may order the political subdivision to advertise for and receive bids for the construction of the public improvement. When the department of local government finance issues such an order, the political subdivision shall file a bid report with the department within five (5) days after the bids are received, and the department shall render a final decision on the proposed issue within fifteen (15) days after it receives the bid report. Notwithstanding the provisions of this subsection, a political subdivision may not enter into a contract for the construction of a public improvement while a petition for review of the bond issue which is to finance the improvement is pending before the department of local government finance.¹³³

School district leases may be subject to review by the department of local government finance and debt levy limitations if the petition and remonstrance procedures [set out in code sections 6-1.1-20-3.1, -3.5] are not followed or if the governing body fails to adopt a resolution or ordinance authorizing a lease rental agreement.¹³⁴

Sec. 14. After May 15, 2007, the department of local government finance may not approve under section 9 of this chapter a school corporation's proposed:

(1) bond issue that does not provide for payments toward the principal of the bonds on at least an annual basis in the amount determined under the rules or guidelines adopted by the department of local government finance;

residing in the political subdivision, but not owning property, the right to participate in the process also.

¹³¹Ind. Code Ann. § 6-1.1-20-3.1(b).

¹³²*Id.* §§ 6-1.1-20-3.2(7), (8).

¹³³*Id.* § 6-1.1-20-9.

¹³⁴*Id.* §§ 20-46-7-8.-8.5. School bus purchase loans that will be repaid solely from the general fund of the school corporation are exempt from requirements of this section. *Id.*

(2) lease rental agreement that does not provide for repayments toward the present asset value of the lease at its inception on at least an annual basis in the amount determined under the rules or guidelines adopted by the department of local government finance; or

(3) debt service fund loan to purchase school buses that does not provide for payments toward the principal of the loan on at least an annual basis in the amount determined under the rules or guidelines adopted by the department of local government finance.¹³⁵

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

¹³⁵*Id.* §§ 20-46-7-14.

IOWA 2019

Current with Legislation from the 2018 Reg. Sess., subject to changes made by Iowa Code Editor for Code 2019, Westlawⁱ

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³

Counties “may enter into leases or lease-purchase contracts for real or personal property.”⁴ Such leases must comply with the following terms and procedures:

a. A county shall lease or lease-purchase property only for a term which does not exceed the economic life of the property, as determined by the board.

b. A lease or lease-purchase contract entered into by a county may contain provisions similar to those sometimes found in leases between private parties, including, but not limited to, the obligation of the lessee to pay any of the costs of operation or ownership of the leased property and the right to purchase the leased property.

c. A provision of a lease or lease-purchase contract which stipulates that a portion of the rent payments be applied as interest is subject to chapter 74A. Other laws relating to interest rates do not apply. Chapter 75 is not applicable. A county enterprise is a separate entity under this subsection, whether it is governed by the board or another governing body.

d. The board must follow substantially the same authorization procedure required for the issuance of general obligation bonds issued for the same purpose to authorize a lease or a lease-purchase contract made payable from the debt service fund.

e. The board may authorize a lease or lease-purchase contract which is payable from the general fund if the contract would not cause the total of lease and lease-purchase payments due from the general fund of the county in any single future fiscal year for all lease or lease-purchase contracts in force on the date of the authorization, excluding payments to exercise purchase options or to pay the expenses of operation or ownership of the property, to exceed 10 percent of the last certified general fund budget amount in accordance with the following procedures:

(1) (a) The board must follow substantially the authorization procedures of section 331.443 to authorize a lease or lease-purchase contract for personal property which is payable from the general fund. The board must follow substantially the authorization procedures of section 331.443 to authorize a lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease-purchase contract does not exceed the following limits:

(i) Four hundred thousand dollars in a county having a population of twenty-five thousand or less.

(ii) Five hundred thousand dollars in a county having a population of more than twenty-five thousand but not more than fifty thousand.

(iii) Six hundred thousand dollars in a county having a population of more than fifty thousand but not more than one hundred thousand.

(iv) Eight hundred thousand dollars in a county having a population of more than one hundred thousand but not more than two hundred thousand.

¹Iowa Code § 331.422. Counties have home rule powers. Iowa Const. art. III, § 39A.

²Iowa Code § 6A.4.

³*Id.* § 331.301.1.

⁴*Id.* § 331.301.10.

(v) One million dollars in a county having a population of more than two hundred thousand.

(b) However, if the principal amount of a lease or lease-purchase contract pursuant to this subparagraph (1) is less than twenty-five thousand dollars, the board may authorize the lease or lease-purchase contract without following the authorization procedures of section 331.443.

(2) The board must follow the following procedures to authorize a lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease or lease-purchase contract exceeds the limits set forth in subparagraph (1):

(a) The board must institute proceedings for entering into a lease or lease-purchase contract payable from the general fund by causing a notice of the meeting to discuss entering into the lease or lease-purchase contract, including a statement of the principal amount and purpose of the lease or lease-purchase and the right to petition for an election, to be published as provided in section 331.305 at least ten days prior to the discussion meeting. No sooner than thirty days following the discussion meeting shall the board hold a meeting at which it is proposed to take action to enter into the lease or lease-purchase contract.

(b) (i) If at any time before the end of the thirty-day period after which a meeting may be held to take action to enter into the lease or lease-purchase contract, a petition is filed with the auditor in the manner provided by section 331.306, asking that the question of entering into the lease or lease-purchase contract be submitted to the registered voters of the county, the board shall either by resolution declare the proposal to enter into the lease or lease-purchase contract to have been abandoned or shall direct the county commissioner of elections to call a special election upon the question of entering into the lease or lease-purchase contract. However, for purposes of this subparagraph (2), the petition shall not require signatures in excess of one thousand persons.

(ii) The question to be placed on the ballot shall be stated affirmatively in substantially the following manner:

Shall the county of enter into a lease or lease-purchase contract in an amount of \$ for the purpose of?

(iii) Notice of the election and its conduct shall be in the manner provided in section 331.442, subsections 2 through 4.

(c) If a petition is not filed or if a petition is filed and the proposition of entering into a lease or lease-purchase contract is approved at the election, the board may proceed and enter into the lease or lease-purchase contract.

f. The governing body may authorize a lease or lease-purchase contract payable from the net revenues of a county enterprise or combined county enterprise by following the authorization procedures of section 331.464.

g. A lease or lease-purchase contract to which a county is a party or in which a county has a participatory interest is an obligation of a political subdivision of this state for the purposes of chapters 502 and 636, and is a lawful investment for banks, trust companies, savings associations, investment companies, insurance companies, insurance associations, executors, guardians, trustees, and any other fiduciaries responsible for the investment of funds.

h. Property that is lease-purchased by a county is exempt under section 427.1, subsection 2.

i. A contract for construction by a private party of property to be lease-purchased by a county is a contract for a public improvement and is subject to section 331.341, subsection 1.⁵

⁵*Id.* Chapter 74A relates to interest rates applicable to counties. *See, infra*, note 58 and accompanying text. Chapter 75 relates to the public sale of bonds. Section 331.443 sets forth the procedures for issuance of “Essential County Purpose Bonds,” which do not include voter approval. Chapter 502 contains the Iowa blue sky provisions. Chapter 636 relates to permitted

Counties may dispose of interests in real property by sale or exchange or by lease, subject to numerous restrictions. A county “shall not lease, purchase, or construct a facility or building before considering the leasing of a vacant facility or building which is located in the county and owned by a public school corporation.”⁶

A county may “[l]ease for a period not to exceed fifteen years all or part of a county enterprise . . . , if the lease will not reduce the net revenues to be produced by the county enterprise.”⁷ A county enterprise includes airports, sanitary sewage systems, swimming pools, golf courses, hospital facilities, waterworks and housing facilities for elderly and disabled persons.⁸

Energy Performance Contracting

Subject to numerous provisions, counties may enter into financing agreements with the state or with another entity, if costs are lower, for cost-effective energy management improvements to facilities.⁹

Municipalities

Municipalities¹⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹¹ eminent domain¹² and police powers.¹³

A municipality may “exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges and property of the city or of its residents.”¹⁴ A municipality may “acquire, hold, and dispose of property outside the [municipality] in the same manner as within”¹⁵ and may enter into leases or lease-purchase contracts for real and personal property in accordance with the following terms and procedures:

- a. A city shall lease or lease-purchase property only for a term which does not exceed the economic life of the property, as determined by the governing body.
- b. A lease or lease-purchase contract entered into by a city may contain provisions similar to those sometimes found in leases between private parties, including, but not limited to, the obligation of the lessee to pay any of the costs of operation or ownership of the leased property and the right to purchase the leased property.
- c. A provision of a lease or lease-purchase contract which stipulates that a portion of the rent payments be applied as interest is subject to chapter 74A. Other laws relating to interest rates do not apply. Chapter 75 is not applicable. A city utility or city enterprise is a separate entity under this subsection whether it is governed by the governing body of the city or another governing body.
- d. The governing body must follow substantially the same authorization procedure required for the issuance of general obligation bonds issued for the same purpose to authorize a lease or a lease-purchase contract made payable from the debt service fund.
- e. The governing body may authorize a lease or lease-purchase contract which is payable from the general fund if the contract would not cause the total of lease and lease-purchase payments due from

investments for funds held by a fiduciary. Section 427.1, subsection 2 is the property tax provision.

⁶Iowa Code § 331.361.7.

⁷*Id.* § 331.465.2.c.

⁸*Id.* § 331.461.2.

⁹*Id.* §§ 473.20, 473.20A.

¹⁰Municipalities for purposes of this discussion are cities. Municipalities may be home rule. Iowa Const. art. III, § 38A.

¹¹Iowa Code § 384.1.

¹²*Id.* § 6A.4.

¹³*Id.* § 364.1.

¹⁴*Id.*

¹⁵*Id.* § 364.4.1 (a). A public hearing is required for any disposal of real property by gift, any lease for more than three years and any sale of property. *Id.* § 364.7.

the general fund of the county in any single future fiscal year for all lease or lease-purchase contracts in force on the date of the authorization, excluding payments to exercise purchase options or to pay the expenses of operation or ownership of the property, to exceed 10 percent of the last certified general fund budget amount in accordance with the following procedures:

(1) The governing body must follow substantially the authorization procedures of section 384.25 to authorize a lease or lease-purchase contract for personal property which is payable from the general fund. The governing body must follow substantially the authorization procedures of section 384.25 to authorize the lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease-purchase contract does not exceed the following limits:

(a) Four hundred thousand dollars in a city having a population of 5,000 or less.

(b) Seven hundred thousand dollars in a city having a population of more than 5,000 but not more than 75,000.

(c) One million dollars in a city having a population of more than 75,000.

(2) The governing body must follow the following procedures to authorize a lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease or lease-purchase contract exceeds the limits set forth in subparagraph (1):

(a) The governing body must institute proceedings to enter into a lease or lease-purchase contract payable from the general fund by causing a notice of the meeting to discuss entering into the lease or lease-purchase contract, including a statement of the principal amount and purpose of the lease or lease-purchase contract and the right to petition for an election, to be published at least once in a newspaper of general circulation within the city at least ten days prior to the discussion meeting. No sooner than thirty days following the discussion meeting shall the governing body hold a meeting at which it is proposed to take action to enter into the lease or lease-purchase contract.

(b) (i) If at any time before the end of the thirty-day period after which a meeting may be held to take action to enter into the lease or lease-purchase contract, a petition is filed with the clerk of the city in the manner provided by section 362.4, asking that the question of entering into the lease or lease-purchase contract be submitted to the registered voters of the city, the governing body shall either by resolution declare the proposal to enter into the lease or lease-purchase contract to have been abandoned or shall direct the county commissioner of elections to call a special election upon the question of entering into the lease or lease-purchase contract. However, for purposes of this subparagraph, the petition shall not require signatures in excess of one thousand persons.

(ii) The question to be placed on the ballot shall be stated affirmatively in substantially the following manner:

Shall the city of enter into a lease or lease-purchase contract in amount of \$.... for the purpose of?

(iii) Notice of the election and its conduct shall be in the manner provided in section 384.26, subsections 2 through 4.

(c) If a petition is not filed or if a petition is filed and the proposition of entering into the lease or lease-purchase contract is approved at an election, the governing body may proceed and enter into the lease or lease-purchase contract.

f. The governing body may authorize a lease or lease-purchase contract payable from the net revenues of a city utility, combined utility system, city enterprise, or combined city enterprise by following the authorization procedures of section 384.83.

g. A lease or lease-purchase contract to which a city is a party or in which a city has a participatory interest is an obligation of a political subdivision of this state for the purposes of chapters 502 and 682, and is a lawful investment for banks, trust companies, savings associations, investment companies,

insurance companies, insurance associations, executors, guardians, trustees, and any other fiduciaries responsible for the investment of funds.

h. Property that is lease-purchased by a city is exempt under section 427.1, subsection 2.

i. Property that is lease-purchased by a city is exempt under section 427.1, subsection 2. A contract for construction by a private party of property to be lease-purchased by a city is a contract for a public improvement under section 26.2, subsection 3. If the estimated cost of the property to be lease-purchased that is renovated, repaired, or involves new construction exceeds the competitive bid threshold set in section 26.3, the city shall comply with the competitive bidding requirements of section 26.3.¹⁶

“A city shall not lease, purchase, or construct a building before considering the leasing of a vacant facility or building owned by a local public school corporation.”¹⁷

Energy Performance Contracting

Subject to numerous provisions, municipalities may enter into financing agreements with the state or with another entity, if costs are lower, for cost-effective energy management improvements to facilities.¹⁸

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax¹⁹ and eminent domain powers.²⁰ School districts may “hold property.”²¹ School districts have the authority to sell, lease or dispose of property, subject to numerous restrictions.²²

School districts may enter into “lease arrangements” if a “physical plant and equipment levy” has been voter approved, for a period not exceeding ten years or the period authorized by the levy.²³ Levy revenue may be expended for the purposes enumerated in section 298.3, which include financing agreements for “energy management improvements,” the lease purchase of equipment or technology exceeding five hundred dollars in value and lease option agreements for school buildings.²⁴ School districts have the authority to enter into a lease-purchase option agreement, when the board determines that it is advisable to construct buildings on real estate owned by the school district.²⁵ The agreement is subject to the approval of sixty percent of the voters at a regular or special election.²⁶ The lease-purchase agreement is awarded to the lowest responsible bidder, and if the estimated cost of the property to be lease-purchased that is renovated, repaired, or involves new construction exceeds the competitive bid threshold in section 26.3, the board shall comply with competitive bidding requirements.²⁷

¹⁶*Id.* § 364.4.4. *See, supra*, note 5. Section 384.25 sets forth the procedures for issuance of general obligation bonds, which do not include voter approval.

¹⁷Iowa Code § 364.21.

¹⁸*Id.* §§ 473.20, 473.20A.

¹⁹*Id.* § 298.1.

²⁰*Id.* § 297.6.

²¹*Id.* § 274.1.

²²*Id.* § 297.22.

²³*Id.* § 279.26.

²⁴*Id.* § 298.3. (Competitive bidding statutes apply in some circumstances.)

²⁵*Id.* § 278.1(2).

²⁶*Id.*

²⁷*Id.*

The board is also authorized to enter into a loan agreement and issue a note to pay for equipment.²⁸ The note must mature within 5 years, or the useful life of the equipment, whichever is less.²⁹ The loan agreement is also subject to other restrictions.³⁰

The board may purchase school buses and enter into contracts to pay for them over a 5-year period. Several limitations apply.³¹

Energy Performance Contracting

Subject to numerous provisions, school districts may enter into financing agreements with the state or with another entity, if costs are lower, for cost-effective energy management improvements to facilities.³²

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.³³ The board of trustees of a fire district “may purchase, own, rent, or maintain fire apparatus or equipment”³⁴

Hospital Districts

There appears to be no general statutory framework for hospital districts.

State Entities

State agency lease-purchasing of real and personal property is centralized in the state treasurer as provided in section 12.28, subsection 2, set out below:

1. As used in this section, unless the context otherwise requires:

a. "Financing agreement" means any lease, lease-purchase agreement, or installment acquisition contract in which the lessee may purchase the leased property at a price which is less than the fair market value of the property at the end of the lease term, or any lease, agreement, or transaction which would be considered under criteria established by the internal revenue service to be a conditional sale agreement for tax purposes.

b. "State agency" means a board, commission, bureau, division, office, department, or branch of state government. However, state agency does not mean the state board of regents, institutions governed by the board of regents, or authorities created under chapter 16 [Iowa Finance Authority], 257C [Advance Funding Authority], or 261A [Higher Education Facilities Program].

2. The treasurer of state shall have sole authority to enter into financing agreements on behalf of state agencies. The treasurer of state may enter into financing agreements, including master lease-purchase agreements, for the purpose of funding state agency requests for the financing of real or personal property, wherever located within the state, including equipment, buildings, facilities, and structures, or additions or improvements to existing buildings, facilities, and structures. Subject to the selection procedures of section 12.30, the treasurer may employ financial consultants, banks, trustees, insurers, underwriters, accountants, attorneys, and other advisors or consultants as necessary to implement the provisions of this section. The

²⁸*Id.* § 279.48.

²⁹*Id.*

³⁰*Id.*

³¹*Id.* § 285.10(7).

³²*Id.* §§ 473.20, 473.20A.

³³*Id.* § 357B.3.

³⁴*Id.*

costs of professional services and any other costs of entering into the financing agreements may be included in the financing agreement as a cost of the property being financed.

3. The financing agreement may provide for ultimate ownership of the property by the state. Title to all property acquired in this manner shall be taken and held in the name of the state. The state shall be the lessee or contracting party under all financing agreements entered into pursuant to this section. The financing agreements may contain provisions pertaining, but not limited to, interest, term, prepayment, and the state's obligation to make payments on the financing agreement beyond the current budget year subject to availability of appropriations. All projects financed under this section shall be deemed to be for an essential governmental purpose.

4. The treasurer of state may contract for additional security or liquidity for a financing agreement and may enter into agreements for letters of credit, lines of credit, insurance, or other forms of security with respect to rental and other payments due under a financing agreement. Fees for the costs of additional security or liquidity are a cost of entering into the financing agreement and may be paid from funds annually appropriated by the general assembly to the state agency for which the property is being obtained, from other funds legally available, or from proceeds of the financing agreement. The provision of a financing agreement which provides that a portion of the periodic rental or lease payment be applied as interest is subject to chapter 74A [interest rates for public obligations]. Other laws relating to interest rates do not apply. Chapter 75 [authorization and sale of public bonds] does not apply to financing agreements entered into pursuant to this section.

5. Payments and other costs due under financing agreements entered into pursuant to this section shall be payable from funds annually appropriated by the general assembly to the state agency for which the property is being obtained or from other funds legally available. The treasurer of state, in cooperation with the department of administrative services, shall implement procedures to ensure that state agencies are timely in making payments due under the financing agreements.

6. The maximum principal amount of financing agreements which the treasurer of state can enter into shall be one million dollars per state agency in a fiscal year, subject to the requirements of section 8.46 [reporting requirement, *see infra*]. For the fiscal year, the treasurer of state shall not enter into more than one million dollars of financing agreements per state agency, not considering interest expense. However, the treasurer of state may enter into financing agreements in excess of the one million dollar per agency per fiscal year limit if a constitutional majority of each house of the general assembly, or the legislative council if the general assembly is not in session, and the governor, authorize the treasurer of state to enter into additional financing agreements above the one million dollar authorization contained in this section. The treasurer of state shall not enter into a financing agreement for real or personal property which is to be constructed for use as a prison or prison-related facility without prior authorization by a constitutional majority of each house of the general assembly and approval by the governor of the use, location, and maximum cost, not including interest expense, of the real or personal property to be financed. However, financing agreements for an energy conservation measure, as defined in section 7D.34, for an energy management improvement, as defined in section 473.19, or for costs associated with projects under section 473.13A, are exempt from the provisions of this subsection, but are subject to the requirements of 7D.34. In addition, financing agreements funded through the materials and equipment revolving fund established in section 307.47 [highways] are exempt from the provisions of this subsection.

7. The treasurer of state shall decide upon the most economical method of financing a state agency's request for funds. The treasurer of state may utilize master lease-purchase agreements, issue certificates of participation in lease-purchase agreements, or use any other financing method or method of sale which the treasurer believes will provide savings to the state in issuance or interest costs.

8. A financing agreement to which the state is a party is an obligation of the state for purposes of chapters 502 and 636 [relating to securities], and is a lawful investment for banks, trust companies, building and loan associations, savings and loan associations, investment companies, insurance companies, insurance associations, executors, guardians, trustees, and other fiduciaries responsible for the investment of funds.

9. Publication of any notice, whether under section 73A.12 or otherwise, and other or further proceedings with respect to the financing agreements referred to in this section are not required except as set forth in this section, notwithstanding any provisions of other statutes of the state to the contrary.³⁵

³⁵*Id.* § 12.28.

Under Iowa Code Section 12.28, state agencies must notify the legislative services agency of certain lease-purchase agreements:

1. For the purposes of this section, unless the context otherwise requires:
 - a. "Installment acquisition" includes, but is not limited to, an arrangement in which title of ownership passes when the first installment payment is made.
 - b. "Lease-purchase arrangement" includes, but is not limited to, an arrangement in which title of ownership passes when the final installment payment is made.
 - c. "State agency" means any executive, judicial, or legislative department, commission, board, institution, division, bureau, office, agency, or other entity of state government.
2. At least thirty days prior to entering into a contract involving a lease-purchase or installment acquisition arrangement in which any part or the total amount of the contract is at least fifty thousand dollars, a state agency shall notify the legislative services agency concerning the contract. The legislative services agency shall compile the notifications for submission to the legislative fiscal committee of the legislative council. The notification is required regardless of the source of payment for the lease-purchase or installment acquisition arrangement. The notification shall include all of the following information:
 - a. A description of the object of the lease-purchase or installment acquisition arrangement.
 - b. The proposed terms of the contract.
 - c. The cost of the contract, including principal and interest costs. If the actual cost of a contract is not known at least thirty days prior to entering into the contract, the state agency shall estimate the principal and interest costs for the contract.
 - d. An identification of the means and source of payment of the contract.
 - e. An analysis of consequences of delaying or abandoning the commencement of the contract.
3. The legislative fiscal committee shall report to the legislative council concerning the notifications it receives pursuant to this section
4. A contract for construction by a private party of property to be lease-purchased by a state agency is a contract for a public improvement as defined in section 26.2. If the estimated cost of the property to be lease-purchased that is renovated, repaired, or involves new construction exceeds the competitive bid threshold in section 26.3, the state agency shall comply with the competitive bidding requirements of section 26.3.³⁶

The director of the department of administrative services has the duty

[u]nless otherwise provided by law, [to] coordinate the location, design, plans and specifications, construction, and ultimate use of the real or personal property to be purchased by a state agency for whose benefit and use the property is being obtained.

a. If the purchase of real or personal property is to be financed pursuant to section 12.28 [supra], the department shall cooperate with the treasurer of state in providing the information necessary to complete the financing of the property.

b. A contract for acquisition, construction, erection, demolition, alteration, or repair by a private person of real or personal property to be lease-purchased by the treasurer of state pursuant to section 12.28 is exempt from section 8A.311, subsections 1 and 11 [relating to competitive bidding], unless the lease-

³⁶*Id.* § 8.46.

purchase contract is funded in advance by a deposit of the lessor's moneys to be administered by the treasurer of state under a lease-purchase contract which requires rent payments to commence upon delivery of the lessor's moneys to the lessee.³⁷

The telecommunications and technology commission may purchase real or personal property through the use of a financing agreement in accordance with the provisions of section 12.28, *supra*,

. . . provided, however, that the commission may purchase property, equipment, or services for telecommunications pursuant to a financing agreement in an amount not greater than the contract limitation amount [as determined annually] without prior authorization by a constitutional majority of each house of the general assembly, approval by the legislative council if the general assembly is not in session, or the approval of the executive council [in cases of natural disaster or threats to homeland security].³⁸

Higher Education

Universities and schools governed by the state board of regents³⁹ may “manage and control the property, both real and personal, belonging to the institutions”⁴⁰ and they may

[l]ease properties and facilities, either as lessor or lessee, for the proper use and benefit of said institutions upon such terms, conditions, and considerations as the board deems advantageous, including leases with provisions for ultimate ownership by the state of Iowa, and to pay the rentals from funds appropriated to the institution for operating expenses thereof or from such other funds as may be available therefor.⁴¹

The board of regents may delegate its powers under chapter 262 to the administrative officers of the institutions under its control.⁴²

The regents offer equipment financing under a master lease agreement program.⁴³ Contracts exceeding fifty thousand dollars must be reported to the legislative service agency.⁴⁴ University of Iowa purchases to be financed must be reviewed by the university’s business manager’s office, and equipment with a cost greater than one million dollars will be submitted to the chief operating officer of the state of Iowa board of regents for approval. Items with a cost exceeding two million dollars may be submitted to the board of regents.⁴⁵

Real property leases with an option to purchase (by any institution) are subject to approval by the board of regents.⁴⁶ When the estimated cost of construction or improvement of buildings or grounds of a property to be lease-purchased by the board exceeds one hundred thousand dollars, competitive bidding may be required.⁴⁷

³⁷*Id.* § 8A.321.

³⁸*Id.* § 8D.11.

³⁹Such institutions include: (1) The state university of Iowa, including the university of Iowa hospitals and clinics; (2) The Iowa state university of science and technology, including the agricultural experiment station; (3) The university of northern Iowa; (4) The Iowa braille and sight saving school; (5) The state school for the deaf; (6) The Oakdale campus; and (7) The university of Iowa hospitals and clinics' center for disabilities and development. *Id.* § 262.7.

⁴⁰*Id.* § 262.9 (4), § 8A.122, § 8A.302.

⁴¹*Id.* § 262.9 (15).

⁴²*Id.* § 262.12.

⁴³Bd of Regents, St. of Iowa, Bd. Pol’y Man. 2.2.5.

⁴⁴*See, supra*, note 36 and accompanying text.

⁴⁵The Univ. of Iowa Operations Manual ch. 11 (last amended 7/18).

⁴⁶Bd of Regents, St. of Iowa, Bd. Pol’y Man. 2.3.2.E.ix.

⁴⁷Iowa Code § 262.34.

Energy performance contracting

State agencies,⁴⁸ including institutions of higher education, may enter into financing agreements for energy saving measures, subject to numerous restrictions.⁴⁹

Debt Limitations

The State of Iowa, counties, municipalities, other political or municipal corporations and school districts are constitutionally and statutorily limited in the amount of debt which they can incur.⁵⁰ This debt limit was held to be violated in *Bachtell v. City of Waterloo*.⁵¹ The city had entered into a lease-purchase agreement for the acquisition of a civic center to be constructed by a nonprofit corporation. The court held the arrangement to be a disguised purchase, noting that upon dissolution of the nonprofit corporation the city would receive its assets without any further consideration being paid; thus the rental due over the twenty-five year term was aggregated and was in excess of the debt limit. The case does not indicate whether or not a nonappropriation clause was included in the lease. In *Windsor v. City of Des Moines*,⁵² the court, in construing a contract for the construction and maintenance of an electric light plant to be paid for over a period of years, stated that where it is entirely optional with a city whether it should pay anything further on a contract no debt is created.

In *Reetz v. Polk County*, a district court in granting summary judgment in favor of the county in an action brought by taxpayers, upheld the legality of the county's lease-purchase of a racetrack financed by the county's own commercial development revenue bonds. The lease-purchase agreement did not have a nonappropriation clause. No violation of the state's constitutional prohibition against lending the state's credit was found.⁵³ Subsequently, the Supreme Court ruled in *Stanfield v. Polk County*,⁵⁴ that the district court should have granted defendant county summary judgment on its statute of limitations defense instead. Another taxpayer action to enjoin the county was then held to be precluded by the *Stanfield* decision.⁵⁵ The Supreme Court did not discuss the legality of the lease-purchase arrangement.

In *Fults v. City of Coralville*,⁵⁶ the Supreme Court ruled that bonds with terms providing that the city's repayment obligation was "subject to nonappropriation in any fiscal year, did not constitute constitutional debt. The court stated that if there is no legally enforceable obligation to continue repayments in the future, the arrangement is not considered constitutional debt."⁵⁷

⁴⁸"State agency" means a board, department, commission or authority of or acting on behalf of the state having the power to enter into contracts with or without the approval of the executive council to acquire property in its own name or in the name of the state. "State agency" does not mean the general assembly, the courts, the governor or a political subdivision of the state. Iowa Code § 7D.34.

⁴⁹*Id.*; see, also, *id.* §§ 473.20A (West Supp. 2012), 473.13A. (State entities may receive assistance implementing energy savings measures from the economic development authority.)

⁵⁰Iowa Const. art. VII, § 5 (State); *id.* art. XI, § 3 (counties, municipalities, other political and municipal corporations); Iowa Code § 346.24 (counties, other political corporations).

⁵¹200 N.W.2d 548 (Iowa 1972).

⁵²81 N.W. 476 (Iowa 1899).

⁵³No. 34-20125 (Iowa Dist. Ct. filed May 8, 1991).

⁵⁴492 N.W.2d 648 (Iowa 1992) (rehearing denied, as amended).

⁵⁵*Riley v. Maloney*, 499 N.W.2d 18 (Iowa 1993).

⁵⁶666 N.W.2d 548 (Iowa 2003).

⁵⁷*Id.* at 556.

Interest Rate Limitations

The interest rates for public obligations of the state, counties, municipalities, school districts and special districts are set by the governing body of the issuer.⁵⁸

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions

⁵⁸Iowa Code § 74A.3.

KANSAS 2019

Statutes are current through Laws effective on or before July 1, 2018, enacted during the 2018 Regular Session of the Kansas Legislature, West Law¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase and hold real and personal estate”⁵ and may “make all contracts and do all other acts in relation to the property and concerns of the county.”⁶ Counties may dispose of property by sale or by lease-purchase agreements for a term on not more than five years.⁷

Counties may “erect or construct, acquire by gift, purchase, condemnation in fee simple or lease, a public building . . . and may acquire any necessary site therefor by gift, purchase or condemnation in fee simple, or make use of any site or sites previously acquired . . . and may improve any existing public building.”⁸ Counties may also lease from public building commissions created by cities.⁹

Energy Performance Contracting

Counties may enter into a lease-purchase agreement for an energy conservation measure, subject to detailed statutory requirements.¹⁰ To facilitate financing, they are also authorized to enter into lease-purchase agreements for an energy conservation measure with the Kansas development finance authority.¹¹

Municipalities

Municipalities¹² qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹³ eminent domain¹⁴ and police powers.¹⁵ Municipalities may “[p]urchase or receive, by bequest or gift, and hold, real and personal property for the use of the city”¹⁶ and may “[m]ake all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers.”¹⁷

¹Counties have home rule powers. Kan. Stat. Ann. § 19-101.

²*Id.* § 79-1802.

³*Id.* § 19-2801.

⁴*Id.* § 19-212.

⁵*Id.* § 19-101.

⁶*Id.*

⁷*Id.* § 19-211.

⁸*Id.* § 19-15,115. *See also id.* ch. 19, art. 15 for powers to acquire and finance projects too numerous to set forth herein.

⁹*See, infra*, notes 19-21 and accompanying text.

¹⁰Kan. Stat. Ann. § 75-37,125.

¹¹*Id.* § 74-8960.

¹²Municipalities for purposes of this discussion are cities. Cities have home rule powers. Kan. Const. art. XII, § 5.

¹³Kan. Stat. Ann. § 79-1801.

¹⁴*Id.* § 26-201.

¹⁵*Id.* § 12-753.

¹⁶*Id.* § 12-101.

¹⁷*Id.*

Cities “may erect or construct, acquire by gift, purchase, condemnation or lease a public building or buildings and procure any necessary site therefor by gift, purchase or condemnation and may alter, repair, reconstruct, remodel, replace or make additions to, furnish and equip a public building.”¹⁸

Cities may create public building commissions and issue revenue bonds to finance various public buildings and facilities for cities, counties, school districts and state educational facilities and municipal universities.¹⁹ Such facilities may be leased to school districts, cities, agencies and departments of the state and counties for a term not to exceed fifty years.²⁰ The public building commission is a municipal corporation with the power of eminent domain.²¹

“Any city may acquire by purchase, or lease . . . land within or without the limits of said city to be used as a public park for the use and benefit of the people of the city.”²²

There exist special statutory provisions, conveying powers to different cities to acquire and finance projects, too numerous to set forth herein.

Energy Performance Contracting

Municipalities may enter into a lease-purchase agreement for an energy conservation measure, subject to detailed statutory requirements.²³ To facilitate financing, they are also authorized to enter into a lease-purchase agreement for an energy conservation measure with the Kansas development finance authority.²⁴

School Districts

School districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ The statute relating to school district leases and lease-purchase provides in part, as follows:

“The board of education of any school district, as lessee or lessor, may enter into written contracts for the use of real or personal property and . . . lease-purchase agreements as provided by K.S.A. 10-1116b [the cash basis law] The term of any lease or lease-purchase agreement . . . may be for not to exceed 10 years. Such lease or lease-purchase agreement may provide for annual or other payment of rent or rental fees and may obligate the school district to payment of maintenance or other expenses Any lease-purchase agreement which is entered into under authority of this section by any school district and which involves the acquisition of land or buildings is subject to the provisions of K.S.A. 10-1116c, and amendments thereto.”²⁸

¹⁸*Id.* § 12-1736.

¹⁹*Id.* § 12-1758; *id.* § 12-1761.

²⁰*Id.* § 12-1765.

²¹*Id.* §§ 12-1757, -1764.

²²*Id.* § 12-1301. The attorney general has opined that this statute provides authority for a city to lease land from an individual to establish a golf course. 87 Op. Att’y Gen. 88 (Kan. 1987). The attorney general also stated that the city had authority to sublease land to a developer to construct and maintain the golf course under the home rule provisions. *Id.* However, the cash basis law must be complied with by the city. *Id.* See, *infra*, notes 79 to 86 and accompanying text.

²³Kan. Stat. Ann. § 75-37,125.

²⁴*Id.* § 74-8960. See <http://kcc.ks.gov/kansas-energy-office/fcip>.

²⁵School districts for purposes of this discussion are unified school districts.

²⁶Kan. Stat. Ann. § 79-1801.

²⁷*Id.* § 72-3216(e).

²⁸*Id.* § 72-1149 (this provision does not allow a school board to enter into a contract, as lessor, of a school bus). This section further provides that “[t]he provisions of the cash basis law shall not apply to any [such] lease or lease-purchase agreement entered into under authority of this section in such a manner as to prevent the intention of this section from being made effective.” See, *infra*, notes 79-86 and accompanying text. The Kansas Attorney General has taken the position that this statute can be used for qualified zone academy bond financing, but also takes the position that a school district cannot mortgage or grant

Notwithstanding section 72-1149, quoted above, school districts in a county having a population of more than three hundred thousand may enter into contracts as lessee for the use of equipment, land or improvements:

. . . Any such contract may provide for annual or other payment of rent or for the payment as compensation for such use a sum substantially equivalent to or in excess of the value of such equipment, land or improvements under an agreement that the lessee shall become, or for no further or a merely nominal consideration has the option of becoming, the owner of such equipment, land or improvements upon full compliance with the provisions of the contract.

(b) Any such board of education, as lessor, may enter into written contracts with any governmental agency for the use of equipment, land or improvements which is owned by the school district. Any net proceeds received under any contract under this subsection shall be deposited in the capital outlay fund or the general fund of the school district or, if such equipment, land or improvements shall have been acquired from the proceeds of a bond issue which shall not have been fully retired at the time such contract is entered into, such net proceeds shall be deposited in the fund for bonds and interest on bonds of the school district.

(c) The term of any lease authorized by subsections (a) or (b) of this section may be for not to exceed twenty (20) years.

(d) Any contract made under authority of this section shall be subject to change or termination at any time by special or general act of the legislature. Any assignment of the lessor's rights in any contract made under subsection (a) of this section shall contain a citation of this section and a recitation that the contract and assignment thereof are subject to change or termination by special or general act of the legislature. The provisions of the cash basis and budget laws shall not apply to any lease made under authority of this section in such a manner as to prevent the intention of this section from being made effective.

(e) Prior to entering any contract made under authority of subsection (a) of this section, the board of education shall submit to the electors of the school district the question of authorizing the board to enter into such contract, and upon the affirmative vote of the majority of those voting thereon, the board shall be authorized to enter into such contract. Such election shall be held in the manner provided by law for elections on questions submitted in the district.²⁹

Statutory requirements relating to school district contracts provide:

(a) It is the public policy of the state of Kansas that all contracts entered into by the board of education of a school district, or any officers or employees thereof acting on behalf of the board, provide that the school district and board of education shall be responsible solely for the district's or board's actions or failure to act under a contract.

(b) The board of education of a school district or any officers or employees thereof acting on behalf of the board shall not have the authority to enter into a contract under which the school district or board agrees to, or is required to, indemnify or hold harmless against damages, injury or death resulting from the actions or failure to act on the part of any party to a contract other than the board or district.

(c) The provisions of any contract entered into in violation of this section shall be contrary to the public policy of the state of Kansas and shall be void and unenforceable.³⁰

* * *

(a) It is the public policy of the state of Kansas that all contracts entered into by the board of education of a school district, or any officers or employees thereof acting on behalf of the board, shall be governed by and interpreted in accordance with the laws of the state of Kansas.

a security interest in real property owned in public trust by the school district. However, it appears that a school district could acquire equipment or real property under a lease-purchase. It is unclear whether a school district could lease out the asset to be improved pursuant to a ground lease. Kan. Att'y Gen. Op. No. 05-22 (Sept. 20, 2005), 2005 WL 2366493 (Kan. A.G.).

²⁹Kan. Stat. Ann. § 72-1150.

³⁰*Id.* § 72-1146.

(b) The board of education of a school district and any of its officers or employees acting on behalf of the board shall have no power to enter into a contract which provides that the contract shall be governed by or interpreted in accordance with the laws of a state other than the state of Kansas.

(c) The board of education of a school district and any officers or employees thereof acting on behalf of the board shall have no power, pursuant to a contract, to submit to the jurisdiction of any court other than a court of the state of Kansas.

(d) The provisions of any contract entered into in violation of this section shall be contrary to the public policy of the state of Kansas and shall be void and unenforceable.³¹

* * *

(a) Except as provided by subsection (c), any contract entered into by the board of education of a school district or any of its officers or employees acting on behalf of the board shall contain the mandatory contract provisions prescribed by the department of administration in form DA-146a, as amended.

(b) Except as provided by subsection (c), any contract entered into after the effective date of this act shall be deemed to have incorporated the mandatory contract provisions prescribed by the department of administration in form DA-146a, as amended, even if such provisions are not specifically contained in such contract.

(c) The board of education of a school district may omit any of the mandatory contract provisions prescribed by the department of administration in form DA-146a, as amended, upon the affirmative recorded vote of a majority of the members of the board. The board shall not have the authority to waive or omit from the provisions of any contract the provisions of K.S.A. 72-1146 or 72-1147, and amendments thereto.³²

Energy Performance Contracting

School districts may enter into a lease-purchase agreement for an energy conservation measure, subject to detailed statutory requirements.³³ To facilitate financing, they are also authorized to enter into a lease-purchase agreement for an energy conservation measure with the Kansas development finance authority.³⁴

Fire Districts

Fire districts³⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁶ and eminent domain³⁷ powers. Fire districts may

- (a) Enter contracts;
- (b) acquire and dispose of real and personal property;
- (c) acquire, construct, reconstruct, equip, operate, maintain and furnish buildings to house fire-fighting equipment;

³¹*Id.* § 72-1147.

³²*Id.* § 72-1148. For more information about DA-146a and actual text, *see, infra*, note 61 and accompanying text.

³³*Id.* § 75-37,125.

³⁴*Id.* § 74-8960. *See* <http://kcc.ks.gov/kansas-energy-office/fcjp>.

³⁵ For purposes of this discussion fire districts are those which may be created by a county pursuant to Kan. Stat. Ann. §§ 19-3601 to 19-3606, and to which a board of trustees has been appointed. *Id.* § 19-3612a. Not included are fire districts which may be created by a township having a population of more than 10,000 outside the limits of any incorporated city, *id.* § 80-1514, other multi-jurisdictional fire districts and “special benefit fire districts,” *id.* § 31-301, which may be created for territory that lies within 10 miles of a city and coincides with the boundaries of a common-school district or a rural high school district. *Id.* Special benefit districts have the power to tax, *id.* § 31-305, and may expend money in the same manner as moneys are paid out and expended in common-school districts or in rural high-school districts. *Id.*

³⁶*Id.* § 19-3601a.

³⁷*Id.*

- (d) acquire, operate and maintain fire-fighting equipment . . .³⁸

The powers of fire districts created in Johnson County³⁹ are stated somewhat differently. Johnson County fire districts have authority to:

- (a) Enter contracts;
- (b) acquire, by lease or purchase, and dispose of real and personal property;
- (c) acquire, by lease or purchase, construct, reconstruct, equip, operate, maintain and furnish buildings to house fire-fighting equipment;
- (d) acquire, by lease or purchase, operate and maintain fire-fighting equipment . . .⁴⁰

Energy Performance Contracting

Fire districts may enter into a lease-purchase agreement for an energy conservation measure, subject to detailed statutory requirements.⁴¹ To facilitate financing, they are also authorized to enter into a lease-purchase agreement for an energy conservation measure with the Kansas development finance authority.⁴²

Hospital Districts

Hospital districts⁴³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴⁴ and eminent domain⁴⁵ powers.

. . . [A]ny hospital district heretofore or hereafter organized which is authorized to acquire a site, construct, reconstruct, equip, maintain, operate or lease a hospital is hereby authorized and empowered to acquire a site, construct, reconstruct, equip, maintain, operate or lease a medical facility in like manner as it is authorized to do in respect to hospitals. All the laws relating to hospitals which apply to any such . . . hospital district heretofore or hereafter organized shall be applicable to the acquisition of a site for and the construction, reconstruction, equipment, maintenance, operation and leasing of a medical facility by such . . . hospital district insofar as the same can be made applicable.⁴⁶

The hospital district board may enter into a written contract for

. . . the lease of real property to be used for hospital purposes from any person, corporation, society or association upon such terms and conditions as deemed necessary by the board;

. . . the lease of personal property from any person, corporation, society or association upon such terms and conditions as deemed necessary by the board. Any such contract may provide for the payment as compensation for use of such personal property a sum substantially equivalent to or in excess of the value of

³⁸*Id.* § 19-3601a.

³⁹*See id.* § 19-3613 (Johnson County).

⁴⁰*Id.* § 19-3616.

⁴¹*Id.* § 75-37,125.

⁴²*Id.* § 74-8960.

⁴³“Hospital districts” are also known as “health care facilities and services hospital districts.” Kan. Stat. Ann. § 80-2550; *id.* § 80-2552 and § 80-2503. Both are governed by a board. *Id.* Health care facilities and services hospital districts are governed by the general law governing hospitals at the time they became districts. *Id.* § 80-2552.

⁴⁴*Id.* § 80-2516.

⁴⁵*Id.* § 80-2533.

⁴⁶*Id.* § 65-424b. “Medical care facility” means a hospital, ambulatory surgical center or recuperation center, but shall not include a hospice which is certified to participate in the medicare program under 42 code of federal regulations, chapter IV, section 418.1 et seq. and amendments thereto and which provides services only to hospice patients. *Id.* § 65-425(h).

the personal property under an agreement that the hospital shall become, or for no further or a merely nominal consideration has the option of becoming, the owner of the personal property upon full compliance with the provisions of the contract.⁴⁷

Energy Performance Contracting

Hospital districts may enter into a lease-purchase agreement for an energy conservation measure, subject to detailed statutory requirements.⁴⁸ To facilitate financing, they are also authorized to enter into a lease-purchase agreement for an energy conservation measure with the Kansas development finance authority.⁴⁹

State Entities

It appears that a state entity's acquisition of real property by lease-purchase is a matter of legislative act.⁵⁰ Leases of real property are subject to approval by the secretary of administration.⁵¹

The Department of Administration generally has authority to acquire equipment⁵² for all state agencies,⁵³ unless the power is delegated to a state agency⁵⁴ or there is a statutory exemption.⁵⁵

a) The secretary of administration is authorized to enter into certificate of participation financing arrangements to provide financing or refinancing for personal property and fixtures acquired for one or more state agencies, subject to approval of the state finance council, acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto, except that such approval may also be given when the legislature is in session.

(b) As used in this section, certificate of participation financing means an installment purchase or lease purchase agreement that is subject to appropriations and which is structured to allow investors to receive a portion of the principal and interest payments made by state agencies as required by the agreement.⁵⁶

Upon the request to the Department of Administration by the chief administrative officer of a state agency

. . . and subject to the approval of the secretary of administration, the director of purchases may convene a financial services negotiating committee to obtain financial services for the state agency under this section.

(b) Each financial services negotiating committee shall be composed of (1) the director of purchases, or a person designated by the director of purchases, (2) the chief administrative officer of the state agency needing financial services, or a person designated by the officer, and (3) the director of accounts and reports, or a person designated by the director of accounts and reports.

(c) The financial services negotiating committee is authorized to negotiate contracts with qualified parties to provide financial services, including services relating to installment purchase, lease, or lease-purchase of equipment or to other financial related services needed by the state agency.

⁴⁷*Id.* § 80-2517(a)(2), (3).

⁴⁸*Id.* § 75-37,125.

⁴⁹*Id.* § 74-8960. <http://kcc.ks.gov/kansas-energy-office/fcip>.

⁵⁰For example, specific authority to enter into a lease-purchase agreement is provided in relation to acquisition of a specific building known as the Santa Fe office building. Kan. Stat. Ann. § 75-3648(b).

⁵¹*Id.* § 75-3739(l).

⁵²*Id.* § 75-3738.

⁵³"(S)tate agency" means any state office or officer, department, board, commission, institution, bureau or any agency, division or unit within any office, department, board, commission or other state authority or any person requesting a state appropriation. *Id.* § 75-3701.

⁵⁴*Id.* § 75-3738.

⁵⁵*Id.* § 75-3739. For example, institutions of higher education may procure equipment independently of the department of administrative services. *Id.* § 76-769. *See, infra*, note 67 for a list of institutions covered.

⁵⁶*Id.* § 75-37,101.

(d) Prior to negotiating for financial services, the committee shall advertise for proposals, negotiate with one or more of the firms submitting proposals and select from among those submitting such proposals the party to contract with for the purpose of providing financial services.

(e) Contracts entered into pursuant to this section for financial services shall not be subject to the provisions of K.S.A. 75-3738 to 75-3740a [relating to competitive bidding], inclusive, and any amendments thereto.⁵⁷

The acquisition of information technology equipment is treated separately:

. . . [S]tate agencies using information processing equipment under lease are hereby authorized to enter into contracts with leasing service companies for purchase by the agency of such equipment with nonstate funds furnished by such leasing service companies and transfer of title to such equipment by the agency to such leasing service company for lease back to the agency.⁵⁸

* * * *

Appropriations may be made for capital outlay and other expenses to carry out the purpose of the division of information systems and communications for the same period as is authorized by K.S.A. 46-155 and amendments thereto for capital improvements [which is 3 years]. The director of information systems and communications, with the approval of the secretary of administration, may enter into multiple year lease or acquisition contracts, subject to state purchasing laws not in conflict with the foregoing authorization and so long as such contracts do not extend beyond the appropriation periods, limitations and restrictions therefor.⁵⁹

The department of administration oversees a master lease-purchase program available to state agencies for acquiring equipment.⁶⁰

The department of administration has issued mandatory contract provisions, set out here:

State of Kansas
Department of Administration
DA-146a (Rev. 06-12)
CONTRACTUAL PROVISIONS ATTACHMENT

Important: This form contains mandatory contract provisions and must be attached to or incorporated in all copies of any contractual agreement. If it is attached to the vendor/contractor's standard contract form, then that form must be altered to contain the following provision:

"The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 06-12), which is attached hereto, are hereby incorporated in this contract and made a part thereof."

The parties agree that the following provisions are hereby incorporated into the contract to which it is attached and made a part thereof, said contract being the ____ day of _____, 20____.

1. Terms Herein Controlling Provisions: It is expressly agreed that the terms of each and every provision in this attachment shall prevail and control over the terms of any other conflicting provision in any other document relating to and a part of the contract in which this attachment is incorporated. Any terms that conflict or could be interpreted to conflict with this attachment are nullified.

2. Kansas Law and Venue: This contract shall be subject to, governed by, and construed according to the laws of the State of Kansas, and jurisdiction and venue of any suit in connection with this contract shall reside only in courts located in the State of Kansas.

3. Termination Due To Lack Of Funding Appropriation: If, in the judgment of the Director of Accounts and Reports, Department of Administration, sufficient funds are not appropriated to continue the function performed in this agreement and for the payment of the charges hereunder, State may terminate this

⁵⁷*Id.* § 75-3799.

⁵⁸*Id.* § 75-4707. Section 75-7209 provides procedures which must be followed.

⁵⁹*Id.* § 75-4704b. This section appears to provide for the sale leaseback of equipment currently under lease. [The text of section 46-155 cited in the material quoted provides: "Except as provided in K.S.A. 40-3405 and K.S.A. 75-4704b, no item of appropriation, or combination of items of appropriation for the same purpose, shall be for a period greater than one (1) ensuing fiscal year in addition to the current fiscal year, except that in the case of capital improvements an item of appropriation, or combination of items of appropriation for the purpose of completing construction of a project may be for any period not exceeding the three (3) ensuing fiscal years in addition to the current fiscal year."]

⁶⁰<https://admin.ks.gov/offices/ofm>.

agreement at the end of its current fiscal year. State agrees to give written notice of termination to contractor at least 30 days prior to the end of its current fiscal year, and shall give such notice for a greater period prior to the end of such fiscal year as may be provided in this contract, except that such notice shall not be required prior to 90 days before the end of such fiscal year. Contractor shall have the right, at the end of such fiscal year, to take possession of any equipment provided State under the contract. State will pay to the contractor all regular contractual payments incurred through the end of such fiscal year, plus contractual charges incidental to the return of any such equipment. Upon termination of the agreement by State, title to any such equipment shall revert to contractor at the end of the State's current fiscal year. The termination of the contract pursuant to this paragraph shall not cause any penalty to be charged to the agency or the contractor.

4. Disclaimer Of Liability: No provision of this contract will be given effect that attempts to require the State of Kansas or its agencies to defend, hold harmless, or indemnify any contractor or third party for any acts or omissions. The liability of the State of Kansas is defined under the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.).

5. Anti-Discrimination Clause: The contractor agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if the contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration; (f) if it is determined that the contractor has violated applicable provisions of ADA, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration.

Contractor agrees to comply with all applicable state and federal anti-discrimination laws.

The provisions of this paragraph number 5 (with the exception of those provisions relating to the ADA) are not applicable to a contractor who employs fewer than four employees during the term of such contract or whose contracts with the contracting State agency cumulatively total \$5,000 or less during the fiscal year of such agency.

6. Acceptance Of Contract: This contract shall not be considered accepted, approved or otherwise effective until the statutorily required approvals and certifications have been given.

7. Arbitration, Damages, Warranties: Notwithstanding any language to the contrary, no interpretation of this contract shall find that the State or its agencies have agreed to binding arbitration, or the payment of damages or penalties. Further, the State of Kansas and its agencies do not agree to pay attorney fees, costs, or late payment charges beyond those available under the Kansas Prompt Payment Act (K.S.A. 75-6403), and no provision will be given effect that attempts to exclude, modify, disclaim or otherwise attempt to limit any damages available to the State of Kansas or its agencies at law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose.

8. Representative's Authority To Contract: By signing this contract, the representative of the contractor thereby represents that such person is duly authorized by the contractor to execute this contract on behalf of the contractor and that the contractor agrees to be bound by the provisions thereof.

9. Responsibility For Taxes: The State of Kansas and its agencies shall not be responsible for, nor indemnify a contractor for, any federal, state or local taxes which may be imposed or levied upon the subject matter of this contract.

10. Insurance: The State of Kansas and its agencies shall not be required to purchase any insurance against loss or damage to property or any other subject matter relating to this contract, nor shall this contract require them to establish a "self-insurance" fund to protect against any such loss or damage. Subject to the provisions of the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.), the contractor shall bear the risk of any loss or damage to any property in which the contractor holds title.

11. Information: No provision of this contract shall be construed as limiting the Legislative Division of Post Audit from having access to information pursuant to K.S.A. 46-1101 et seq.
The Eleventh Amendment: "The Eleventh Amendment is an inherent and incumbent protection with the State of Kansas and need not be reserved, but prudence requires the State to reiterate that nothing related to this contract shall be deemed a waiver of the Eleventh Amendment."

13. Campaign Contributions / Lobbying: Funds provided through a grant award or contract shall not be given or received in exchange for the making of a campaign contribution. No part of the funds provided

through this contract shall be used to influence or attempt to influence an officer or employee of any State of Kansas agency or a member of the Legislature regarding any pending legislation or the awarding, extension, continuation, renewal, amendment or modification of any government contract, grant, loan, or cooperative agreement.⁶¹

The secretary of the department of corrections

[i]s empowered to enter into contracts and agreements with any person, firm or corporation upon a self-liquidating basis for the acquisition, purchase or lease of equipment, tools, supplies, materials and buildings for manufacturing or for providing services, to the end that the same may be paid for over a period of not exceeding 20 years, and the aggregate amount of such purchases or acquisitions shall not exceed \$500,000 unless specifically approved by the governor. All such amounts shall be payable solely from the correctional industries fund.

. . . Nothing in this section shall be so construed or interpreted as to authorize or permit the incurring of a state debt of any kind or nature as contemplated by the constitution of this state in relation to such debt.⁶²

Information technology is overseen by the information technology executive council⁶³ and each branch of government has a chief information technology officer to which agencies within that branch must submit projects for approval.⁶⁴ In some situations projects may be subject to legislative approval.⁶⁵

The executive chief information technology officer may enter into multiple year lease contracts as follows:

Appropriations may be made for capital outlay and other expenses to carry out the purpose of the office of information technology services for the same period as is authorized by K.S.A. 46-155, and amendments thereto, for capital improvements. The executive chief information technology officer may enter into multiple year lease or acquisition contracts, subject to state purchasing laws not in conflict with the foregoing authorization and so long as such contracts do not extend beyond the appropriation periods, limitations and restrictions therefor.⁶⁶

Institutions of higher education,⁶⁷ under the supervision of the board of regents, may contract with nonprofit corporations on an “amortization plan” for student union buildings and student dormitories.⁶⁸

The state board of regents, or any institution with the approval of the board, may contract⁶⁹ and hold property,⁷⁰ acquire land by eminent domain⁷¹ and “purchase or acquire” land or existing buildings leased for the purpose of housing students.⁷²

⁶¹<https://admin.ks.gov/docs/default-source/ofpm/procurement-contracts/contractual-provisions.pdf?sfvrsn=4>.

⁶²Kan. Stat. Ann. § 75-5281. The secretary of corrections may “acquire, in the name of the state, by lease, purchase or contract additional facilities as may be needed for the housing of persons...” *Id.* § 75-5210; *see id.* § 75-5205 (similar power).

⁶³*Id.* § 75-7203.

⁶⁴*Id.* § 75-7209. “Information technology project” means a project for a major computer, telecommunications or other information technology improvement with an estimated cumulative cost of \$250,000 or more and includes any such project that has proposed expenditures for: (1) New or replacement equipment or software; (2) upgrade improvements to existing equipment and any computer systems, programs or software upgrades therefor; or (3) data or consulting or other professional services for such a project. *Id.* § 75-7201(c).

⁶⁵*Id.* § 75-7211.

⁶⁶*Id.* § 75-4704b. *See, supra*, note 59, for the text of section 46-155.

⁶⁷“The university of Kansas, Kansas state university of agriculture and applied science, Wichita state university, Emporia state university, Pittsburg state university, and Fort Hays state university (sic).” *Id.* § 76-711.

⁶⁸*Id.* §§ 76-6a02 to 76-6a11.

⁶⁹*Id.* § 76-721.

⁷⁰*Id.* § 76-722.

⁷¹*Id.* § 76-147.

⁷²*Id.* § 76-763.

Individual educational institutions may acquire equipment and real property by lease pursuant to rules and regulations adopted in accordance with policies set by the board of regents.⁷³

The boards of trustees of community colleges, in accordance with the rules and regulation of the state board of regents, may lease-purchase real and personal property for community college purposes, subject to change or termination by the legislature.⁷⁴ Community colleges have the power to tax.⁷⁵

Energy Performance Contracting

State agencies, including institutions of higher education, may enter into a lease-purchase agreement for energy conservation measures subject to numerous restrictions.⁷⁶

Debt Limitations

The state is constitutionally limited in the amount of debt that it may incur.⁷⁷

Municipalities entering into a contract for the lease or sale of property with an option to purchase⁷⁸ must comply with the cash basis and budget laws.⁷⁹ For purposes of the cash basis law “municipalities” include counties, cities, school districts, fire districts, hospital districts and any other taxing district of the state.⁸⁰ These laws prohibit municipalities from creating “indebtedness” in excess of funds on hand.⁸¹ The cash basis law states that:

[n]othing in the provisions of [the cash basis law] shall prohibit a municipality from entering into . . . a lease agreement without an option to buy, or . . . [a] lease-purchase agreement, if any of such agreements specifically state that the municipality is obligated only to pay periodic payments or monthly installments under the agreement as may lawfully be made from . . . funds budgeted and appropriated for that purpose during such municipality’s current budget year or . . . funds made available from any lawfully operated revenue producing source.⁸²

A lease-purchase agreement entered into in accordance with the cash basis law is subject to certain conditions, as follows:

- (a) If the proposed agreement is for a term exceeding the current fiscal year of the municipality, it shall be approved by a majority vote of all members of the governing body.⁸³
- (b) If the proposed agreement involves the acquisition of land or buildings by a municipality other than a county, school district or community college, is for a term of three or more years, and provides for payments in any year in excess of 3% of the total amount budgeted by the municipality for expenditure

⁷³*Id.* § 76-769. A copy of the board of regents policies can be found online at: http://www.kansasregents.org/about/policies-by-laws-missions/board_policy_manual_2

⁷⁴*Id.* § 71-201, § 71-201a.

⁷⁵*Id.* § 71-204.

⁷⁶*Id.* § 75-37,125. State agencies may use a master equipment lease-purchase program through the department of administrative services for conservation improvement projects. <http://kcc.ks.gov/kansas-energy-office/fcip>. They are also statutorily authorized to enter into a lease-purchase agreement for an energy conservation measure with the Kansas development finance authority, Kan. Stat. Ann. § 74-8960; *id.* § 75-37,112, but use the department of administrative services master lease program. <http://kcc.ks.gov/kansas-energy-office/fcip>

⁷⁷Kan. Const. art. 11, §§ 6, 7, and 8.

⁷⁸J.D. Adams Co. v. Dor Tp., 153 Kan. 623, 113 P.2d 138 (1941).

⁷⁹Kan. Stat. Ann. §§ 10-1101 to -1122; *id.* §§ 79-2925 to -2942. There are numerous exceptions to these provisions set forth in specific legislation.

⁸⁰*Id.* § 10-1101(a).

⁸¹*Id.* § 10-1112; *id.* § 79-2935 (this section prohibits creation of indebtedness in excess of the budget year).

⁸²*Id.* § 10-1116b. “Lease-purchase agreement” includes a lease with an option to buy or an installment purchase agreement. *Id.* This section does not authorize installment contracts for services. 89 Op. Att’y Gen. 16 (Kan. 1988).

⁸³Kan. Stat. Ann. § 10-1116c(a).

during the current year, excluding debt service, a notice thereof specifying the purpose and the total of all payments shall be published once each week for two consecutive weeks in a newspaper of general circulation within such municipality. If, within 30 days following the last publication of such notice, a petition in opposition to the agreement signed by not less than 5% of the qualified voters of such municipality is filed with the appropriate county election officer, no such agreement shall take effect unless and until the same is approved by a majority of the qualified voters of such municipality voting at an election thereon. Any such election shall be called and held in accordance with the provisions of K.S.A. 10-120, and amendments thereto, or in accordance with the provisions of the mail ballot election act.⁸⁴

(c) If the municipality is a county, school district or community college and the proposed agreement involves the acquisition of land or buildings, is for a term exceeding the current fiscal year of the municipality, and provides for annual payments which in the aggregate exceed \$100,000, the governing body of such municipality first shall adopt a resolution stating its intent to enter into such lease-purchase agreement. The resolution shall specify the total of all payments to be made pursuant to the agreement and the purpose for which such agreement is to be entered into. The resolution shall be published once each week for two consecutive weeks in a newspaper of general circulation within the municipality. If a protest petition signed by not less than 5% of the qualified voters of the municipality, as determined by the vote for secretary of state at the last general election, is filed with the appropriate county election officer within 30 days following the last publication of the resolution, no such agreement shall take effect unless approved by a majority of the qualified voters of the municipality voting at an election thereon. Any such election shall be called and held in the manner provided by K.S.A. 10-120, and amendments thereto, or in accordance with the provisions of the mail ballot election act. If no such protest petition is filed within the time limitation contained herein, the governing body of the municipality may enter into such agreement. If an election is held pursuant to a protest petition and a majority vote is cast in favor of the proposition, the governing body of the municipality shall have authority to enter into such agreement.⁸⁵

(d) If the proposed agreement is for a term exceeding the current fiscal year of the municipality, the agreement shall specify the following: (1) The amount or capital cost required to purchase the item if paid for by cash, (2) the annual average effective interest cost, and (3) the amount included in the payments for service, maintenance, insurance or other charges exclusive of the capital cost and interest cost.⁸⁶

The Kansas attorney general has said that a lease-purchase agreement containing provisions (including a provision requiring that the unpaid balance be due and payable in the event of destruction of the equipment and a provision requiring a cancellation charge in the event of termination of the agreement) which would obligate a board of education for payments, regardless of whether funds had been budgeted therefor in the current fiscal year, was an obligation extending beyond the current budget year. Such an agreement, which obligates a municipality to make payments in any year subsequent to its current budget year or which may result in the municipality being obligated for an amount in excess of the funds provided in the budget for the current budget year, does not comply with the cash basis law.⁸⁷ The attorney general has also said that a lease-purchase agreement must specifically state that “a municipality is obligated only to pay such payments or installments as have been provided in the budget of the municipality for the current year.”⁸⁸ A lease-purchase agreement which would allow a municipality to terminate the lease only if it has exhausted all available means for appropriating funds--and also providing that failure to do so would result in default with the balance of the lease payments coming due--would not satisfy the cash basis law.⁸⁹ The attorney general stated the agreement must be measured against the cash basis law on “the basis of the obligation which exists unless and until the privilege of cancellation is exercised.”⁹⁰ In *Unified School District Number 207 v. Northland National Bank*,⁹¹ the

⁸⁴*Id.* § 10-1116c(b).

⁸⁵*Id.* § 10-1116c(c). The Kansas Attorney General has taken the position that the \$100,000 threshold is determined by aggregating all of the annual payments under the contract instead of looking solely at each year individually for exceeding this threshold. 2005 Op. Atty. Gen. 12 (Kan. 2005), 2005 WL 1247926 (Kan. A.G.).

⁸⁶Kan. Stat. Ann. § 10-1116c(d).

⁸⁷82 Op. Atty Gen. 46 (Kan. 1982); *see also* 87 Op. Atty Gen. 88 (Kan. 1987); 84 Op. Atty Gen. 117 (Kan. 1984); 82 Op. Atty Gen. 79 (Kan. 1982).

⁸⁸85 Op. Atty Gen. 167 (Kan. 1985); *see generally*, *State ex. rel. Fatzer v. Armory Board*, 256 P.2d 143 (Kan. 1953) (upheld lease financing by state from state created authority where rentals were contingent on state appropriation).

⁸⁹*Id.*

⁹⁰*Id.*

Court of Appeals of Kansas held two school district leases void. The court held that nonappropriation clauses in the school leases which included a duty to continue payments if money from other sources is available rendered the leases void and, in addition, the cash basis law required specific, mandatory disclosures with respect to various items including the stated amount or capital cost if paid in cash, the annual average effective interest cost, and a statement of the amount included in payments for service, maintenance and insurance cost exclusive of capital and interest cost.⁹²

Interest Rate Limitations

Limitations on interest rates are established by statute:

[T]he parties to any bond, bill, promissory note or other instrument of writing for the payment or forbearance of money may stipulate therein for interest receivable upon the amount of such bond, bill, note or other instrument of writing, at a rate not to exceed 15% per annum unless otherwise specifically authorized by law.⁹³

* * *

(a) The maximum stated rate of interest which may be fixed on fixed-rate bonds issued by a municipality or taxing subdivision of the State of Kansas shall be determined on the day the bonds are sold and shall not exceed the daily yield for the ten-year treasury bonds published by The Bond Buyer, in New York, New York, on the Monday next preceding the day on which the bonds are sold, plus (1) three percent, if the interest on the bonds is excluded from gross income for federal income tax purposes or (2) four percent, if the interest on the bonds is included in gross income for federal income tax purposes.⁹⁴

(b) The maximum stated rate of interest which may be fixed on variable-rate bonds issued by a municipality or taxing subdivision of the State of Kansas shall be determined on the date on which the rate is determined in accordance with the resolution or ordinance of the issuer and shall not exceed the daily yield for the ten-year treasury bonds published by The Bond Buyer, in New York, New York, on the Monday next preceding such date, plus (1) three percent, if the interest on the bonds is excluded from gross income for federal income tax purposes or (2) four percent, if the interest on the bonds is included in gross income for federal income tax purposes.⁹⁵

Miscellaneous

Property lease-purchased by the state or a municipality or a political subdivision of the state is exempt from all property and ad valorem taxes so long as bonds can be issued or taxes levied for financing the lease-purchase.⁹⁶

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁹¹887 P.2d 1138 (1994).

⁹²*Id.*

⁹³Kan. Stat. Ann. § 16-207(a).

⁹⁴*Id.* § 10-1009(a). “Municipality . . . shall mean and include every corporation and quasi-corporation empowered to issue bonds in payment of which taxes may be levied.” *Id.* § 10-101.

⁹⁵*Id.* § 10-1009(b).

⁹⁶*Id.* § 79-201a.

KENTUCKY 2018 REVISION

Updated through Ch 8 of the 2018 regular Session, Westlaw, as of April 2018¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “sell and convey any real estate” and may “buy land for the use of the county, when necessary, for the lawful purposes of the county.”⁵ Counties may also “[a]s needed, cause the construction, operation and maintenance of all county buildings and other structures, grounds, roads and other property.”⁶ Courts have held that counties may convey property to a corporation organized for the purpose of building county buildings and then lease the building from the corporation.⁷ Counties may also create county building commissions for “financing the acquisition, construction, remodeling or improvement of a county building or buildings.”⁸ The county may convey property to the county building commission to provide “county buildings for county purposes or to remodel or improve same.”⁹ The county must then enter into a lease with the county building commission for one year which “by its terms shall give the lessee the option to extend the lease from year to year.”¹⁰ The lease may be renewed for up to thirty years.¹¹ Subject to restrictions, counties may “own and hold the permit for, plan, initiate, acquire, construct, and maintain solid waste management facilities [and] enter into contracts or leases with private parties for the design, construction, or operation of a publicly-owned solid waste management facility.”¹²

Kentucky’s Governmental Leasing Act¹³ provides:

(1) The governing body of a governmental agency may approve by ordinance, order, or resolution and may execute, perform, and make payments under a lease with any person, to acquire or construct personal property or real property for any public purpose. The lease may be on the terms and conditions that are deemed appropriate by the governing body. Leases may be payable in whole or in part from taxes and may be obligations of the governmental agency for the entire term of the lease or for a period that does not exceed one(1) year. Leases may contain an option or options to renew or extend the term and may be made payable from a pledge of all or any part of any revenues, funds, or taxes or any combination of any revenues, funds, or taxes, which are available to the governmental agency for its public purposes.

(2) A governmental agency may pledge any revenues or taxes as security for payment under leases, and the leases may provide that the governmental agency may terminate its obligations under the lease at the expiration of each year during the term of the lease. A governmental agency may pledge any revenue or taxes as security for payment under a lease regardless of any right to terminate. The lease may provide for the payment of interest on the unpaid amount of the lease price at a rate, rates, or method of determining rates and may contain prepayment provisions, termination penalties, and other provisions determined by the governing body of the governmental agency.

¹Counties, except those containing a first class city, may merge all units of government into an “urban-county” form of government. Ky. Rev. Stat. Ann. § 67A.010. All forms have similar powers. *See id.* § 67.712. The powers of urban-county governments created under *id.* § 67A.060 are not impacted by the classification of cities. *Id.* § 67A.035.

²*Id.* § 68.090.

³*Id.* § 67.085. The procedure is found in The Eminent Domain Act of Kentucky. *Id.* §§ 416.540 to 416.680.

⁴*Id.* § 70.540.

⁵*Id.* § 67.080(1)(b). A county’s power to sell property includes the power to lease. *Burns v. Moore*, 209 S.W.2d 735 (Ky. 1948).

⁶Ky. Rev. Stat. Ann. § 67.080(2)(b).

⁷*Sizemore v. Clay County*, 105 S.W.2d 841 (Ky. 1937).

⁸Ky. Rev. Stat. Ann. § 67.450.

⁹*Id.* § 67.465.

¹⁰*Id.* § 67.475.

¹¹*Id.*

¹²*Id.* § 109.041.

¹³*Id.* §§ 65.940 to 65.956. Municipalities, school districts and other local government entities are also covered by this act. *Id.*

(3) Prior to entering into a lease for the financing of the purchase of any personal property or real property, a governmental agency shall comply with other provisions of law regarding the purchase of property for public purposes. The lease shall be deemed an instrument for financing and provisions of law regarding purchases of property for public use shall not apply to the lease itself. Leases may be entered into on a publicly advertised competitive basis or on a private negotiated basis without advertisement.

(4) A sinking fund prescribed by KRS 66.081 shall be established for the payment of leases which are not annually renewable and which are payable in whole or in part from taxes and lease payments under those leases shall be made from the sinking fund.¹⁴

....

A lease for real property may have any term, including renewals, not to exceed forty years. A lease for personal property may have any term, including renewals, not to exceed the useful life of the personal property financed, determined in accordance with generally accepted accounting principles.¹⁵

Subject to additional requirements, if the lease price exceeds \$500,000, no county (except urban counties) shall enter into a lease without approval of the state local debt officer.¹⁶ Counties are required to comply with other applicable public bidding and notice requirements relating to the requisition of real or personal property.

A government agency shall be considered the equitable owner [if it is not actually legal owner] of any personal or real property leased under [this Act] where the property is used solely for public purposes Personal or real property which is equitably or legally owned . . . shall be exempt from all taxation Leases . . . shall be exempt from taxation . . . to the same extent as bonds or notes¹⁷

Leases entered into pursuant to the Act are a legal and authorized investment for numerous kinds of financial institutions and fiduciaries.¹⁸

Urban-county governments and cities may enter into sale-leaseback transactions for buildings and improvements with private entrepreneurs.¹⁹

Energy Performance Contracting

Counties may finance the installation of energy conservation measures for its buildings through the use of lease-purchase agreements, subject to numerous restrictions.²⁰

Municipalities

Municipalities²¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²² eminent domain²³ and police powers.²⁴ A municipality of the first class may “acquire property for

¹⁴*Id.* § 65.942.

¹⁵*Id.* § 65.946.

¹⁶*Id.* § 65.944(1)(a). Written notification to the local debt officer is required by section 65.117 for leases exceeding \$200,000.

¹⁷*Id.* § 65.948.

¹⁸*Id.* § 65.950.

¹⁹*Id.* § 91A.180.

²⁰*Id.* §§ 45A.345, .352, .353.

²¹Municipalities for purposes of this discussion are cities classed by form of government.. There are two classes (first and home-rule).*Id.* § 81.005; Ky. Const. § 156a. First class cities include cities organized and operating under Ky. Rev. Stat. Ann. chapter 83. Home rule class cities include any city government organized and operating under a city manager plan of government, *id.* § 83A.150; a mayor-council plan of government, *id.* § 83A.130; or a commission plan of government, *id.* § 83A.140. *Id.* § 83.520. (Before year 2015 there were six classes of municipality.)

²²*Id.* § 83.520 (first class cities); *id.* § 92.280 (home rule class cities).

²³*Id.* § 82.082.

²⁴*Id.* § 100.201.

municipal purposes by purchase or otherwise” and may “sell and convey, rent or lease its property.”²⁵ The Kentucky Governmental Leasing Act applies to municipalities as well as counties.²⁶ Municipalities are required to notify the state local debt officer of a lease if the lease price exceeds \$200,000.²⁷

Cities may enter into sale-leaseback transactions for buildings and improvements with private entrepreneurs.²⁸

Energy Performance Contracting

Municipalities may finance the installation of energy conservation measures for its buildings through the use of lease-purchase agreements, subject to numerous restrictions.²⁹

School Districts

School districts³⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³¹ and eminent domain powers.³² A school district may “make contracts; . . . purchase, receive, hold and sell property; . . . and do all things necessary to accomplish the purposes for which it is created.”³³

(2) No board of education shall participate in any financing of school buildings, school improvements, appurtenances thereto, or furnishing and equipment, including education technology equipment without:

(a) First establishing the cost of the project in advance of financing, based on the receipt of advertised, public, and competitive bids for such project, in accordance with KRS Chapter 424; and

(b) Establishing the cost of financing in advance of the sale of any bonds, certificates of participation in any leases, or other evidences of financial commitments issued by or on behalf of such board. Any bonds, leases, participations, or other financial arrangements shall not involve a final commitment of the board until the purchaser or lender involved shall have been determined by public advertising in accordance with KRS Chapter 424.

(3) No board of education shall make a mortgage, lien, or other encumbrance upon any school building owned by the board, or transfer title to any such school building as part of any financing arrangement, without the specific approval of the Department of Education, and without the transaction being entered into pursuant to a detailed plan or procedure specifically authorized by Kentucky statute.

(4) Without the approval of the Department of Education, no board may lease, as lessee, a building or public facility that has been or is to be financed at the request of the board or on its behalf through the issuance of bonds by another public body or by a nonprofit corporation serving as an agency and instrumentality of the board, or by a leasing corporation. Any lease, participation, or other financial arrangement shall not involve a final commitment of the board unless and until the purchaser or lender involved in same shall have been determined by public advertising in accordance with KRS Chapter 424. No transaction shall be entered into by the board except upon the basis of public advertising and competitive bidding in accordance with KRS Chapter 424.

(5) Rental payments due by a board under a lease approved by the Department of Education in accordance with subsection (4) of this section shall be due and payable not less than ten (10) days prior to the interest due date for the bonds, notes, or other debt obligations issued to finance the building or public facility. If a board fails to make a rental payment when due under a lease, upon notification to the Department

²⁵*Id.* § 83.420 (first class cities); all classes of cities may “acquire and dispose of property.” *Id.* § 82.081.

²⁶*See, supra*, notes 13-18 and accompanying text.

²⁷Ky. Rev. Stat. Ann. § 65.117.

²⁸*Id.* § 91A.180.

²⁹*Id.* §§ 45A.345, 45A.352, 45A.353.

³⁰There are two types of school districts. *Id.* § 160.010 (county school districts); *id.* § 160.020 (independent school districts).

³¹*Id.* § 160.460.

³²*Id.* § 162.030.

³³*Id.* § 160.160.

of Education by the paying agent, bond registrar, or trustee for the bonds not less than three (3) days prior to the interest due date, the Department of Education shall withhold or intercept any funds then due the board to the extent of the amount of the required payment on the bonds and remit the amount to the paying agent, bond registrar, or trustee as appropriate. Thereafter, the Department of Education shall resolve the matter with the board and adjust remittances to the board to the extent of the amount paid by the Department of Education on the board's behalf.

(6) Bonds, notes or leases negotiated to provide education technology shall not be sold for longer than seven years or the usual life of the equipment as established by the state technology master plan, whichever is less.³⁴

School districts may convey property to cities of any size or to counties so that the city or county may provide for the construction of a school building.³⁵ After completion, the school district may then lease the building from the city or county, with a series of one-year renewable options in the school district, the entire term not to exceed thirty years.³⁶ The property and the building or buildings are to be conveyed back to the school district upon payment of all rentals and other payments due under the lease.³⁷

The Kentucky Governmental Leasing Act applies to school districts,³⁸ but provides as to school districts that “no school district shall enter into a lease if the lease price exceeds \$100,000 without first receiving the approval of the lease from the chief state school officer.”³⁹

Subject to numerous restrictions, school districts may obtain state assistance in entering into or financing leases of “technology equipment and related software” or “major renovation of existing school facilities” for use in technology education.⁴⁰

Energy Performance Contracting

School districts may finance the installation of energy conservation measures for its buildings through the use of lease-purchase agreements, subject to numerous restrictions.⁴¹

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.⁴² Fire districts may acquire and maintain “adequate” fire protection facilities and firefighting equipment.⁴³

The Kentucky Governmental Leasing Act applies to fire districts.⁴⁴

Energy Performance Contracting

³⁴*Id.* § 160.160(2) - (6).

³⁵*Id.* §§ 162.120, 162.300.

³⁶*Id.* §§ 162.140, 162.330. *See also* City of Bowling Green v. Board of Education, 443 S.W.2d 243 (Ky. 1969).

³⁷Ky. Rev. Stat. Ann. §§ 162.280, 162.330. School districts may enter into such lease financing structures directly with nonprofit finance corporations as well as with cities and counties. *Id.* § 162.385.

³⁸*See, supra*, notes 13-18 and accompanying text.

³⁹Ky. Rev. Stat. Ann. § 65.944(1)(b).

⁴⁰*Id.* § 157.611.

⁴¹*Id.* §§ 45A.345, 45A.352, 45A.353; *id.* § 157.420(5); 702 KY ADC 4:160.

⁴²*Id.* § 75.040. Fire districts are “taxing districts.” *Id.* § 65.180.

⁴³*Id.* § 75.040(2).

⁴⁴*See, supra*, notes 13-18 and accompanying text.

Fire districts, as taxing districts, may finance the installation of energy conservation measures for its buildings through the use of lease-purchase agreements, subject to numerous restrictions.⁴⁵

Hospital Districts

Hospital districts⁴⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴⁷ and eminent domain⁴⁸ powers. A hospital district may “acquire...lands, property rights, equipment, hospital facilities and systems for the maintenance of hospitals, buildings, structures and any other facilities.”⁴⁹ Hospital districts may “lease existing hospital or hospitals and equipment and other property used in connection with the operation of a hospital, and to pay such rental therefor as the board shall deem proper.”⁵⁰ Hospital districts may “enter into contracts with a nonprofit corporation acting as a governmental agency for the construction and equipping of a hospital or hospitals, and the leasing of the same to the district.”⁵¹

The Kentucky Governmental Leasing Act applies to hospital districts.⁵²

Energy Performance Contracting

Hospital Districts, as taxing districts, may finance the installation of energy conservation measures for its buildings through the use of lease-purchase agreements, subject to numerous restrictions.⁵³

State Entities

State entities must seek authorization from the general assembly before acquiring real property of any value or equipment with a value over \$400,000:

(1) Notwithstanding any statutory provisions to the contrary, any state agency as defined in KRS 7A.010, institution of higher education defined as an institution in KRS 164A.550, or affiliated corporation as defined in KRS 164A.550, shall obtain authorization from the General Assembly prior to entering into an agreement identified in subsection (2) of this section. The General Assembly authorization shall occur only when the General Assembly enacts legislation specifically authorizing the agreement.

(2) General Assembly authorization shall be required for an agreement for the use, purchase, or acceptance of real property of any value, or equipment with a value in excess of four hundred thousand dollars (\$400,000), if:

(a) The agreement provides that the state, a state agency, institution of higher education, or affiliated corporation will become the owner of the real property or equipment at any time; and

(b) All or any portion of the purchase price of the real property or equipment is funded through the issuance of a financial instrument which requires payment of principal and interest over time, including,

⁴⁵*Id.* §§ 45A.345, 45A.352, 45A.353.

⁴⁶Hospital districts are taxing districts within the meaning of section 157 of the Kentucky Constitution. Ky. Rev. Stat. Ann. § 216.317.

⁴⁷*Id.* § 216.335(13).

⁴⁸*Id.* § 216.335(2).

⁴⁹*Id.* § 216.335(1).

⁵⁰*Id.* § 216.335(5).

⁵¹*Id.* § 216.335(7).

⁵²*See, supra*, notes 13-18 and accompanying text.

⁵³*Id.* §§ 45A.345, 45A.352, 45A.353.

but not limited to, notes, bonds, securities, and certificates of participation, regardless of the identity of the issuer.⁵⁴

Lease-purchases exceeding \$200,000 may be subject to review by the General Assembly.⁵⁵ The power of state entities⁵⁶ to acquire real property by lease is covered by Title VII, Chapter 56, State Lands and Buildings⁵⁷ and section 45A.045 of the Kentucky Model Procurement Code.⁵⁸ Acquisition is managed by the Department of Real Property, except in the case of highway right-of-way purchases and acquisitions by universities which have elected to administer their real property functions.⁵⁹

The Kentucky Model Procurement Code⁶⁰ applies “to every expenditure of public funds by [the] Commonwealth . . . under any contract or like business agreement, excepting only that this code shall not apply to contracts or like business agreements between the Commonwealth and its political subdivisions or other governments, except as provided in KRS 45A.295 to 45A.320.”⁶¹

Authority for procurement (“procurement” includes leasing⁶²) of equipment is centralized in the secretary of the Finance and Administration Cabinet pursuant to the Kentucky Model Procurement Code.⁶³ The Finance and Administration Cabinet has administrative rulemaking power.⁶⁴ It may delegate

⁵⁴*Id.* § 45.763. State entities may have specific statutory authority to enter into a lease-purchase. “State agency” means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity of the executive, judicial, or legislative branch of the state government. Ky. Rev. Stat. Ann. § 7A.010(4); “Institutions” means all public supported postsecondary educational institutions in Kentucky recognized in Ky. Rev. Stat. Ann. §§ 164.100, 164.290, 164.580, or 164.810(1)(a). *See, infra*, note 71 and accompanying text.

⁵⁵Ky. Rev. Stat. Ann. § 48.111.

⁵⁶Under the procurement code “governmental body” includes “any department, commission, council, board, bureau, committee, institution, legislative body, agency, government, corporation, or other establishment of the executive or legislative branch of the state government” *id.* § 45A.030(17); under chapter 56 “state agency” means any state administrative body, agency, department, or division as defined in KRS 42.005, or any board, commission, institution, or division exercising any function of the state but which is not an independent municipal corporation or political subdivision. *Id.* § 56.440. The turnpike authority and highway department are exempted from the procurement code and chapter 56. *Id.* § 45A.050(1), § 56.463(2) (citing chapter 175 relating to the turnpike authority and chapters 176-80 relating to the highway department).

⁵⁷*Id.* §§ 56.800 to 56.832. The Finance and Administration Cabinet may provide for an option to purchase or the lease-purchase of real property. *Id.* § 56.806(3). Leases incorporating an option to purchase or a lease-purchase are subject to certain reporting requirements. *Id.* § 56.823.

⁵⁸*Id.* § 56.500; *id.* § 56.463.

⁵⁹Fin. & Admin. Proc. 220-15-00.

⁶⁰Ky. Rev. State Ann. §§ 45A.005 to 45A.990; 200 Ky Admin. Regs 5:021 to 5:410.

⁶¹Ky. Rev. Stat. Ann. § 45A.020(1). “Contract” means “leases” for the purchase of property and supplies. *Id.* § 45A.030(8), (29).

⁶²*Id.* § 45.030(22). “Procurement” means the purchasing, buying, renting, leasing, or otherwise obtaining of any supplies, services, or construction. It includes all functions that pertain to the procurement of any supply, service, or construction item, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration. *Id.*

⁶³*Id.* § 45A.045; § 45A.050. Laws relating to the turnpike authority and the highway department are exempted from the procurement code. *Id.*

⁶⁴*Id.* § 45A.045. Fin. & Admin. Proc. 111-52-00 covers long term equipment rentals and options to purchase that are not otherwise covered by law or part of an established contract.

procurement to individual agencies which must comply with the procurement code and other purchasing laws.⁶⁵

Certain items of equipment are deemed capital projects subject to budget laws, and subject to approval by the general assembly,⁶⁶ if they meet certain statutory thresholds:

“Capital projects” means, regardless of the source of cash or other consideration:

* * *

5. Any lease of an item of movable equipment . . . if the total cost of the lease-purchase or lease with an option to purchase is two hundred thousand dollars (\$200,000) or more; and

6. Any new acquisition, upgrade, or replacement of an information technology system estimated to cost

a. In the case of institutions of higher education, one million dollars (\$1,000,000) or more in cash or other consideration; and

b. In the case of all other entities, six hundred thousand dollars (\$600,000) or more in cash or other consideration . . .⁶⁷

By regulation, procurement of a computer or telecommunication system is a capital project if it meets one of the following criteria:

(1) The unit price for the procurement of any computer or telecommunications hardware exceed the sum of \$100,000;

(2) The total cost of a minimum functional configuration of computer or telecommunications hardware exceeds \$100,000;

(3) The total cost of procuring a computer or telecommunications system exceeds \$200,000.⁶⁸

Information technology for the state is comprehensively managed by the Commonwealth Office of Technology of the Finance and Administration Cabinet⁶⁹ in accordance with the Kentucky Model Procurement Code.⁷⁰

A passenger carrying motor vehicle pool is operated by the state for the various state agencies⁷¹ except that agencies may apply to the cabinet to establish an agency specific motor pool. Agencies may not lease motor vehicles from a private business without prior written approval of the Secretary of the Finance and Administrative Cabinet.⁷²

Governing boards of public institutions of higher education⁷³ “may acquire real or personal property, by purchase, lease, sublease, [or] condemnation . . .⁷⁴ They are covered by the Kentucky Model

⁶⁵200 Ky. Admin. Regs. 5:302.

⁶⁶Ky. Rev. Stat. Ann. §§ 45.760 to 45.800.

⁶⁷*Id.* § 45.750(f).

⁶⁸14 Ky. Admin. Regs. 1:010.

⁶⁹Ky. Rev. Stat. Ann. § 42.730.

⁷⁰*Id.* §§ 45A.005 to 45A.990; 200 Ky. Admin. Regs. 5:021 to 5:410; Fin. & Admin Proc. 111-15-00.

⁷¹200 Ky. Admin. Regs. 40:020. The term “agencies” includes agencies of the executive and judicial branches but state supported universities and the Kentucky State Police are exempt.

⁷²*Id.*

⁷³University of Kentucky, Kentucky State University and Eastern Kentucky University, Morehead State University, Murray State University, Western Kentucky University, Northern Kentucky University, Kentucky Community and Technical College System, and the University of Louisville. Ky. Rev. Stat. Ann. § 164A.550.

⁷⁴*Id.* § 164A.595.

Procurement Code.⁷⁵ Procurements or purchases of up to \$40,000 per project by state institutions of higher education may be made in accordance with small purchase administrative regulations promulgated by the secretary of the Finance and Administration Cabinet.⁷⁶ The acquisition of real property is subject to approval by the Secretary of Finance and Administration Cabinet.⁷⁷ Capital construction projects by institutions of higher education are subject to numerous budget and financial administration laws.⁷⁸

Energy Performance Contracting

Postsecondary institutions and state agencies may enter into energy savings performance contracts subject to numerous requirements.⁷⁹

Debt Limitations

The State is constitutionally limited in the amount of debt which it may incur,⁸⁰ and counties, municipalities and school districts and taxing districts such as fire and hospital districts are constitutionally limited in the amount of debt which they can incur.⁸¹ Statutory limitations are also imposed on the amount of debt counties can incur.⁸²

Lease-purchase agreements have been consistently upheld by Kentucky courts whether they involve counties,⁸³ municipalities⁸⁴ or school districts,⁸⁵ as long as the entity is not bound for an amount greater than yearly revenues or a term greater than one year.⁸⁶ This may be accomplished by yearly renewable options and nonappropriation clauses. An option in the entity to purchase throughout the term is not a requirement, but may be provided, and the lease may provide for a conveyance of the property to the entity at the end of the term.⁸⁷

In *Hoskins v. Wilson*,⁸⁸ the court upheld a lease-purchase arrangement under which the county created a nonprofit corporation which was to issue revenue bonds for roadway repairs, the nonprofit corporation was to take ownership of the roadways, and was to lease them back to the county. The lease was subject to annual appropriation. Although the county's rental payments were the only source of funds to retire the revenue bonds and the plaintiffs argued that the county would be pressured to renew the lease each year, the court found that the bond issue was constitutionally valid because the debt was that of the corporation's and not that of the county's, and therefore the debt was not enforceable against the county.

⁷⁵*Id.* tit. VI, Ch. 45A; § 45A.030(17).

⁷⁶*Id.* § 45A.100(1).

⁷⁷*Id.* § 164A.575.

⁷⁸*Id.* § 7A.010; §§ 45.750 through 45.800 and § 45A.180; § 164A.630.

⁷⁹*Id.* §§ 56.770 to 56.784; 200 Ky. Admin. Regs. § 5:350.

⁸⁰Ky. Const. §§ 49, 50.

⁸¹Ky. Const. §§ 157, 158. Although school districts are not specifically mentioned in these constitutional provisions, they have been held to apply to school districts. *Commonwealth v. Louisville & N.R. Co.*, 48 S.W. 1092, 1093 (Ky. 1899).

⁸²See generally Ky. Rev. Stat. Ann., ch. 66 (Issuance of Bonds and Control of Funds). Tax supported leases entered into pursuant to under *id.* §§ 65.940 to 65.956 are included in calculation of net debt for purposes of the debt limitations set forth in *id.* § 66.041 for a city, urban-county, consolidated local government, or charter county. *Id.* § 66.031.

⁸³See, e.g., *Warren County Fiscal Court v. Warren Tuberculosis Sanatorium Corp.*, 272 S.W.2d 331, 332 (Ky. 1954) (lease of hospital to county by public corporation upheld); *Sizemore v. Clay County*, 105 S.W.2d 841 (Ky. 1937).

⁸⁴See, e.g., *Baker v. City of Lexington*, 273 S.W.2d 34 (Ky. 1954); *Booth v. City of Owensboro*, 118 S.W.2d 684 (Ky. 1938).

⁸⁵See, e.g., *Carter v. Taylor*, 231 S.W.2d 601 (Ky. 1950); *Waller v. Georgetown Bd. of Educ.*, 273 S.W. 498 (Ky. 1925).

⁸⁶See cases cited, *infra*, notes 86-87.

⁸⁷The lease in *Booth* provided the city with an option to purchase throughout the term of the lease. 118 S.W.2d at 685. The lease in *Baker* provided that the property would be reconveyed when the rents paid were sufficient to retire the bond issued. 273 S.W.2d at 35.

⁸⁸778 S.W.2d 654 (Ky. Ct. App. 1989).

Similarly, the Supreme Court of Kentucky held with respect to the Commonwealth that serial leases which are automatically renewable do not create a long-term obligation and therefore are not legal debts within the meaning of the constitution.⁸⁹

Interest Rate Limitations

The State of Kentucky, counties, municipalities, school districts and other taxing districts may issue “bonds, notes, warrants or other obligations”⁹⁰ “at any rate or rates” of interest.⁹¹ However, these interest rates should “be competitive with those rates which are permitted by other states.”⁹²

Miscellaneous

Counties, municipalities and school districts, hospital districts and all special districts must annually complete and file a uniform financial information report with the Governor’s Office for Local Development⁹³ relating to lease-purchase agreements.⁹⁴ “‘Lease-purchase agreement’ means an agreement to lease or to lease and purchase major items of property, equipment, or services estimated to cost fifty thousand dollars . . . or more, and two hundred thousand dollars . . . or more for the construction or installation of a building or a utility.”⁹⁵

Political subdivisions of the state, including counties, cities, school districts and special districts (including hospital districts) may participate in state agency price contracts for supplies and materials under the Kentucky Model Procurement Code.⁹⁶

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁸⁹Wilson v. Kentucky Transp. Cabinet, 884 S.W. 2d 641, 644 (1994).

⁹⁰Ky. Rev. Stat. Ann. § 58.410(1)(b).

⁹¹*Id.* § 58.430.

⁹²*Id.* § 58.420.

⁹³*Id.* § 65.905.

⁹⁴*Id.* § 65.910.

⁹⁵*Id.* § 65.900.

⁹⁶*Id.* § 45A.050(3). “Supplies” means all property, including but not limited to leases of real property . . . , except land or a permanent interest in land. *Id.* § 45A.030.

LOUISIANA 2018 REVISION

Current through the 2018 First Extraordinary Session, Westlaw¹

Parishes

Parishes¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴

Parishes “may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.”⁵ The greater power of owning property in full fee has been held to include the lesser right of acquiring or holding property under a lease or any other appropriate contract.⁶

[Parishes] may finance or refinance the acquisition, construction, improvement, rehabilitation, repair, or enlargement of public facilities by entering a sale, sale-back, lease, or sublease transaction or other agreement or any combination of the foregoing with any issuer⁷ under such terms and conditions as may be agreed to in order to facilitate such financing, provided any such agreement shall contain a nonappropriation clause.⁸

This authority is granted only to facilitate the issuance of bonds by any issuer on behalf of any beneficiary using this authority in order to wholly fund or provide local matching funds for the financing, and if done in such context, no other law shall be applicable to any sale, sale-back, lease, or sublease utilized in the financing agreement.⁹

Parishes may:

A. . . . finance the acquisition of equipment and other movable property to be used by such political subdivision by entering into an installment sale, lease, or similar agreement with any lender or other person. Such agreement shall be subject to approval of the State Bond Commission in accordance with the provisions of R.S. 39:1410.60 et seq.

B. Under such agreement, title to the equipment or other movable property may vest by contract with either the political subdivision or the other party to the agreement during the term of such agreement. Regardless of whether title to such property vests with the political subdivision or the other party to the agreement under the terms of the agreement or by operation of law, the agreement may provide that the equipment or movable property shall be transferred by the political subdivision to the other party to the agreement or its assignee if the political subdivision fails to appropriate funds sufficient to make payments under the agreement.¹⁰

Parishes may enter into lease agreements for telecommunications systems:

A. A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals which shall conform to the following requirements:

(1) Specifications for the telecommunications or data processing systems equipment and related services shall be prepared in advance and shall designate the specific class or classes of equipment desired and may include all features associated with such class or classes of

¹Parishes may be home rule. La. Const. art. 6, § 5.

²*Id.* art. 6, § 26(A); La. Rev. Stat. § 33:1236(7).

³La. Const. art. 6, § 23; La. Rev. Stat. § 33:4621. Louisiana uses the term “expropriation” rather than “eminent domain.”

⁴La. Rev. Stat. § 33:1236(38)(a).

⁵La. Const. art. 6, § 23.

⁶*Langley v. Police Jury*, 201 So. 2d 300 (La. Ct. App. 1967).

⁷“Issuer” means “any public corporation, joint commission . . . , or any public trust” La. Rev. Stat. § 33:4715.1.A.(3).

⁸*Id.* § 33:4715.1.B.

⁹These provisions are also applicable to municipalities, school boards and special districts. *Id.* § 33:4715.1.A(1).

¹⁰*Id.* § 33:4712.7. *See also, infra*, note 97. This provision is applicable to all “political subdivisions.”

equipment. The specifications may also include requirements for the maintenance of the equipment if desired.

(2) If a lease-purchase contract for a telecommunications or data processing system is contemplated, the specifications shall require that the proposal contain the following:

- (a) The principal amount of any proposed lease.
- (b) The interest rate factor to be computed in the lease payments.
- (c) The right of the lessee to purchase the equipment at the termination of payments for such equipment as set forth in the lease-purchase contract for a sum not to exceed \$1.00.

(3) Any equipment lease-purchase contract entered into pursuant to this Part shall contain an annual appropriation dependence requirement to the effect that the renewal and continuation of such contract is contingent on the appropriation of funds to fulfill the requirements of the contract. If the political subdivision, after a diligent and good-faith effort, fails to appropriate sufficient monies to provide for payments under the contract, the obligation to make payments under the contract shall terminate in accordance with the terms of the contract on the last day of the last fiscal year for which funds were appropriated, provided the equipment is returned to the lessor or his agent as provided in the equipment lease-purchase contract, and such contract shall not be a long-term debt of the local political subdivision. In addition, in the equipment lease-purchase contract, the lessor shall covenant and agree to indemnify and hold the lessee harmless against any loss, damage, liability, cost, penalty or expense, including attorneys' fees, which is not otherwise agreed to by lessee in the equipment lease-purchase contract and which is incurred and arises upon a failure of the political subdivision to appropriate funds in the manner described herein for a continuation of the contract or exercise of the option to purchase the equipment.

(4) Any telecommunications or data processing equipment lease-purchase contract entered into pursuant to this Part shall be treated as a lease for all legal purposes without regard to the rights and obligations of the lessee at lease termination or to any interest factor payment, and without necessity of filing a chattel mortgage. The lessor shall be deemed owner of the equipment during the terms of the lease. In addition, the equipment shall be deemed to be movable property for all purposes and shall not become a component part of any immovable property, notwithstanding any provisions of law to the contrary, including, but not limited to Civil Code Articles 465, 466, 467, 493.1, or 495 [relating to "immovables"].

(5) All lease-purchase contracts entered into pursuant to this Part shall provide that whatever interests, claims and rights, including warranties of the equipment, which the lessor may have against the selected vendor of the equipment which is the subject of such lease-purchase contract, shall be assigned to the lessee, and the lessee shall have full right to pursue any and all remedies available to the lessor for breach of any warranty against the vendor. In addition, the lease-purchase contract shall provide that the lessor shall join the lessee as a party plaintiff in any cause, if required under state law, for successful pursuit of such action. Upon termination of the lease-purchase contract, unless the option to purchase is exercised, all such interests, claims, and rights assigned to the lessee under this Section shall revert to the lessor. In addition, the lease-purchase contract shall provide that lessee has no right to alienate or encumber the equipment during the terms of the lease.

(6) Public notice of the request for proposals shall be given at least thirty days prior to the date scheduled for opening the request for proposals. In addition, written notice of the request for proposals shall be mailed to persons, firms, or corporations who are known to be in a position to furnish such equipment, systems, and related services.

(7) The request for proposals will indicate the relative importance of price and other evaluation factors, shall clearly define the tasks to be performed under the contract, the functional specifications, the criteria to be used in evaluating the proposals and the time frames within which the work must be completed.

(8) An award shall be made to the responsible offeror whose proposal is determined in writing by the governing authority of the political subdivision to be the most advantageous, taking into consideration price and other evaluation factors set forth in the request for proposals. No other basis of evaluation shall be used except those set out in the request for proposals.

(9) The governing authority of the political subdivision may reject all proposals when it is deemed that such action is in the best interest of such political subdivision.

(10) Where written proposals are submitted by vendors, the proposals of the successful vendor shall be incorporated into the final contract consummated with that vendor.

B. Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to R.S. 38:2211, et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a request for proposals, written notice of that fact shall be given to all bidders and such notice shall also state that the request for proposals procedure will not be applicable.¹¹

For the purposes of this Part, relative to telecommunications, the following words and phrases shall be defined as follows:

(1) “Telecommunications equipment, systems, related services” are limited to the equipment and means to provide:

- (a) Electronic transmission facilities.
- (b) Data transmission systems.
- (c) Voice transmission systems.
- (d) Telephone systems.
- (e) Facsimile systems.
- (f) Radio paging services.
- (g) Mobile telephone services.
- (h) Intercom and electro-mechanical paging systems.
- (i) Any and all systems based on emerging and future telecommunication technologies relative to (a) through (h) above.

(2) “Procurement” or “procure” means the selling, buying, purchasing, renting, leasing, or otherwise obtaining telecommunications equipment, systems, or related services, as well as all activities engaged in, resulting in, or expected to result in the selling, buying, purchasing, renting, leasing, or otherwise obtaining telecommunications equipment, systems, or related services by a political subdivision.

(3) “Electronic transmission facility” means any transmission medium, switch, instrument, wiring system, or other facility which is used, in whole or in part, to provide any transmission including two-way radio, terminal equipment, modems, front end processors, acoustic couplers, and remote job entry equipment.

(4) “Wiring system” means any wiring which directly or indirectly interconnects any terminal equipment with any other terminal equipment or with any regulated facility or common carrier service.

For the purposes of this Part, relative to data processing, the following words and phrases shall be defined as follows:

(5) “Data” means recorded information, regardless of form or characteristic.

(6) “Procurement” means and includes the selling, buying, purchasing, renting, leasing, or otherwise obtaining of data processing equipment, related services, or software, as well as all activities engaged in, resulting in, or expected to result in the selling, buying, purchasing, renting, leasing, or otherwise obtaining of data processing equipment, related services, or software by political subdivisions.

(7) “Related services” means and is limited to service activities affecting the maintenance of data processing equipment or software.

¹¹*Id.* § 38:2237. This statute applies also to municipalities, school boards, fire districts and hospital districts. *Id.* § 38:2235.

(8) “Software” means computer programs and documentation essential to and necessary for a computer to perform productive operations.¹²

“Public entities” may create public benefit corporations and enter into “financing arrangements” with them and private parties.¹³ The term “financing arrangements” includes “leases, sale leasebacks and lease leasebacks.”¹⁴ The act provides that “[t]he dedication to public purposes of property transferred by a public entity . . . shall be specifically stated in any transfer or disposition document, and such language shall also specifically provide that the title and control of the property shall automatically by operation of law revert to the public entity upon the property commencing to be used for a purpose other than a public purpose.”¹⁵

Energy Performance Contracting

“Political subdivisions” are authorized to enter into “performance based energy efficiency contracts” for services and equipment.¹⁶

Municipalities

Municipalities¹⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁸ eminent domain¹⁹ and police powers.²⁰

Municipalities “may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.”²¹ “[A] municipality shall be vested with all powers, rights, privileges, immunities, authorities, and duties heretofore possessed in accordance with all constitutional and statutory provisions.”²²

Municipalities have the same authority as to certain provisions applicable to parishes.²³

Energy Performance Contracting

“Political subdivisions” are authorized to enter into “performance based energy efficiency contracts” for services and equipment.²⁴

School Districts

School districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷

¹²La. Rev. Stat. § 38:2236.

¹³La. Rev. Stat. § 39:1051. “Public entities” includes parishes, municipalities, fire districts and hospital districts. *Id.* § 39:1051.G(1). *See also, Id.* § 17:100.10 (relating to school properties).

¹⁴*Id.* § 39:1051.C.

¹⁵*Id.*

¹⁶*Id.* §§ 33:4547.1 to 4547.3. “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. La. Const. art. VI, § 44.

¹⁷Municipalities for purposes of this discussion are cities, towns and villages. La. Const. art. 6, § 44; La. Rev. Stat. § 33:341. Municipalities may be home rule. La. Const. art. 6, § 5.

¹⁸La. Const. art. 6, § 27(A); La. Rev. Stat. § 33:361(B).

¹⁹La. Const. art. 6, § 23; La. Rev. Stat. § 33:4621. Louisiana uses the term “expropriation” rather than “eminent domain.”

²⁰La. Rev. Stat. § 33:4721.

²¹*Id.* § 23.

²²La. Rev. Stat. § 33:361.

²³*See, supra*, notes 7-15 and accompanying text.

²⁴*Id.* §§ 33:4547.1 to 4547.3. “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. La. Const. art. VI, § 44.

School districts “may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.”²⁸ School districts have the same authority as to certain provisions applicable to parishes.²⁹ Subject to numerous restrictions, local school boards, along with cities and parishes, may create public benefit corporations for “engaging in financing arrangements to plan, renovate, construct, lease, sublease, manage and improve schools and school property . . .”³⁰ and may transfer its properties through “sale-leasebacks, leases, and lease-leasebacks.”³¹

Energy Performance Contracting

“Political subdivisions” are authorized to enter into “performance based energy efficiency contracts” for services and equipment.³²

Fire Districts

Fire districts³³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁴ power.

Such districts shall also be authorized to do and perform all acts in their corporate capacity and in their corporate names necessary and proper for the purposes of acquiring, maintaining, and operating buildings, machinery, equipment, water tanks, water hydrants, water lines, and such other things, including both movable and immovable property, as might be necessary or proper for effective fire prevention and control or considered necessary by the governing body of the district for the protection of the property within the limits of the district against fire. However, districts may not own and operate systems of waterworks.³⁵

Under certain statutory provisions, fire districts are granted the same authority as parishes.³⁶

Energy Performance Contracting

“Political subdivisions” are authorized to enter into “performance based energy efficiency contracts” for services and equipment.³⁷

Hospital Districts

Hospital districts³⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁹ and eminent domain⁴⁰ powers. “It shall also have the power and authority to acquire any and all

²⁵School districts are political subdivisions for purposes of article 6 of the constitution. La. Const. art. 6, § 44(2).

²⁶*Id.* art. 8, § 13(C).

²⁷*Id.* art. 6, § 23; La. Rev. Stat. § 19:2(1).

²⁸La. Const. art. 6, § 23.

²⁹*See, supra*, notes 7-15 and accompanying text.

³⁰La. Rev. Stat. § 17:100.10.

³¹*Id.* § 17:100.10.C. Documentary language is required to provide that the title and control of the property shall automatically and immediately revert to the school board if the property is used for a purpose other than school purposes. *Id.*

³²*Id.* §§ 33:4547.1 to 4547.3. “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. La. Const. art. VI, § 44.

³³Fire districts are known as “fire protection districts” and are considered subdivisions of the state for tax and bond purposes and for incurring debt. *Id.* § 40:1492. Their governing authority may be a board of commissioners or the governing authority of the parish in which they are located. *Id.* § 40:1495. They are public corporations. *Id.* § 40:1500. “Generally, it has such powers as of taxing districts and political subdivisions.” *Id.* § 40:1499.

³⁴*Id.* § 40:1499; La. Const. art. 6, § 32.

³⁵*Id.* § 40:1500.

³⁶*See, supra*, notes 7-15 and accompanying text.

³⁷*Id.* §§ 33:4547.1 to 4547.3. “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. La. Const. art. VI, § 44.

necessary equipment and buildings for the purpose of performing the objects for which it is formed . . .
.”⁴¹

Hospital districts have the same authority as to certain provisions applicable to parishes.⁴²

Energy Performance Contracting

“Political subdivisions” are authorized to enter into “performance based energy efficiency contracts” for services and equipment.⁴³

State Entities

Lease-purchase agreements for capital improvements, but not movables, must be submitted to the State Bond Commission for approval:

A. No agreement, including, but not limited to agreements of lease, lease-purchase or third party financing, shall be entered into by, on behalf of or with the state, directly or through any state board, department, commission, authority or agency, providing for the outlay of funds in excess of one hundred thousand dollars, in any fiscal year, beginning at the expiration of the fiscal year 1977-1978, for capital improvement or expenditure, including, but not limited to, equipment, buildings, land, machinery, renovations, major repairs and construction, without prior written approval of the State Bond Commission or its successor.

B. Any agreement, including, but not limited to agreements of lease, lease-purchase or third party financing, made in violation of the provisions of this Section shall be null and void, and unenforceable in the courts of this state.

C. **The provisions of this Section shall not apply** to capital outlay projects approved by the legislature pursuant to Article 7, Section 11(B) of the Louisiana Constitution of 1974, or to the expenditure of funds previously appropriated by the legislature, or **to any multi-year agreement dealing with movable property containing an appropriation dependency clause which provides for no penalty upon termination or failure to fund.** [Emphasis added.]

D. Any officer, official, agent or employee of the state or of any state board, department, commission, authority or agency, who enters into an agreement in violation of the provisions of this Section; or who counsels, aids or abets such a violation knowingly; shall be fined not less than five hundred dollars and not more than one thousand dollars, and/or imprisoned for not less than sixty days nor more than six months.

E. In the event the State Bond Commission considers alternative methods for the acquisition of capital improvements, it shall approve the least expensive method of acquisition.⁴⁴

The office of the Secretary of the Department of Transportation, successor to powers of the Board of Public Works⁴⁵ may “acquire . . . all kinds of property, movable and immovable, tangible or

³⁸“Hospital service districts” are bodies corporate and are subdivisions of the state for tax and bond purposes and for incurring debt. La. Rev. Stat. § 46:1060.

³⁹La. Const. art. 6, § 32.

⁴⁰La. Rev. Stat. § 46:1060.

⁴¹*Id.*

⁴²*See, supra*, notes 7-15 and accompanying text.

⁴³*Id.* §§ 33:4547.1 to 4547.3. “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. La. Const. art. VI, § 44.

⁴⁴La. Rev. Stat. § 39:1410.31.

⁴⁵*Id.* §§ 38:16, 38:17.

intangible”⁴⁶ and “shall comprise all of the administrative functions of the state in relation to the planning, design, survey and construction, operation, and maintenance and repair of public buildings”⁴⁷

“No immovable property shall be acquired . . . [or] leased . . . without the commissioner [of administration or his delegate] being a party to the transaction.”⁴⁸ An exception to this is for immovable property under the control of any higher education institution or board.⁴⁹

Generally, public works⁵⁰ exceeding \$150,000, or as adjusted annually, must be publicly bid in accordance with rules and regulations promulgated by the division of administration.⁵¹

Procurement authority for supplies, services and major repairs by state entities⁵² is centralized in the Office of State Procurement within the Division of Administration.⁵³ It is headed by the chief procurement officer acting under regulations set by the commissioner of administration.⁵⁴ Generally, the procurement code applies to all expenditures of government funds.⁵⁵ Entities with limited exemptions from conducting procurement through central purchasing include state public systems of higher education,⁵⁶ the Department of Transportation and Development,⁵⁷ the Department of Education,⁵⁸ and the State Bond Commission.⁵⁹ The governor is required to procure supplies and equipment for the governor’s mansion and “similar agencies.”⁶⁰

No competitive process is required for purchases \$25,000 or less per single purchase transaction, subject to numerous procedural restrictions.⁶¹ Relating to installment-purchase contracts, the procurement code provides:

The central purchasing agency may, on behalf of any governmental body, enter into contracts for the installment purchase of supplies or equipment, including but not limited to data processing equipment and telecommunications equipment, procured under this Chapter and any other applicable laws on the procurement of supplies or equipment, in accordance with the following provisions:

(1) All installment-purchase contracts shall be entered into utilizing the requisite procedures applicable to the particular supply or equipment being procured.

(2) The term of such contract shall not exceed the economic life to the item or items being procured, which shall be established by the central purchasing agency and shall be set forth

⁴⁶*Id.* § 38:1.

⁴⁷*Id.* § 38:2.

⁴⁸*Id.* § 39:11.

⁴⁹*Id.* § 39:14 (various other properties are excluded).

⁵⁰“Public work” means the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity. *Id.* § 38:2211(12). “Public entity” means and includes the state of Louisiana, or any agency, board, commission, department, or public corporation of the state, including any political subdivision. *Id.* § 38:2211(11).

⁵¹*Id.* § 38:2212.

⁵²The legislative and judicial branches, political subdivisions covered by Title 38 and certain other activities of certain state departments and commissions are excluded. La. Rev. Stat. § 39:1554. “Supplies” means all property, including but not limited to equipment, materials, insurance, and leases on immovable property excluding land or a permanent interest in land. *Id.* § 39:1556.

⁵³*Id.* § 39:1571; § 39:1554.

⁵⁴La. Rev. Stat. § 39:1564.

⁵⁵*Id.* § 39:1554 (Exemptions apply for the judicial and legislative branches).

⁵⁶Louisiana State University System, Southern University System, and Louisiana Community and Technical College system.

⁵⁷“[F]or procurement of materials and supplies that will become a component part of any road, highway, bridge or appurtenance thereto.” *Id.* § 1572(A)(1).

⁵⁸The exemption also applies to institutions under the supervision of the State Board of Elementary and Secondary Education.

⁵⁹La. Rev. Stat. § 39:1572 (the bond commission is exempted for printing only); *id.* § 39:1554.

⁶⁰*Id.* § 39:1554.

⁶¹*Id.* § 39:1596; La. Admin. Code tit. 34, Pt V, § 701; Exec. Order JBE 2017-18 (July 31, 2017).

in the invitation to bid or request for proposal, but in no case shall the term of the contract exceed five years.

(3) Each contract shall contain an annual appropriation dependency clause which shall provide that the continuation of the contract is contingent upon the continuation of an appropriation of funds by the legislature to fulfill the requirements of the contract. If the legislature fails to appropriate sufficient monies to provide for the continuation of the contract or if a veto or reduction of appropriation of funds necessitates the discontinuance of the contract, the contract shall terminate on the last day of the fiscal year for which funds were appropriated, in accordance with R.S. 39:1615(C).

(4) Such contracts shall also conform to any other requirements which may be established by the central purchasing agency through rules and regulations, promulgated in accordance with law.⁶²

Relating to “lease with purchase option” the administrative code provides:

A. Unless a requirement can be met only by the leased supply as determined in writing by an officer above the level of procurement officer, a purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding. Before exercising such an option the chief procurement officer shall:

1. investigate alternative means of procuring comparable supplies; and,
2. compare estimated costs and benefits associated with the alternative means and the exercise of such option, for example, the benefit of buying new state-of-the-art equipment compared to the estimated initial savings associated with exercise of a purchase option.⁶³

The administrative code additionally provides:

When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. When such a contract is awarded by competitive sealed bidding, exercise of the option shall be at the state's discretion only, and shall be at the mutual agreement of the state and the contractor.⁶⁴

* * * *

Before exercising any option for renewal, extension, or purchase, the chief procurement officer should attempt to ascertain whether a re-solicitation is practical, in terms of current market conditions and trends and cost factors, and would be more advantageous to the state than renewal or extension of the existing contract.⁶⁵

State entities through the Division of Administration may enter into equipment lease-purchase contracts with nonprofit lessors.⁶⁶ The Office Facilities Corporation,⁶⁷ the Louisiana Office Building Corporation,⁶⁸ and the Correctional Facilities Corporation⁶⁹ are three such nonprofit corporations which may enter into lease-purchase agreements of facilities for leasing to the state.

Information Technology Procurement

⁶²La. Rev. Stat. §39:1616.

⁶³La. Admin. Code Tit. 34 § 2005. This provision is located in the chapter on lease of movables which also provides that “[a] lease of movables is a contract for the use of equipment under which title does not pass to the state” *Id.* § 2001 and “[a] lease of movables may be entered into provided: 1. it has been competitively bid in accordance with these rules and regulations, applicable executive orders, and policy and procedure memoranda; 2. it is in the best interest of the state; 3. all conditions for renewal and costs of termination are set forth in the lease.” *Id.* § 2003.

⁶⁴La. Admin. Code Tit. 34 § 2101.

⁶⁵La. Admin. Code Tit. 34 § 2103.

⁶⁶La. Rev. Stat. § 39:1761 to 1771; La. Admin Code tit. 34 §§ 5101 to 5513.

⁶⁷La. Rev. Stat. § 39:1798.

⁶⁸*Id.* § 39:1796.

⁶⁹*Id.* § 39:1780.

The Office of Technology Services within the division of administration oversees policy on the acquisition of information technology by agencies in the executive branch, headed by the Chief Information Officer (CIO).⁷⁰

Sections 39:196 to 200 of the Louisiana Statutes relate to acquisition of data processing equipment, related services and software.

A. The provisions of this Part shall be applicable to all state agencies in the executive branch, as defined in R.S. 36:3(1),⁷¹ except for any agency of a statewide elected official, with respect to the purchase, lease, and rental of all information technology equipment, related services, and software.

B. The office of technology services shall, subject to the provisions of this Part, have sole authority and responsibility for defining the specific information technology systems and information technology services to which the provisions of this Part shall be applicable. Rules and regulations shall be promulgated as may be necessary to carry out the provisions of this Part..⁷²

Section 39:197 provides:

For the purposes of this Part, the following words and phrases shall be defined as follows:

(1) "Agency" shall have the same meaning ascribed to it as provided in R.S. 36:3(1).

(2) "Competitive sealed bidding" means a method of procurement which strictly follows the requirements set forth in Chapter 17 of Title 39 of the Louisiana Revised Statutes of 1950 except for such variations as are specifically established herein.

(3) "Procurement" means the selling, buying, purchasing, renting, leasing, or otherwise obtaining information technology systems, information technology services, or its related software, as well as all activities engaged in, resulting in, or expected to result in the selling, buying, purchasing, renting, leasing, or otherwise obtaining information technology systems, information technology services, or its related software by the state or its agencies.

(4) "Software" means computer programs and documentation essential to and necessary for an information technology system or information technology service to perform productive operations.

(5) "Information technology service contract" means a contract for the procurement of information technology services to include but not be limited to software as a service, infrastructure as a service, platform as a service, application hosting services, or installation and configuration services.

(6) "Information technology systems", which shall include information technology equipment and related services, and "information technology services" are limited to the equipment and services and means to provide:

- (a) Server systems and services.
- (b) Storage systems and services.
- (c) Information technology security systems and services.
- (d) Related peripheral systems and services.
- (e) Software and software application services.
- (f) Infrastructure and platform systems and services.
- (g) Desktop computing systems and services.
- (h) Geographic information systems and services.
- (i) Mobile device systems and services.

⁷⁰*Id.* §§ 39:15.2, 15.3.

⁷¹"Agency" means any state office, department, board, commission, institution, division, officer or other person, or functional group, heretofore existing or hereafter created, that is authorized to exercise, or that does exercise, any functions of the government of the state in the executive branch, but not any governing body or officer of any local government or subdivision of the state, or any parochial officer who exercises functions coterminous with the municipality in which he performs those functions. La. Rev. Stat. § 39:2. Any agency of a statewide elected official is excluded. *Id.* § 15.1. Public postsecondary management boards or the Board of Regents are excluded. *Id.*

⁷²*Id.* § 39:196.

(j) Any and all systems and services based on emerging and future information technologies relating to Subparagraphs (a) through (i) of this Paragraph.

(7) "Information technology systems contract" means a contract for the procurement of information technology systems including equipment and related services to include but not be limited to installation and maintenance.

(8) "Information technology systems lease contract" means a contract between a supplier of information technology systems and the division of administration, office of technology services, or the procuring agency, through which information technology systems may be procured for a term which shall not exceed ten years. The contract may be either an operating lease, installment purchase, or a financed lease without a balloon payment.

(9) "Utility" means any information technology service provided by the office of technology services and used in the essential operations of a state agency, such as system authentication, data replication, and system utilization and performance management.

(10) "Related services" mean and are limited to service activities affecting the maintenance of information technology equipment or software and the providing of fiscal intermediary services in processing claims of health care providers

(11) "Direct order contract" means a contract which covers a specific class of information technology equipment, software, or services, or a contract which covers a single, specific class of information technology equipment and all features associated with that class and through which state agencies may procure the item of hardware specified by issuing a purchase order under the terms of the contract, without the necessity of further competitive bidding.

(12) "Multi-year contract" means contracts for a term of more than one year, not to exceed ten years and includes the following:

(a) Contracts between a supplier of information technology systems, information technology services, and software, and s, and the state or a state agency through which information technology systems, information technology services, and software, except for fiscal intermediary services for the processing of claims of health care providers, may be leased or purchased for a term of more than one fiscal year, but the term shall not exceed sixty months.

(b) Contracts for fiscal intermediary services for the processing of claims received from health care providers.

(13) "Rental contract" means and includes contracts between a supplier of information technology equipment and the state, or a state agency, through which information technology equipment may be leased for a term not to exceed one fiscal year, such contracts to include the right of termination by the state upon notice of ninety days or less, and to be renewable, upon review and recommendations of the procurement support team and review and approval by the office of information technology, with such renewal to be limited to one additional term not to exceed twelve months.

(14) "Competitive sealed bidding" means a method of procurement which strictly follows the requirements set forth in Chapter 17 of this Title except for such variations as are specifically established herein.

(15) "Emergency acquisitions or rentals of information technology" means a method of procurement utilized when there exists a threat to the public health, welfare, safety or public property.

(16) "Master agreement" means an agreement between the state and a vendor which specifies the general terms and conditions under which parties will routinely conduct procurement business.

(17) "Purchase contract" means a contract that is utilized for the direct acquisition of certain equipment, including but not limited to information technology, desktop computers, server systems, storage systems, mobile computing systems, peripheral systems, software, and related services. Such contract shall contain the terms and conditions pertinent to the rights and obligations of both the state and the vendor. Any purchase by direct acquisition under the terms of the purchase contract will require one single payment, and

title shall pass to the state upon the date of purchase as defined in the contract unless the purchase contract is amended by an installment payment contract.

(18) "Installment-payment contract" means a contract which amends and is incorporated into a purchase contract and is utilized to finance with the vendor the purchase of certain equipment, including but not limited to information technology, desktop computers, server systems, storage systems, mobile computing systems, peripheral systems, software, related services and related supplies or a contract which itself alone is utilized to procure such equipment from a contractor and provides therein for payment in a set of installments over a fixed period of time. An installment payment contract shall arrange for a method of financing with payment being made in a set of installment payments over a fixed period of time in accordance with the provisions of the contract and shall provide for the vendor to deliver title to the governmental body in accordance with such terms

(19) "Financed lease" means a contract or lease of an information technology system made pursuant to a solicitation for procurement, according to which:

(a) The successful proposer, as lessor, shall retain title to the information technology system, although the using agency, as lessee, shall take possession of the system.

(b) Payments shall be made by the lessee according to a payment schedule to the lessor.

(c) The lessor may transfer its designation as lessor to its choice of financial institution; however, such transfer shall have no effect on the contracted payment schedule, contracted interest rate, or any other right or obligation of either the lessee or lessor under the contract.⁷³

Section 39:198 provides:

A. The types of contracts permitted in the procurement of information technology systems, information technology services, and software are defined in this Part, and the provisions of this Part supersede, with respect to such procurements, any existing conflicting statutory provisions and supplement the provisions of R.S. 39:1551 through 1736.

B. The office of technology services, through the state purchasing office, may, on behalf of any state agency, enter into information technology systems contracts in accordance with the following provisions:

(1) Contracts of this type shall be entered into through a request for proposals as provided in R.S. 39:199. An invitation to bid format may be utilized with written approval from the state chief information officer.

(2) The term of such contracts shall not exceed five years.

C. The office of technology services, through the state purchasing office, may on behalf of any state agency, enter into information technology services contracts in accordance with the following provisions:

(1) Contracts of this type shall be entered into through a request for proposals as provided in R.S. 39:199. An invitation to bid format may be utilized with written approval from the state chief information officer.

(2) The term of such contracts shall not exceed ten years.

D. The office of technology services, through the state purchasing office, may on behalf of any state agency, enter into a information technology systems lease contract for an operating lease, installment purchase, or financed lease for information technology systems in accordance with the following provisions:

(1) All contracts of this type shall be entered into through a request for proposals as provided in R.S. 39:199.

⁷³*Id.* 39:197.

(2) The justification of such contracts must be approved by the office of technology services prior to issuance of a request for proposals. Such justification shall identify and consider all cost factors relevant to that contract.

(3) The term of such contracts shall not exceed ten years, except financed contracts shall be for a term not to exceed the economic life of the system or ten years, whichever is less.

(4) Upon the advance written approval of the office of technology services, state agencies may extend operating leases of information technology systems on a month-to-month basis for a period not to exceed one calendar year for the stated lease prices.

E. Notwithstanding the provisions of R.S. 39:1615 to the contrary, the use of a multi-year contract for information technology systems and information technology services shall be in accordance with rules and regulations and under the following conditions:

(1) The state chief information officer shall approve in writing the use of a multi-year contract over one year, not to exceed three years.

(2) The director of the state purchasing office shall approve in writing the use of a multi-year contract over three years, not to exceed five years.

(3) The commissioner of administration, or his designee, shall approve in writing the use of a multi-year contract over five years.

(4) A report of all multi-year contracts shall be provided to the Joint Legislative Committee on the Budget no later than ninety days after the end of each fiscal year.

F. Direct order contracts. The office of technology services, through the state central purchasing agency, shall, on behalf of all state agencies, enter into a direct order contract with a vendor of information technology equipment for the purchase, rental, or both, of such equipment in accordance with the following provisions:

(1) Specifications for direct order contracts. Specifications for direct order contracts shall be developed in advance and shall conform to the following requirements:

(a) Specifications for direct order contracts shall cover a specific class of equipment and may include all features associated with that class.

(b) Specifications in the invitation for bids for direct order contracts shall be developed by the office of information technology .

(c) Specifications shall be based on the projected needs of user agencies.

(d) Specifications for direct order contracts for the purchase and/or rental of information technology equipment may include specifications for the maintenance of the equipment desired.

(2) Procurement of direct order contracts. The initial procurement of a direct order contract, and procurement of equipment by using agencies under a direct order contract, shall be as defined herein:

(a) Direct order contracts shall be awarded by competitive sealed bidding.

(b) A using agency may procure required information technology equipment available under a direct order contract through release of a purchase order for the required equipment to the vendor holding a direct order contract. However, such procurement by purchase order shall be accomplished in accordance with the procedures and regulations prescribed by the state central purchasing agency in the division of administration and shall be subject to all other statutory requirements.

(3) The final authority for entering into direct order contracts shall rest with the division of administration, and such contracts shall be executed by the purchasing office, in accordance with procedures and regulations defined by the Division of Administration.

(4) Terms and conditions of direct order contracts. Direct order contracts for information technology equipment are subject to the following requirements:

(a) Direct order contracts shall be valid for not more than three fiscal years.

(b) The prices stated in such contract shall be firm for the period of the contract; except that, all such contracts shall include a clause granting to the state the benefit of any general price reductions effected by the vendor during the term of the contract.

(c) Individual items of computer hardware which may be included under a direct order contract may not have a purchase price greater than seventy-five thousand dollars or a monthly rental price greater than two thousand dollars. Such price shall not include costs of maintenance, taxes, or transportation.

(d) Direct order contracts shall include the annual appropriation dependency clause set forth in Subparagraph B(1)(d) of this Section.

(e) Direct order contracts may be extended into one additional fiscal year only under the following conditions:

(i) Such extension of a direct order contract shall be subject to the approval of the office of data processing.

(ii) The vendor may increase rental prices for the term of the additional fiscal year by an amount equal to the lesser of any increase permitted by that vendor's contract with the General Services Administration of the United States Government for such equipment, or any increase in that vendor's published list prices for such equipment, during that fiscal year; provided that, such increase may not exceed ten percent, and the increase must have been authorized by the initial direct order contract.

(f) Items covered by a direct order contract may also be acquired through additional competitive sealed bidding.

G. Multiyear contracts other than direct order contracts and contracts for fiscal intermediary services in processing claims of health care providers. State agencies may enter into contracts for the lease or purchase of information technology systems, information technology services, or software when the term of such lease or purchase is greater than twelve months or involves more than one fiscal year in accordance with the following provisions:

(1) General terms and conditions for multiyear contracts shall be as follows:

(a) All contracts of this type shall be entered into through competitive sealed bidding.

(b) The justification of such contracts must be presented to the state central purchasing agency prior to issuance of an invitation for bids. Such justification shall identify and consider all cost factors relevant to that contract.

(c) The term of such contract shall not exceed sixty months.

(d) All such contracts must contain the following annual appropriation dependency clause:

"The continuation of this contract is contingent upon the continuation of an appropriation of funds by the legislature to fulfill the requirements of the contract. If the legislature fails to appropriate sufficient monies to provide for the continuation of a contract or if such appropriation is reduced by the veto of the governor or by any means provided in the Appropriation Act or Title 39 of the Louisiana Revised Statutes of 1950 to prevent the total appropriations for the year from exceeding revenues for that year or for any other lawful purpose and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated."

(e) The state central purchasing agency in the division of administration shall maintain a list of all multi-year contracts. This list must show at a minimum the name of the vendor, the annual cost of each contract, and the term of the contract.

(f) All such contracts for lease must contain a clause granting to the state the benefit of any general price reduction effected by the vendor during the term of the contract.

(g) With respect to all such contracts for purchase, there shall be no provisions for a penalty to the state for the early payment of the contract.

(2) Provisions relating to multi-year contracts for software:

(a) Contracts for software which extend for periods greater than twelve months or which cover all or a portion of more than one fiscal year, but which require only a single payment by the state to the vendor, may be entered into by any state agency, without regard to the specific requirements of Paragraph (1) of this Subsection.

(3) Provisions relating to multi-year contracts for the installment payment of financing for certain equipment, including but not limited to desktop computers, server systems, storage systems, mobile computing systems, peripheral systems, software, and related services are as follows:

(a) Installment-payment contracts will be entered into with vendors of the defined equipment by the division of administration through the state central purchasing agency on behalf of all state agencies in accordance with rules and regulations adopted by the director of central purchasing.

(b) Installment-payment contracts may serve as amendments to and be incorporated into the vendor purchase contracts.

(c) The installment-payment contract may serve as a financing agreement and may contain only those provisions pertinent to the payment obligation, including but not limited to payment schedule and rate, provisions of default, assignment of payment stream, early payment, passage of title, and insurance coverage.

(d) Each contract shall contain an annual dependency clause, as defined in Subparagraph (G)(1)(d) of this Section.

(e) Installment-payment contracts utilized in procuring micro computer equipment, word processing, software, and maintenance through brand name contracts shall contain a fixed interest for the term, which will generally be defined as one fiscal year, of the brand name contract. The interest rate is to be bid by the vendor, accepted by central purchasing, and approved by the State Bond Commission.

(f) Interest rates for individual procurements of equipment either through the competitive sealed bid process or under the terms of the applicable brand name contract shall be fixed for the term of the multi-year contract specific to that individual procurement.

(g) The term of an installment-payment contract utilized for the equipment defined herein shall not exceed sixty months.

(4) Provisions relating to the procurement of information technology consulting services through the office of technology services shall be conducted in accordance with the provisions of R.S.39:1481 through 1526.

H. Rental Contracts. Upon the advance written approval of the state central purchasing agency, state agencies may enter into contracts for the rental of information technology equipment and related services on a month to month basis for a period not to extend beyond the end of the fiscal year in which the contract is made. All such contracts shall be entered into only as a result of competitive sealed bidding procedures.

(1) Equipment currently installed, or installed at the beginning of a fiscal year under a valid rental contract, may be retained at the end of the fiscal year by renewing or extending the existing rental contract for one additional term, not to exceed twelve months, without competitive sealed bidding procedures, subject to the following provisions:

(a) All prices under a fiscal year rental contract shall be no greater than the supplier's established catalogue price and shall be firm for the fiscal year in which the contract is made, with the exception that the state shall be entitled to any general price reductions effected by the supplier during the term of the contract.

(b) All rental contracts shall have a notice of termination provision in favor of the state not to exceed ninety days and shall allow termination of the contract as it applies to specific equipment or services without termination of the entire contract.

(c) Renewal of a rental contract shall be subject to the advance review and recommendation of the procurement support team and to the advance written approval of the state central purchasing agency and shall only be permitted if any proposed price increases do not exceed the supplier's current published list prices.

(2) Termination of a rental contract may be effected, in addition to any other legal reasons, by the state central purchasing agency, which shall have authority to direct a user agency to terminate, with adequate notice, a rental contract for the failure of any party to comply with the provisions herein, and to initiate competitive sealed bidding procedures in order to retain or replace the equipment affected by termination.

I. Contracts for fiscal intermediary services in processing claims of health care providers. State agencies may enter into contracts for fiscal intermediary services in processing claims of health care providers. The term of such a contract shall be one hundred twenty months. In the event special circumstances, as provided in Paragraph (9) of this Subsection, necessitate, additional one-year extensions of the contract may be granted. The award process and final contract shall include the following:

(1) Contracts for fiscal intermediary services in processing claims of health care providers shall be awarded by a competitive selection process which shall list in the solicitation for proposals the method by which the contract shall be awarded and include all criteria to be used and the weights assigned to each criterion. The procedure for issuance of the solicitation for proposals shall be in accordance with guidelines published by the state central purchasing agency. The selection of the contractor shall be made by the head of the using agency only in accordance with the method and criteria as set forth in the solicitation for proposals and in accordance with the recommendation of the procurement support team.

(2) Justification for the contract shall be submitted to the state central purchasing agency and shall be submitted to the House and Senate committees on health and welfare at least forty-five days prior to the issuance of a solicitation for proposals. Within thirty days of receipt of the justification by the House and Senate committees on health and welfare, either committee may convene a meeting separately or jointly for the purpose of conducting a public hearing on the justification which was submitted. Such justification shall include identification and consideration of all factors, including costs, relevant to the solicitation for proposals and the final contract.

(3) The one-hundred-twenty-month term of such contract shall be divided into one period of between thirty-six months and sixty months, immediately followed by successive twelve-month periods. The state shall have an option to renew such contract for each of the twelve-month periods. If the state does not exercise its option to renew, the contract shall be terminated. In the event special circumstances occur, as provided in Paragraph (9) of this Subsection, additional twelve-month extensions of the contract may be granted.

(4) In addition to other provisions as required by law or in the best interests of the state, such contract shall contain provisions setting forth, (a) the amount and requirements of the contractor's performance bond, (b) penalty and enforcement provisions for the failure of the contractor to perform in accordance with the contract documents, (c) conditions for optional renewal of the contract by the state in accordance with the provisions of this Subsection, and (d) requirements for termination of the contract by the state at any time, or for cause, or upon the refusal of the state to exercise an option to renew such contract.

(5) Issuance of specifications for a solicitation for proposals on a contract for fiscal intermediary services in processing claims of health care providers shall be made at least twelve months prior to the termination date of an existing contract, unless the contract termination is for cause or due to the refusal of the state to exercise an option to renew.

(6) No award of the contract shall be made until the House and Senate committees on health and welfare, meeting jointly or a joint subcommittee thereof has conducted a public hearing concerning such award.

(7) No award of the contract shall be made later than eight months prior to the termination date of an existing contract, unless the contract termination is for cause or due to the refusal of the state to exercise an option to renew.

(8) No option to renew such contract shall be exercised by the state until the following criteria have been satisfied:

(a) The Department of Health and Hospitals has conducted a public hearing concerning such renewal.

(b) The Department of Health and Hospitals submits to the House and Senate committees on health and welfare a notice of intention by the Department of Health and Hospitals to exercise the option to renew such contract and a copy of any public testimony which was taken at the public hearing held by the Department of Health and Hospitals. The House and Senate committees on health and welfare, meeting separately or jointly, may hold a public hearing concerning such renewal within thirty days following the receipt of a notice of intention by the Department of Health and Hospitals to exercise the option to renew such contract.

(c) The House and Senate committees on health and welfare, meeting separately or jointly, have conducted a public hearing concerning such renewal or thirty days have elapsed from the date the Department of Health and Hospitals submitted a notice of intention to renew such contract to the House and Senate committees on health and welfare and neither committee has posted a public notice of meeting concerning the renewal of such contract.

(9) In the event the Department of Health and Hospitals and/or the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services proposes substantial changes in the operations of the Medicaid program that would materially impact the services performed by the fiscal intermediary, the Department of Health and Hospitals may, subject to the approval of the House and Senate committees on health and welfare, approve additional extensions of the contract until such time as it is practical to prepare a solicitation for proposals describing the revised services that would be performed by the fiscal intermediary. During the time frame covered by any extension beyond the original one-hundred-twenty-month period, the fiscal intermediary may be required to perform additional functions to assist in preparing the Department of Health and Hospitals in the transition to the new program. Such functions shall include existing fiscal intermediary services as well as efforts to control fraud and abuse, program reports,

beneficiary enrollment and program information services, encounter data, and annual managed care negotiation data.

J. Master Agreements. The state director of purchasing may enter into master agreements with vendors with which the state conducts substantial business over a period of time.

(1) Such agreements shall set forth those terms and conditions of specific legal import which relate to the basic provisions according to which procurement activity will be conducted, and shall meet the following requirements:

(a) Such agreements may be for any term up to sixty months.

(b) All agreements must contain a clause providing that any changes mandated by state or federal law, whether legislative or judicial, will be incorporated; however, if such a change is not acceptable to either party, the affected term or terms of the contract shall be renegotiated and, if agreement cannot be reached, shall be stricken from the contract.

(c) A specific provision of any such agreement may be waived or changed only once during the term of the agreement, by mutual consent, expressed in writing.

(d) Each master agreement must be negotiated by a procurement support team and executed on behalf of the state by the state director of purchasing.

(2) Vendors may refer to the master agreement on file with the state director of purchasing when responding to invitations for bids for specific items of information technology equipment, related services, or software. Such bid responses must include a proposed schedule incorporating the terms of the master agreement and further detailing the items and prices bid. The selected vendor and the procuring agency shall sign the schedule and submit it to the state central purchasing agency for approval.

(3) The state director of purchasing, subject to the approval of commissioner of administration, shall have authority for determining when and if master agreements may be used. Notwithstanding any other provisions of this Part, master agreements shall not be used to circumvent the competitive bid process otherwise required by law.

K. The Department of Public Safety and Corrections may enter into a multiyear contract not to exceed ten years when contracting for the Video Gaming Monitoring System for the purposes described in R.S.27:405(B)(1). This contract may be awarded by the competitive request for proposal procedures set forth in R.S. 39:1593(C).

L. The Department of Wildlife and Fisheries may enter into a multiyear contract not to exceed ten years when contracting for the issuance of hunting and fishing licenses through an electronic issuance system as authorized by R.S. 56:30.1. This contract may be awarded by the competitive request for proposal procedures set forth in R.S. 39:1593(C).

M. Any contract entered into for a period of more than three years as authorized by this Section shall be subject to prior approval of the Joint Legislative Committee on the Budget.⁷⁴

Section 39:199 provides:

A. The office of technology services, through the state purchasing office, may procure information technology systems and information technology services by a request for proposals to conform with the following requirements:

(1) Public notice of the request for proposals shall be the same as for an invitation to bid as provided in R.S. 39:1594(C).

⁷⁴La. Rev. Stat. § 39:198.

(2)(a) The request for proposals shall indicate the relative importance of all evaluation factors and shall clearly define the work, service, or solution to be provided under the contract, the functional specifications, the criteria to be used in evaluating the proposals, and the time frames within which the work must be completed or the service provided.

(b) For information systems lease contracts, the request for proposals shall require that proposals contain a declaration as to the maximum price for which the system may be purchased following the termination of the lease contract. No other basis of evaluation shall be used except that set out in the request for proposals.

(3) The office of technology services shall evaluate all proposals to determine the proposal most advantageous to the state, taking into consideration all evaluation criteria set forth in the request for proposals, and shall make a recommendation of award to the state purchasing office.

(4) The office of technology services may request that the state purchasing office reject all proposals when it is deemed that such action is in the best interest of the state.

B. The office of technology services may procure information technology systems and information technology services in accordance with the law or regulations, or both, which govern the state purchasing office, the division of administration.

C. Method for procuring maintenance services. Notwithstanding any other provisions of this Part, any agency may procure maintenance services for information technology equipment without the need for competitive bidding. Such procurement must have the written advance approval of the state central purchasing agency and shall not be for a price greater than the vendor's published price. D. Method for procuring software and software maintenance and support services. Notwithstanding any other provisions of this Part, any agency may procure data processing software, software maintenance, and support services without the need for competitive bidding. Such procurement must have the written advance approval of the state central purchasing agency and shall not be for a price greater than the vendor's published price.

E. Method for procuring information technology equipment, software, and maintenance services for public colleges and universities. Notwithstanding any other provisions of this Part, any public college or university may procure, through its purchasing officer, information technology equipment, software, and maintenance services without the advance approval of the state central purchasing agency when a single expenditure for such materials or combined materials and services does not exceed one hundred thousand dollars.

F. (1) The commissioner of administration shall for each fiscal year designate a goal for awarding to small businesses a portion of anticipated total state procurement of information technology equipment and software. For purposes of this Subsection, "small businesses" shall be defined as an employer with fifty or fewer employees. The commissioner may divide the procurements so designated into contract award units of economically feasible production runs in order to facilitate offers or bids from small businesses. In making his annual designation of goals for small business procurements, the commissioner shall attempt to vary the included procurements so that a variety of information technology equipment and software produced by different small businesses shall be a goal each year. The failure of the commissioner to establish a goal for particular procurements shall not be deemed to prohibit or discourage small businesses from seeking the procurement award through the normal solicitation and bidding processes. The commissioner of administration shall report to the Joint Legislative Committee on the Budget and to the House Committee on Commerce and the Senate Committee on Commerce, Consumer Protection, and International Affairs on the program established in this Subsection each year prior to the submission of the executive budget. Such report shall include the goals and awards from the previous year, a list of unsuccessful awards as described in Paragraph (4) of this Subsection, and the goals for the upcoming year.

(2) Contract procedure. The commissioner shall establish a contract procedure in accordance with law, for the awarding of a procurement contract under the goals established in this Subsection. Surety bonds guaranteed by the United States Small Business Administration shall be acceptable security for an award under this Subsection.

(3) Responsibility of bidder or offeror. Before making a goal award, the commissioner shall evaluate whether the small business scheduled to receive the award is able to perform the set-

aside contract. This determination shall include consideration of production and financial capacity and technical competence.

(4) Award of contracts after unsuccessful goal procedures. In the event that the provisions of this Subsection do not operate to extend a contract award to a small business, the award shall be placed pursuant to the existing solicitation and award provisions established by law. The commissioner shall thereupon designate a goal for small businesses' additional state procurements of information technology equipment and software corresponding in approximate value to the contract unable to be awarded pursuant to the provisions of this Subsection.

(5) Conflict with other code provisions. All laws and rules pertaining to solicitations, bid evaluations, contract awards, and other procurement matters not inconsistent with the provisions of this Subsection shall apply to procurements set-aside for small businesses. In the event of conflict with other rules, the provisions of this Subsection shall govern.⁷⁵

Section 39:200 provides:

The following general provisions shall apply to all procurements under this Part:

A. Used equipment. Used information technology equipment is defined to include all equipment which cannot be certified as new by the vendor. Used equipment may be acquired through rental or purchase when the vendor and/or manufacturer certify that:

(1) The equipment has been properly maintained and used.

(2) Maintenance acceptable to the state is available by contract at a cost which shall not increase the total cost to the state to that level which would exist should the state acquire the same equipment new.

(3) The equipment is warranted by the manufacturer or vendor under the same terms and conditions as those offered by the manufacturer for that equipment when new.

B. Purchase of equipment being leased or rented. Equipment being leased or rented by a state agency may be purchased without the need for competitive sealed bidding. When the contract under which the equipment is being leased or rented provides for any credit of rental or lease payments toward purchase, the leasing or renting vendor shall be required to deduct such credits from the purchase price. A written analysis of the contract must be made by the using agency and filed with the state central purchasing agency. Such analysis shall at a minimum include the current market value of the equipment, the total amount paid to the vendor as lease or rental payments credited to the purchase price, the total time the equipment was leased or rented, and the amount of and contractor for related prior and subsequent contracts, including but not limited to maintenance contracts. Such purchases shall have the written advance approval of the state central purchasing agency, and the legislature shall have provided a specific appropriation for such purchase.

C. Disposition of information technology equipment no longer required by state agencies. The state central purchasing agency shall have the authority to dispose of information technology equipment no longer required by a state agency in accordance with regulations which shall be developed and published by the state central purchasing agency. Such dispositions may be through trade-in, assignment to another state agency, or sale. Dispositions other than by assignment to another agency shall be on a competitive basis.

D. Effective date of contracts. Any contracts entered into under the provisions of this Part may have an effective starting date at any point during a fiscal year. No contract entered into hereunder shall have an initial effective date earlier than the date on which such contract receives the final statutorily required approval. However, with the approval of the state central purchasing agency, a state agency shall make payments to a vendor in those circumstances where it has utilized the information technology equipment to be contracted prior to the actual receipt of the final

⁷⁵La. Rev. Stat. § 39:199.

statutorily required approval. The state central purchasing agency shall determine the size of the payments in accordance with the number of such days of utilization.

E. Contract amendments. All changes, modifications, and amendments to any contract hereunder shall be approved in advance by the state central purchasing agency, in addition to any other statutorily required approvals. This Subsection shall not apply to contracts for maintenance or software, but amendments to such contracts may not increase the rates specified in such contracts to a figure greater than the vendor's published standard rates.

F. Contract form. No contracts entered into hereunder shall be on preprinted contract forms supplied by a vendor.

G. Proposal or bid incorporated into contract. Where written proposals or bids are submitted by vendors, the proposal or bid of the successful vendor shall be incorporated into the final contract consummated with that vendor.

H. Letters of intent. Letters of intent may be issued by an agency to a vendor solely for the purpose of obtaining a delivery schedule with that vendor. All such letters must be clearly identified as such, and must be filed on issuance with the office of information technology and the attorney general.

I. Procurement support. All contracts covered under the provisions of this Chapter, in an amount greater than one hundred thousand dollars, whether for purchase or rental payments or fiscal intermediary services in processing claims of health care providers, or master agreements, but excluding taxes, transportation, and other related services, shall be entered into with the assistance of a procurement support team as provided in Paragraph (2) of this Subsection and in accordance with guidelines to be published by the state central purchasing agency.

(1) Procurement support team participation must include, as a minimum, assistance in evaluation of bids and negotiation of contracts.

(2) A procurement support team shall consist of a person chosen jointly by the speaker of the House of Representatives and the president of the Senate from among the attorneys on the legislative services staff of the House of Representatives or the staff of the Senate and one or more representatives from each of the following: the Division of Administration, central purchasing agency; the using agency initiating the procurement action; and the Legislative Fiscal Office. At least two members of the team shall have received formal training in computer contract negotiations. At least four members, one from each office or agency designated, must be present to constitute a quorum.

J. Contract specifications. (1) A specification may be drafted which describes a product which is proprietary to one company only when no other kind of specification is reasonably available for the state to describe its requirements; or when there is a requirement for specifying a particular design or make of product due to factors of compatibility, standardization, or maintainability; and, where such specification includes language which specifically permits an equivalent to be supplied. Such specification shall include a description of the essential characteristics of the product.

(2) Whenever proprietary specifications are used, the specifications shall clearly state that the proprietary characteristics are used only to denote the quality standard of the equipment desired and that such specifications do not restrict vendors to the specific brand, make, or manufacture; that they are used only to set forth and convey to prospective bidders the general style, type, character, and quality of equipment desired; and that equivalents will be acceptable.

(3) The specifications in an invitation for bids shall contain a list of the factors to be considered in evaluating the responses to the invitation, and any weights assigned to those factors. No other basis of evaluation shall be used with respect to bids received. When relevant, the following factors shall be included in the specifications: cost of transportation, installation, and conversion of operations; taxes; or cost of conversion to different equipment architecture.

K. The provisions of this Part shall, with respect to the procurement of information technology systems or information technology services, supersede specifications of any contradictory or conflicting provisions of the following statutes: R.S. 38:2211 et seq. with respect to awarding of public contracts and R.S. 39:1551 through 1736, but all other provisions in Chapter 17 of Title 39 apply to all procurements under this Part. The provisions of this Part do not relate to the procurement of services covered by R.S. 39:1481 through 1526 except as provided in R.S. 39:198. The Louisiana Lease of Movables Act, R.S. 9:3301 through 3342, shall not apply to the provisions of this Part.

L. In addition to specific authorizations contained in this Part, and pursuant to R.S. 39:15.2(C), the state chief information officer, with the approval of the commissioner of administration or his designee, shall have the power and authority to make necessary and reasonable regulations and orders to carry out the provisions of this Part in accordance with the provisions of the Administrative Procedure Act.⁷⁶

Telecommunications Procurement

Sections 39:1751 to 1755 of the Louisiana Statutes relate to acquisition of telecommunications systems and telecommunications services.

A. The provisions of this Part shall be applicable to any agency, as defined in R.S. 36:3(1),⁷⁷ within the executive branch of state government with respect to the procurement of all telecommunications systems and telecommunications services. However, nothing provided in this Part shall be construed to preempt the authorities granted to the higher education boards in Article VIII of the Constitution of Louisiana.

B. The office of telecommunications management shall, subject to the provisions of this Part, have sole authority and responsibility for defining the specific telecommunications systems and telecommunications services to which the provisions of this Part shall be applicable. Rules and regulations shall be promulgated as may be necessary to carry out the provisions of this Part.⁷⁸

Section 39:1752 provides:

For the purposes of this Part, the following words and phrases shall be defined as follows:

(1) "Agency" as used in this Part and in Part V of Chapter 1 of this Title shall have the same meaning ascribed to it as provided in R.S. 36:3(1).

(2) "Competitive sealed bidding" means a method of procurement which strictly follows the requirements set forth in this Chapter except for such variations as are specifically established in this Part.

(3) "Local area network" means a limited distance data processing/communications network or system used to link computers and peripheral devices.

(4) "Multi-year contracts" are contracts for a term of more than one year, not to exceed ten years.

(5) "Procurement" means the selling, buying, purchasing, renting, leasing, or otherwise obtaining telecommunications systems, telecommunications services, or their related software as well as all activities engaged in, resulting in, or expected to result in the selling, buying, purchasing, renting, leasing, or otherwise obtaining telecommunications systems, telecommunications services, or their related software by the state or its agencies.

(6) "Software" means computer programs and documentation essential to and necessary for a telecommunications system or telecommunications service to perform productive operations.

⁷⁶La. Rev. Stat. § 39:200.

⁷⁷"Agency" means and includes the boards, commissions, departments, agencies, offices, officers, and other instrumentalities, or any or all of these, within the executive branch of state government which are abolished by this Title or which are transferred and placed within departments of the state government created and established or continued by this Title or transferred to and placed within the office of the governor as provided by this Title. La. Rev. Stat. § 36:3(1) (Supp. 2012).

⁷⁸*Id.* § 39:1751 (2005).

(7) "Telecommunications service contract" means a contract for the procurement of telecommunications services to include but not be limited to long distance, pay telephone, radio paging, and utility-type services such as local dial tone.

(8) "Telecommunications systems", which shall include telecommunications equipment and related services, and "telecommunications services," are limited to the equipment and services and means to provide:

(a) Telecommunications transmission facilities and services.

(b) Voice telecommunications systems and services.

(c) Local area network systems and services.

(d) Wide area network systems and services.

(e) Video systems and services, except those video systems and services specifically reserved to the Louisiana Educational Television Authority pursuant to R.S. 17:2501.

(f) Wireless systems and services to include, but not be limited to, cellular and personal communications systems.

(g) Radio systems, to include but not be limited to two-way radio systems; however, the operational abilities and priorities of two-way communications of the departments in the executive branch shall not be impeded.

(h) Intercom and electro-mechanical paging systems.

(i) Any and all systems and services based on emerging and future telecommunications technologies relating to Subparagraphs (a) through (h) of this Paragraph.

(9) "Telecommunications systems contract" means a contract for the procurement of telecommunications systems including equipment and related services to include but not be limited to installation and maintenance.

(10) "Telecommunications systems lease contract" means a contract between a supplier of telecommunications systems and the division of administration, office of telecommunications management, or the procuring agency, through which telecommunications systems may be procured for a term which shall not exceed ten years. The contract may be either an operating lease, installment purchase, or a financed lease without a balloon payment.

(11) "Telecommunications transmission facility" means any transmission medium, switch, instrument, wiring system, or other facility which is used, in whole or in part, to provide any transmission.

(12) "Utility" means any telecommunications service provided by the office of telecommunications management and used in the essential operations of a state agency, such as local dial tone, wide area network, and local area network.

(13) "Wide area network" means a data processing/communications network or system generally utilizing common carrier facilities to link geographically dispersed local area networks to other local area networks or computer systems.⁷⁹

Section 39:1753 provides:

A. The types of contracts permitted in the procurement of telecommunications systems and telecommunications services are defined in this Part, and the provisions of this Part supplement the provisions of R.S. 39:1551 through 1736.

B. The office of telecommunications management, through the state purchasing office, may, on behalf of any state agency, enter into telecommunications systems contracts in accordance with the following provisions:

⁷⁹*Id.* § 39:1752 (2005).

(1) Contracts of this type shall be entered into through a request for proposals as defined in this Part. An invitation to bid format may be utilized with written approval from the director of the office of telecommunications management.

(2) The term of such contracts shall not exceed five years.

C. The office of telecommunications management, through the state purchasing office, may on behalf of any state agency, enter into telecommunications services contracts in accordance with the following provisions:

(1) Contracts of this type shall be entered into through a request for proposals as defined in this Part. An invitation to bid format may be utilized with written approval from the director of the office of telecommunications management.

(2) The term of such contracts shall not exceed ten years.

D. The office of telecommunications management, through the state purchasing office, may on behalf of any state agency, enter into a telecommunications systems lease contract for an operating lease, installment purchase, or financed lease for telecommunications systems in accordance with the following provisions:

(1) All contracts of this type shall be entered into through a request for proposals as defined in this Part.

(2) The justification of such contracts must be approved by the office of telecommunications management prior to issuance of a request for proposals. Such justification shall identify and consider all cost factors relevant to that contract.

(3) The term of such contracts shall not exceed ten years, except financed contracts shall be for a term not to exceed the economic life of the system or ten years, whichever is less.

(4) Upon the advance written approval of the office of telecommunications management, state agencies may extend operating leases of telecommunications systems on a month-to-month basis for a period not to exceed one calendar year for the stated lease prices.

E. Notwithstanding the provisions of R.S. 39:1615 to the contrary, the use of a multi-year contract for telecommunications systems and telecommunications services shall be in accordance with rules and regulations and under the following conditions:

(1) The director of the office of telecommunications management shall approve in writing the use of a multi-year contract over one year, not to exceed three years.

(2) The state chief procurement officer shall approve in writing the use of a multi-year contract over three years, not to exceed five years.

(3) The commissioner of administration, or his designee, shall approve in writing the use of a multi-year contract over five years.⁸⁰

Section 39:1754 provides:

A. The office of telecommunications management, through the state purchasing office, may procure telecommunications systems and telecommunications services by a request for proposals to conform with the following requirements:

(1) Public notice of the request for proposals shall be the same as for an invitation to bid as provided in R.S. 39:1594(C).

(2)(a) The request for proposals shall indicate the relative importance of all evaluation factors and shall clearly define the work, service, or solution to be provided under the contract, the

⁸⁰*Id.* § 39:1753.

functional specifications, the criteria to be used in evaluating the proposals, and the time frames within which the work must be completed or the service provided.

(b) For telecommunications systems lease contracts, the request for proposals shall require that proposals contain a declaration as to the maximum price for which the system may be purchased following the termination of the lease contract. No other basis of evaluation shall be used except that set out in the request for proposals.

(3) The office of telecommunications management shall evaluate all proposals to determine the proposal most advantageous to the state, taking into consideration all evaluation criteria set forth in the request for proposals, and shall make a recommendation of award to the state purchasing office.

(4) The office of telecommunications management may request that the state purchasing office reject all proposals when it is deemed that such action is in the best interest of the state.

B. The office of telecommunications management may procure telecommunications systems and telecommunications services in accordance with the law or regulations, or both, which govern the state purchasing office, the division of administration.⁸¹

Section 39:1755 provides:

The following general provisions shall apply to all procurements under this Part:

(1) No contracts entered into shall have an initial effective date earlier than the date on which such contract receives approval as required by this Part.

(2) All changes, modifications, and amendments to any contract hereunder shall be approved in advance by the office of telecommunications management and the state purchasing office, in addition to any other approvals required by law.

(3) Where written proposals or bids are submitted by vendors, the proposal or bid of the successful vendor shall be incorporated into the final contract consummated with that vendor.

(4) All contracts must contain the following annual appropriation dependency clause:

"The continuation of this contract is contingent upon the continuation of an appropriation of funds by the Legislature to fulfill the requirements of the contract. If the Legislature fails to appropriate sufficient monies to provide for the continuation of a contract or if such appropriation is reduced by the veto of the governor or by any means provided in the appropriations act to prevent the total appropriations for the year from exceeding revenues for that year or for any other lawful purpose and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the last day of the fiscal year for which funds were appropriated."

(5) The provisions of this Part shall, with respect to the procurement of telecommunications systems or telecommunications services, supersede specifications of any contradictory or conflicting provisions of the following statutes: R.S. 38:2211 et seq. with respect to awarding of public contracts, and R.S. 39:1551 through 1736.⁸²

Louisiana Workforce Commission

The Louisiana Workforce Commission may enter into lease-purchase agreements

. . . for the purpose of acquiring land and buildings for the exclusive use and occupancy of the programs administered under the Louisiana Employment Security Law . . . with the approval of the governor and advisory council, and in conform with the requirements of the United States Department of Labor pertaining to the use of funds granted to this state . . . Expenses incurred under any agreement entered into pursuant to

⁸¹*Id.* § 39:1754.

⁸²*Id.* § 39:1755.

the authority contained in this Subsection shall not be a charge against or be paid from the general funds of the state, but shall be chargeable to and paid from funds granted to this state by the United States Department of Labor⁸³

Higher Education

The Board of Regents coordinates all public higher education in the state.⁸⁴ The board is headed by the Commissioner of Education. Institutions of public higher education appear to be empowered to procure property independently of the Office of State Purchasing,⁸⁵ but are subject to provisions of the state procurement code discussed, supra.⁸⁶

University policies promulgated by the Finance and Facilities Division of the Board of Regents (“BOR”) provide:

1.2.19. Projects Utilizing Alternative Means of Financing

This section establishes parameters and guidelines as well as suggested practices for Projects Utilizing Alternative Means of Financing.⁸⁷ The BOR acknowledges the benefits of this method of obtaining needed facilities for an institution. Advantages include the ability to react to current needs without having to wait for entry into the annual capital outlay process and expedited project administration. Due to reduced public oversight, it is imperative that all involved take all necessary steps to ensure that the public institutions receive the same optimum value, benefit, and protection as with other methods of financing.

The BOR trusts that all applicable laws will be followed by the management boards. It is further confident that each system board will adhere to the provisions of all laws governing ethics of public officials as well as seek assistance from the Ethics Commission if necessary. The BOR believes that while it is necessary to recognize a private entity’s non-public status, it is equally important to maintain public confidence in all of higher education’s endeavors.

Projects utilizing alternative means of financing must be submitted to the BOR for review and approval before any contracts are executed (except as provided in section 1.2.6) [this section provides for a sequenced process for review and approval] **or construction is initiated.** BOR staff’s review will consider appropriateness to the role, scope, and mission of the institution; compliance with the institution’s master plan, budgetary impact including operational costs, and compliance with this BOR policy. If significant changes are made after the original approval is made, the BOR must be advised of these changes and those changes should be approved prior to work being done pursuant to those changes. A significant change would include a change that increases the total value of the project by 20% or more, changes the use of the proposed facility; or changes the parties involved in the project. [Emphasis added.]

Projects performed utilizing alternative means of financing typically involve contractual agreements, cooperative endeavor agreements, or other legal instruments executed with a third party. The organization and activities of third parties are set forth in relevant law. Relevant law includes but is not necessarily limited to La. R. S. 17:3361 et. seq. and La. R. S. 17:3390.

Third party projects are typically structured such that the project site is leased to the third party by the management board, the third party is contractually bound to construct facilities in accordance with a plan, and then the completed facilities are returned to the institution for its use via additional lease, lease-back

⁸³*Id.* § 23:1670.

⁸⁴La. Const. art. 8 § 5.

⁸⁵La. Rev. Stat. § 39:1572.

⁸⁶*Id.* § 17:3355; §§ 39:1551 to 1736 (procurement); §§ 39:1751 to 1755 (telecommunications); §§ 39:196 to 200 (information technology).

⁸⁷“Alternative means of financing” is defined as “funding for capital projects using sources other than traditional capital outlay appropriations of the legislature to provide necessary facilities for an institution.” “Leased facilities” is defined as “real estate and/or improvements that are (1) owned by others and leased by them to any university and/or management board for any use, (2) real estate and/or improvements owned by any institution and leased to others for any use, and (3) property owned by any institution leased to a 3rd party and then leased back to the institution [http://www.laregentsarchive.com/Finance/BOR Facilities Policy 2005, Revised eff. Apr. 27, 2016.pdf](http://www.laregentsarchive.com/Finance/BOR_Facilities_Policy_2005_Revised_eff._Apr._27,_2016.pdf). BOR 1.2.2.

agreements, or donation. La. R.S. 17:3361 et. seq. and La. R.S. 17:3390 authorize these projects and govern their status. These projects are private and are not subject to public works administration. These statutes also address auditing and the classification of a third party's documents as public or non-public.

There are numerous variations of projects utilizing alternative means of financing, and the BOR encourages institutions to be creative in proposing such financing.

Documentation supporting such projects must include a comprehensive business plan. Business plans shall include project concept, structure of the project (relationship of the entities involved and probable contractual structure), justification of need, relationship to the institution's campus master plan, appropriateness to the role, scope, and mission of the institution, a business plan pro-forma, provisions for an MRA with MRA Use Schedule, and other relevant information.

Projects utilizing alternative means of financing must have project oversight by the institution and should have a qualified person specifically designated by the institution to oversee the work.

Auxiliary enterprise projects, as contrasted with academic and support projects, shall be entirely self-supporting unless otherwise approved by the BOR.

In some instances the source of alternative means of financing is from state funds committed to the operating budget of the institution to pay for the leasing of facilities completed by the third party. When such financing occurs, a cooperative endeavor agreement or other legal instrument as may be appropriate must be executed between the State of Louisiana, the management board or other state entity and the third party making the funding of the lease an obligation of the state. It is recommended that any such agreement, contract or other document should contain a provision authorizing an audit of obligations contained therein.

Third party projects utilizing state line item appropriated funds for repayment shall be subject to additional project oversight. Facility Planning and Control [FP&C] section of the Division of Administration has agreed to provide this service, and the oversight shall be appropriate to the project. The review and oversight function performed by FP&C shall be conducted in a manner prescribed by them, and lacking that, the project shall not progress to the next step. Services of Facility Planning and Control may include on-site inspection by field engineers assigned to that region.

The BOR offers the following points as suggested practices that it believes should be utilized when engaging in this type of project. If suggested practices are not followed, project documentation should provide justification for not doing so:

- Project finances should be set up in such a way that, whenever feasible and appropriate, movable equipment, such as furniture, appliances, etc., is acquired by the third party, and architectural and engineering fees should not be applicable to such expenditures. However, in some instances where the services of interior design professionals are used, either as a consultant to the A/E professional or Design/Build team or a direct contract service of the third party, appropriate compensation may be incorporated into the contract.
- Institutions should use and document a competitive proposal process in obtaining the services of a design professional, contractor, and/or design-build team. Where an RFQ or RFP is used to select a design professional, contractor, and/or design-build team, solicitations for services must define the project concept, scope of work, probable site, preliminary budget, purpose of the project, standards to be met, timing of the project and criteria by which responses to the solicitation will be judged. The selection process should leave no doubt that the selection was competitive, fair, impartial and unbiased. At a minimum, such documentation should demonstrate that those selected are competent, experienced, reliable, financially sound and bondable and available for the project. Documentation should also include the scoring process by which one respondent was selected over the others.
- Submittals and/or presentations in response to solicitations for services are speculative in nature and are no guarantee of success. Respondents must accept the expense of such submittals as a cost of pursuing business. There should be no compensation to any respondent for such expenses.
- Contracts or other legal documents used in the project should include provisions addressing the disposition of the facility at the termination of the third party agreement. There should be provisions for control of the project by the institution and/or management board in the event of a

default by the third party. If insisting on such a provision jeopardizes funding or the success of the project, then there should be provisions that restrict the use of the facility to ensure that it is either used for the same purpose or is compatible with the other university facilities and their occupants.

- Actual expenditures for the project including financing and the cost of selling bonds, legal fees, capitalized debt service, interest earnings, the activities of the third party, design fees, construction costs, movable equipment purchases, change orders, and any other costs should be reported to the designated system office quarterly or as needed for proper supervision of the project and its progress. All contracts, cooperative endeavor agreements or other legal instruments should include a requirement for documentation and reporting.

- Relevant relationships involved with these projects must be examined so as to avoid any possible conflicts of interests or the appearance of conflict. For example, if the third party has a board, an inquiry should be made as to whether or not any board member of the private entity will have an interest in the development or building of the facility.

1.2.20. Leases

In general, there are three types of leases, (1) the management board and/or institution leasing real estate it owns to others, (2) the management board and/or institution obtaining the use of real estate and improvements thereon that is owned by others, and (3) the management board and/or institution leasing real estate it owns to a 3rd party with the intent that the 3rd party construct improvements thereon and then lease the completed facility and real estate back to the management board and/or institution for its use. Leases impact Section 1.2.5 of this policy and may have budgetary impact as well.

With regard to leasing of real estate owned by the management board and/or institution, a management board may lease any property it owns to others, grant utility easements, grant oil, gas, and mineral related leases, and rights-of-ways without the approval of the BOR.

Where the leasing of real estate owned by the management board and/or institution to others has as its purpose the construction of facilities thereon and involves any of the third party arrangements as provided for in this policy, the leasing of such real estate shall be included in the financial package for such arrangements, and shall be subject to approval by the BOR.

In accordance with the provisions of La. R. S. 39:1641, management boards and institutions may lease real estate with improvements it may need without BOR approval if funding has been included in the operating budget for the institution.

The renewal of existing leases with the same terms as the original or previously approved lease may be renewed for an addition term with the same provisions without additional review and approval by the BOR.

Expenditures for the improvement and/or maintenance of leased facilities owned by others cannot come from state sources. Provisions for future improvements and maintenance of the facility must be built into the lease and the cost borne by the lessor.

Where required by law, leases under this section shall be reviewed and approved by the Office of Contract Review and lease section of Facility Planning and Control.⁸⁸

The boards of supervisors for each of the public higher education systems are bodies corporate and may supervise and manage the state colleges and universities within their respective jurisdictions, subject to the powers vested in the Board of Regents and otherwise provided in the code.⁸⁹

The boards of supervisors may “[p]urchase land and purchase or construct buildings necessary for the use of the university system, subject to the approval of the Board of Regents . . . ;”⁹⁰ “[p]urchase

⁸⁸[http://www.laregentsarchive.com/Finance/BOR Facilities Policy 2005, Revised eff. Apr. 27, 2016.pdf](http://www.laregentsarchive.com/Finance/BOR%20Facilities%20Policy%202005,Revised%20eff.%20Apr.%2027,%202016.pdf).

⁸⁹La. Rev. Stat. §§17:3218, 17: 3351.

⁹⁰*Id.* § 17:3351.A(6).

equipment;”⁹¹ and “[l]ease land or other property belonging to it or to any college or university within its system”⁹²

The Louisiana Community and Technical College system may enter into lease-purchase agreements with the Louisiana Centers of Excellence Financing Corporation.⁹³

Universities are allowed to enter into lease transactions for real property and improvements without approval from the State Bond Commission under Louisiana Revised Statutes sections 17:3361 to 3366.

Energy Performance Contracting

Any state agency may enter into a performance-based energy efficiency contract for services and equipment, subject to numerous restrictions.⁹⁴

Debt Limitations

The state is constitutionally and statutorily limited in the amount of debt it may incur.⁹⁵

Parishes, municipalities, school districts, fire districts and hospital districts are statutorily limited in the amount of debt which they may incur.⁹⁶

Approval by the State Bond Commission is required before any debt can be incurred or bonds issued by a parish, municipality, school district, or any other political or public corporation or taxing district except for purchases made in the ordinary course of business on terms of credit not to exceed 90 days. A conventional lease or installment purchase of movable property which contains a nonappropriation clause, and which does not contain an anti-substitution or penalty clause, is not considered debt.⁹⁷ Rules have been adopted by the Commission to expedite the review procedure of lease-purchase agreements entered into in conjunction with the issuance of debt obligations⁹⁸

In addition, a parish, municipality, school district, fire district, or hospital district may:

⁹¹*Id.* § 17:3351.A(7).

⁹²*Id.* § 17:3351.A(8).

⁹³*Id.* §§ 17:1800.21 to 1800.35.

⁹⁴*Id.* § 39:1622. “Agency” means any state office, department, board, commission, institution, division, officer or other person, or functional group, heretofore existing or hereafter created, that is authorized to exercise, or that does exercise, any functions of the government of the state in the executive branch, but not any governing body or officer of any local government or subdivision of the state, or any parochial officer who exercises functions coterminous with the municipality in which he performs those functions. *Id.* § 39:2. Board of Regents bylaws require board approval prior to execution of performance-based energy efficiency contracts. BOR 1.2.218 (2016).

⁹⁵La. Const. art. 7, § 6; La. Rev. Stat. § 39:1367. *See also*, La. Admin. Code. tit. 71, Pt III, § 1501, which addresses debt secured by capital leases of immovable property payable by the state or annual appropriations by the state.

⁹⁶La. Rev. Stat. §§ 39:551, 562.

⁹⁷*Id.* § 39:1410.60(A), (B), and (C). The Louisiana Attorney General has clouded this exception by opining that revisions to Article 9 of the Uniform Commercial Code of Louisiana are applicable to lease-purchase agreements, since they would be secured transactions thereunder, and has also taken the position that the granting of a security interest in the property lease-purchased or seizing such property would be contrary to the Louisiana Constitution. 2002 WL 31753449 (La. A.G.). This opinion does not seem well reasoned, since Article 9 is designed as an optional method for a secured party to perfect and obtain priority in the assets financed. It would appear that a lease-purchase agreement could be structured such that only lease termination remedies would be applicable, such as return of assets at the end of the term or upon nonappropriation. The remedies should preclude applicability of Article 9 and look solely to contractual remedies provided in the lease-purchase agreement consisting of return of the assets, damages for failure to do so, acceleration of current year rentals, and any rights under state law, but not any self help remedy to seize the asset, no right to execute on the asset and no grant of a security interest in the asset.

⁹⁸La. Admin. Code tit. 71, Pt III, §§ 901 to 907.

. . . having the prior approval of the governing authority which created it . . . make in any year, contracts or other obligations dedicating in whole or in part the excess of annual revenues of subsequent years above . . . statutory, necessary and usual charges. No such contract or obligation shall have any longer term fixed for payment than 10 years from the date of the contract or obligation. No dedication of future revenues shall be made which, alone or with other prior dedications in force, exceeds the estimated excess of revenues over the statutory, necessary and usual charges of the year in which the contract or obligation is made.⁹⁹

The attorney general has advised that this section authorizes the purchase of equipment over a period of years.¹⁰⁰

In *All American Assurance Company v. State*,¹⁰¹ the court upheld the state's nonappropriation under a lease of office space.

Interest Rate Limitations

For all public securities not requiring an election, "the maximum interest rate shall be the maximum rate set forth in the resolution or other instrument providing for their issuance adopted by the governing authority of the public entity and approved by the State Bond Commission."¹⁰²

Miscellaneous

The Louisiana Lease of Movables Act¹⁰³ would be applicable to lease-purchase transactions of movable property and movable property that subsequently becomes a component of immovable property or which is immobilized by declaration.¹⁰⁴ It is a comprehensive statute that covers recording procedures, various allowable charges under the lease-purchase agreement, default remedies and procedures, insurance, and other various terms. Some of the remedies on default might violate state law concerning debt limitations.

By statute, Louisiana has invalidated forum selection clauses in construction contracts, subcontracts, and purchase orders for public and private works projects which require a suit or arbitration proceeding to be brought in a forum or jurisdiction outside Louisiana.¹⁰⁵ In *Historical Arts and Castings, Inc. v. Favalora Constructors, Inc.*,¹⁰⁶ the Louisiana Court of Appeal held that the statute applies only to contracts in which the state or a political subdivision thereof is a contracting party.

Parishes, municipalities and school districts can also lease-purchase equipment from "nonprofit lessors."¹⁰⁷ Such lease-purchase agreements must be approved by the State Bond Commission.¹⁰⁸ The enacting legislation provided for a maximum of \$50,000,000 of equipment costs for fiscal year 1985-1986; no provision was found that provides the amount of financing for subsequent fiscal years.¹⁰⁹

⁹⁹La. Rev. Stat. § 33:2922.A (2002).

¹⁰⁰43 Op. Att'y Gen. (La. 1980).

¹⁰¹621 So. 2d 1129 (La. Ct. App. 1993).

¹⁰²La. Rev. Stat. § 39:1424(2). "'Securities' means bonds, notes, certificates, or other written obligations for the repayment of borrowed money" *Id.* § 39:1421(1). State boards, agencies, or commissions, and parishes, municipalities, and parish and municipal school boards and districts, and fire protection and hospital service districts are public entities. *Id.* § 39:1421(2).

¹⁰³*Id.* § 9:3301-3342.

¹⁰⁴*Id.* § 9:3304.A.

¹⁰⁵*Id.* § 9:2778.

¹⁰⁶882 S.2d 221.

¹⁰⁷*Id.* § 38:2319-2319.10.

¹⁰⁸*Id.* § 38:2319.10.

¹⁰⁹Acts 1985, No. 758 § 6.

The attorney general has advised “[i]n lease-purchase agreements containing an option to purchase, that option to purchase may not be exercised unless the original lease-purchase agreement followed the legal requirements set forth in the Public Bidding Laws.”¹¹⁰

“Purchase,” for purposes of the public bidding statutes, includes a lease-purchase or a lease with option to purchase.¹¹¹

Lease of public lands by state entities, including universities, and parishes, municipalities, school districts, and other subdivisions of the state, as lessor, must be publicly bid, though the lease-back need not be.¹¹² Public benefit corporations need not publicly bid the leasing of immovable property, however numerous requirements are applicable.¹¹³

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

¹¹⁰77-924 Op. Att’y Gen. (La. 1977). *See also* 87-553 Op. Att’y Gen. (La. 1987) (acquisition of materials and supplies under La. Rev. Stat. § 9:3301 et seq. requires use of public bidding laws).

¹¹¹ 88 Op. Att’y Gen. 62.

¹¹²La. Rev. Stat. §§ 41:1211 to 41:1294; 89 Op. Att’y Gen. 149.

¹¹³La. Rev. Stat. § 41:1215.B.

MAINE 2018 REVISION

Updated through January 3, 2018, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “acquire land by purchase or by condemnation proceedings for the enlargement of the grounds around county buildings”⁵ and “provide and keep in repair” courthouses . . . fireproof buildings . . . for safekeeping of records and . . . any other necessary buildings.⁶ Counties are also authorized to purchase “necessary supplies” for law enforcement functions.⁷ Subject to certain restrictions, counties may “purchase, lease, contract or enter into agreements for the use of facilities to house minimum security prisoners who have been sentenced to the county jail.”⁸

The Municipal Bond Bank conducts the competitive bid process for lease-purchase agreements on behalf of counties and other governmental entities, but does not lend money.⁹

Energy Performance Contracting

County commissioners are authorized to enter into contracts, subject to numerous provisions, “for the design, installation, operation, maintenance and financing of energy conservation improvements at county facilities.”¹⁰

Municipalities

Municipalities¹¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹² eminent domain¹³ and police powers.¹⁴ Municipalities “may raise or appropriate money for any public purpose” including, but not limited to, purposes specified by statute.¹⁵ A municipality may provide by charter the power to purchase property absent any statutory restriction.¹⁶

The Municipal Bond Bank conducts the competitive bid process for lease-purchase agreements on behalf of municipalities and other governmental entities, but does not lend money.¹⁷

In *McGettigan v. Town of Freeport*, the town’s charter required that multi-year contracts be “made or approved by ordinance.” The court determined that “approved by ordinance” language

¹Counties may adopt charters and home rule powers. Me. Rev. Stat. Ann. tit. 30-A, §§ 1301, 1351.

²*Id.* tit. 30-A, §§ 701-708.

³*Id.* tit. 30-A, § 121; tit. 6, § 122 (for airports).

⁴*Id.* tit. 30-A, §§ 451-460.

⁵*Id.* tit. 30-A, § 121.

⁶*Id.*

⁷*Id.* tit. 30-A, § 459.

⁸*Id.* tit. 30-A, § 1658.

⁹<http://mmbb.com/> (go to Programs).

¹⁰*Id.* tit. 30-A, § 903.

¹¹Municipalities for purposes of this discussion are “cities and towns” (except as provided in the Maine Municipal Bond Bank Act, Me. Rev. Stat. Ann. tit. 30-A, §§ 5901-6024). *Id.* tit. 30-A, § 2001(8). Municipalities have home rule powers. Me. Const. art. 8, pt. 2, § 1; Me. Rev. Stat. Ann. tit. 30-A, § 3001.

¹²Me. Rev. Stat. Ann. tit. 36, § 505.

¹³*Id.* tit. 30-A, § 3101.

¹⁴*Id.* tit. 30-A, § 5725.

¹⁵*Id.* tit. 30-A, § 5721. *See also id.* §§ 5722 to 5728.

¹⁶*Libby v. City of Portland*, 74 A. 805 (Me. 1909); *State v. Rand*, 366 A.2d 183 (Me. 1976).

¹⁷<http://mmbb.com/> (go to Programs).

contemplates ratification by ordinance of a contract that has already been drafted, agreed upon by the parties, and executed by the proper municipal officials.¹⁸

Town's charter required that multi-year contracts be "made or approved by ordinance." The Court determined that "approved by ordinance" language contemplates ratification by ordinance of a contract that has already been drafted, agreed upon by the parties, and executed by the proper municipal officials.

Energy Performance Contracting

Municipalities may seek energy-saving improvements in municipal buildings through a program established by the Maine Municipal Bond Bank.¹⁹

School Districts

School districts are to be supported and maintained by municipalities in Maine.²⁰ In some instances the municipality operates and funds the schools and in others a school administrative district, regional school unit, or community school district operates the schools.²¹ Municipalities, school administrative districts, regional school units, and community school districts have the power of eminent domain²² and school administrative districts, regional school units, and community school districts have the power to tax.²³ School districts for purposes of this discussion shall be municipalities, school administrative districts, regional school units, and community school districts.

Superintendents may, subject to certain restrictions, contract for transportation.²⁴ School bus purchases, contracts or leases must be approved by the Commissioner of the Department of Education,²⁵ and initial payments of lease-purchases of new buses must have been appropriated.²⁶

A school district shall "repair, improve and maintain its facilities"²⁷ and may "raise money to erect and equip school buildings"²⁸ and lease facilities and other property.²⁹ In addition, a school district "shall provide its students with schoolbooks and necessary apparatus and appliances."³⁰

School units may enter into "permanent space lease-purchase projects" subject to voter approval and other restrictions.³¹ Section 15672 provides, upon compliance with certain requirements, the subsidy of certain debt service costs for the lease-purchase of buses, major capital projects, school buildings, portables, administrative space, temporary and interim instructional space and other small and permanent instructional space.

¹⁸McGettigan v. Town of Freeport. 2012 ME 28 (Maine 2012).

¹⁹Me. Rev. Stat. Ann. tit. 30-A § 5953-C.

²⁰Me. Const. art. 8, pt. 1, § 1.

²¹Me. Rev. Stat. Ann. tit. 20-A, § 1.

²²*Id.* § 16101.

²³*Id.* § 1310 (school administrative district), *id.* § 1703 (community school district) *id.* § 1505 (regional school unit).

²⁴*Id.* § 5401. Such contracts may not exceed five years and approval is needed from the school district's governing body for contracts existing beyond one year. *Id.* § 5401.13.

²⁵*Id.* § 5401.15.

²⁶*Id.*

²⁷*Id.* § 4001.1.

²⁸*Id.* § 4001.2.

²⁹*Id.* § 4001.3 A lease term must not exceed ten years.

³⁰*Id.* § 4002.1.

³¹*Id.* § 15903; *id.* § 15904.6. Permanent space lease-purchase project means "the lease-purchase of permanent administrative space or permanent small nonadministrative or instructional space whose costs are wholly or partially eligible as debt service costs for subsidy purposes under section 15672 . . . , but does not mean the purchase, lease-purchase or construction of portable temporary classroom space . . . or the lease-purchase of bus garage and maintenance facilities." *Id.* § 15901.

The Municipal Bond Bank conducts the competitive bid process for lease-purchase agreements on behalf of school systems and other governmental entities, but does not lend money.³²

Energy Performance Contracting

Any school administrative unit may enter into an agreement for financing energy conservation or air quality improvement measures at existing school facilities, subject to numerous restrictions.³³ Additionally, school districts may seek energy-saving improvements in school buildings through a program established by the Maine Municipal Bond Bank.³⁴

Fire Districts

Fire districts³⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.³⁶ Fire districts may "borrow funds and do all things necessary to furnish fire protection within [the] district."³⁷ All incidental powers, rights and privileges necessary to accomplish the main objectives set forth in title 30-A, sections 3531 to 3540 relating to fire districts are granted to a district.³⁸

The Municipal Bond Bank conducts the competitive bid process for lease-purchase agreements on behalf of governmental entities³⁹ (which appears to include fire districts), but does not lend money.⁴⁰

Hospital Districts

There exists authority for municipalities to form districts governed by charter to deliver public services, but hospital districts are excluded.⁴¹ There appears to be no statutory framework for hospital districts.

State Entities

The Director of the Bureau of General Services is generally authorized to procure all services, materials, and equipment on behalf of the State and its departments and agencies according to public bidding law⁴² and pursuant to any rules made by the Department of Administrative and Financial Services.⁴³

Lease-purchase agreements are subject to review by the Legislature and those exceeding certain thresholds are subject to approval and reporting requirements:

³²<http://mmbb.com/> (go to Programs); cf. Me. Rev. Stat. Ann. tit. 30-A § 5953-E (Maine School Facilities Finance Program).

³³*Id.* tit. 20-A § 15915. Regional school units, which are made up of multiple school administrative units, are included by definition. *Id.* § 1 (26).

³⁴Me. Rev. Stat. Ann. tit. 30-A § 5953-C.

³⁵"[F]ire district means a district created by vote of a group of municipalities for the purpose of providing fire protection." *Id.* § 3531. Fire districts are quasi-municipal corporations. *Id.* tit. 30-A § 3532.

³⁶*Id.* § 3538.

³⁷*Id.* § 3532.

³⁸*Id.*

³⁹"Governmental unit means any county, municipality, school administrative district, community school district, public waste disposal corporation as authorized under Title 38, section 1304-B or other quasi-municipal corporation within the State, including any corporation owned entirely by a municipality and providing water, sewer or electric service or performing other essential governmental functions." *Id.* § 5903(6).

⁴⁰<http://mmbb.com/> (go to Programs).

⁴¹Me. Rev. Stat. Ann. tit. 30-A, § 2351.4.

⁴²*Id.* tit. 5 § 1812, subject to exceptions set forth in *id.* titles 141 to 155.

⁴³*Id.* tit. 5 § 1812. The Department of Administrative and Financial Services is the primary fiscal department of state government. *Id.* § 281.

Notwithstanding any other provision of law, no agent or officer of the State or any department or agency thereof may enter into a lease-purchase or other similar agreement whereby the State would become the ultimate owner of buildings or equipment, if the outright purchase price of such capital items is more than \$2,000, or \$40,000 for telecommunications related equipment, without specific prior approval of the Legislature through the usual budget procedure. That request for approval shall be submitted as a separate line item. All agreements relating to telecommunications equipment that are \$40,000 or less shall be subject to review by a subcommittee of the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs. All lease-purchase agreements submitted for review or approval shall include the total amount of interest charged. Upon execution of any lease-purchase agreements that exceed the amounts listed above, all departments and agencies shall provide information to the Treasurer of State pertaining to the actual amount of the lease-purchase, including the term and the interest cost of the lease-purchase agreement.⁴⁴

The State shows a preference for state agencies and departments to participate in master lease purchase programs developed, negotiated and managed by the Department of Administrative and Financial Services and approved by the Legislature:

1. Authority of Department of Administrative and Financial Services; central records. The Department of Administrative and Financial Services may develop, negotiate and administer master lease-purchase financing programs, in accordance with the provisions of section 1587, to facilitate advantageous lease-purchase terms and economies of scale. Upon final legislative approval of agency lease-purchase proposals, state agencies, except for programs supported by the Highway Fund or the Federal Expenditure Fund in the Department of Transportation, shall participate in the Department of Administrative and Financial Services master lease-purchase program, unless participation is not feasible. The Department of Administrative and Financial Services, in conjunction with the relevant state agency, may negotiate and execute lease-purchase or financial contracts on behalf of the State. These master lease-purchase financing agreements may include the refinancing or consolidation of any state agency lease-purchase agreements. The Department of Administrative and Financial Services shall maintain central records on each lease-purchase financing agreement and each master lease-purchase program the department administers on behalf of a benefiting department or agency.

2. State agency participation. Except for the Department of Transportation when implementing a program supported by the Highway Fund or the Federal Expenditure Fund, all state agencies that seek to construct, improve or repair long-term capital assets or to acquire real property or equipment by a lease-purchase or other financing agreement shall notify the Commissioner of the Department of Administrative and Financial Services and shall cooperate with the commissioner or a designee in developing the agency's proposal for submission to the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs. Each requesting agency shall submit a justification for each proposal to the commissioner or to the commissioner's designee. The justification must include a benefit-cost analysis or cost-effective analysis in a form and content prescribed by the commissioner or the commissioner's designee. Programs supported by the Highway Fund or the Federal Expenditure Fund in the Department of Transportation may participate on the same terms as other agencies in any master lease-purchase financing agreement developed, negotiated and administered by the Department of Administrative and Financial Services.

3. Fund accounting protocol. Funds for master lease-purchase programs or specific lease-purchase arrangements approved by the Legislature in accordance with subsection 1 and section 1587 must be appropriated or allocated to an account or accounts established by the State Budget Officer with authorization for the transfer of other than General Fund resources from the account or accounts of the benefiting departments or agencies. Funds appropriated or allocated for this purpose may not lapse but must be carried forward from year to year to meet the principal and interest obligations of the master lease-purchase program or specific lease-purchase arrangement. Any appropriated or allocated balances remaining after the conclusion of a specific lease-purchase arrangement must lapse to the fund or account from which the lease-purchase obligations were appropriated or allocated.⁴⁵

⁴⁴Me. Rev. Stat. Ann. tit. 5 § 1587.

⁴⁵*Id.* § 1588. Acquisition of heavy equipment by the State is subject to further requirements of either being in the State's budget or additional approvals of the Commissioner of Administrative and Financial Services. *Id.* § 1825.

Acquisitions of information technology, telecommunications and data processing services, systems and equipment are subject to approval of the Chief Information Officer.⁴⁶

The Department of Administrative and Financial Services through the Bureau of General Services has general authority to “negotiate and manage all real property leases required by the departments and agencies of State government,”⁴⁷ with the exception of land leases⁴⁸ and has general supervision of the State House and grounds.⁴⁹ Construction projects in the capitol area are subject to a master plan developed by the Capitol Planning Commission, and submitted to the Legislature.⁵⁰

Exceeding appropriations is prohibited:

No agent or officer of the State or any department or agency thereof, whose duty it is to expend money under an appropriation by the Legislature, shall contract any obligation on behalf of the State in excess of the appropriation. Whoever exceeds in his expenditure said appropriation shall not have any claim for reimbursement.

Any person who knowingly violates this section shall be guilty of a Class E crime. All prosecutions under this section shall be by indictment and the fines inure to the State.⁵¹

The Department of Transportation may “take over and hold” property for the state,⁵² has the power of condemnation⁵³ and “full power of procurement” for transportation and related services⁵⁴ and for contracts for construction and maintenance of transportation infrastructure.⁵⁵

Higher Education

Under a broad statute in a chapter⁵⁶ that allows for revenue bonds and other borrowings by the University of Maine,⁵⁷ there is some authority for the university to borrow money and acquire property under a long term lease.⁵⁸ It is not clear whether these provisions would be applicable to a nonappropriation lease-purchase agreement. Some of the provisions of the chapter are set out below:

In order to carry out the purposes of this chapter, the university shall have the following powers, which shall be in addition to any other powers that the university may have pursuant to laws of the State:

* * *

4. Project ownership. To acquire, construct, reconstruct, improve, equip, own, operate and maintain any project or projects, or any combination of project;

5. Acquisition of property. To acquire by purchase, contract, lease, long-term lease or gift, and hold or dispose of, real or personal property or rights or interests in any such property;

* * *

⁴⁶*Id.* §§ 1973, 1974.

⁴⁷Me. Rev. Stat. Ann. tit. 5 §§ 1742.19-A and 1742-D.

⁴⁸*Id.* § 1742-D.9.

⁴⁹*Id.* § 1742.15.

⁵⁰*Id.* § 302.

⁵¹*Id.* § 1583.

⁵²*Id.* tit. 23 § 153-B.

⁵³*Id.* § 154.

⁵⁴*Id.* § 4242.

⁵⁵*Id.* § 4243.

⁵⁶*Id.* tit. 20-A, §§ 10950 to 10965: Borrowing Authority of the University of Maine System.

⁵⁷The university is a body corporate and an agency of the State. *Id.* tit. 20-A § 10951.8 (2008). The University of Maine is a system of seven universities *id.* §§ 10901, 10901-A.

⁵⁸*Id.* § 10952.

7. Borrow money. To borrow money pursuant to this chapter and issue evidences of indebtedness to finance the acquisition, construction, reconstruction, improvement or equipping of any one project, or more than one, or any combination of projects, or to refund evidences of indebtedness hereafter issued or to refund general obligation debt of the State, or to refund any such refunding evidences of indebtedness or for any one, or more than one, or all of those purposes, or any combination of those purposes, and to provide for the security and payment of those evidences of indebtedness and for the rights of the holders of them, except that any borrowing pursuant to this chapter, exclusive of borrowing to refund evidences of indebtedness, to refund general obligation debt of the State, or to fund issuance costs or necessary reserves, may not exceed in the aggregate principal amount outstanding at any time \$220,000,000, and except that no borrowing may be effected pursuant to this chapter unless the amount of the borrowing and the project or projects are submitted to the legislative Office of Fiscal and Program Review for review by the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs at least 30 days before closing on such borrowing for the project or projects is to be initiated;

8. Execute contracts. To make, enter into, execute, deliver and amend any and all contracts, agreements, leases, instruments and documents and perform all acts and do all things necessary or convenient to acquire, construct, reconstruct, improve, equip, finance, maintain and operate projects and to carry out the powers granted to this chapter, or reasonably implied from those powers; and

* * *

Any and all powers granted to the university under this chapter may be exercised by majority vote of the trustees and may be delegated to any officer, official or trustee of the university by majority vote of the trustees.⁵⁹

* * *

In furtherance of the provisions of section 10906, subsection 1, paragraph C, subparagraph (1), the university may, when directed by vote of the trustees and duly and properly authorized by the Governor, borrow money and enter into financing transactions⁶⁰ in the name of the university, on behalf of the State, and issue evidences of indebtedness in connection with such financing transactions:

1. **Finance.** To finance the cost of any one project, or more than one, or any combination of projects;

2. **Refund evidences of indebtedness.** To refund evidences of indebtedness issued and to finance the cost of any project or projects as provided in this chapter or to refund general obligation debt of the State; or

3. **Refund refunding borrowings.** To refund any such refunding borrowings.

All evidences of indebtedness issued in connection with financing transactions entered into pursuant to this section shall be authorized by majority vote of the trustees and approved by the Governor upon submission by the trustees of the vote so passed.⁶¹

Section 10906 relates to the powers and duties of the treasurer:

1. Receipt and custody of moneys, expenditures, authority to contract. The treasurer shall:

A. Receive and have custody of all moneys received for the university;

B. Make all expenditures upon vouchers authenticated and approved in a manner designated by the trustees;

C. Have no authority to contract debts and obligations or borrow money except:

(1) Loans in anticipation of assured revenues when approved by vote of the trustees; and

⁵⁹*Id.* § 10952.

⁶⁰“Financing transaction” means the borrowing of money by the university on behalf of the State pursuant to this chapter.” *Id.* § 10951(5).

⁶¹*Id.* § 10954.

(2) Other loans when directed by vote of the trustees and duly and properly authorized by the Governor.

All such loans shall be effected in accordance with the provisions of chapter 412.

2. Report of treasurer. The treasurer shall prepare a complete report for the period ending on June 30th of each year and forward a copy of the report to the Governor, the board of trustees and the members of the Legislature.⁶²

The Trustees of the University of Maine System are permitted to authorize the Department of Administrative and Financial Services to act for them in making purchases.⁶³ System universities must consult with the System Tax-Exempt Debt (“TED”) Compliance Coordinator to determine what the approval and compliance implications of entering into lease-purchase agreements would be. If it is collectively determined (between a university and the University of Maine System Office) that a university can proceed, the TED Compliance Coordinator shall monitor all such tax-exempt financings for the year to assure that the “small issuer” limit (currently, \$10,000,000) is not exceeded.⁶⁴

The University of Maine System may acquire property such as dormitories or enter into leases with or through the Maine Health & Higher Education Facilities Authority, subject to numerous restrictions.⁶⁵

Energy Performance Contracting

Any department or agency of the State, subject to approval of the bureau of Public Improvements, may enter into a “agreement with a private party or third-party financing company for the design, operation, maintenance and financing of energy conservation improvements at state facilities, subject to review of the Legislature.”⁶⁶ Such agreements are not subject to the statute, section 1587 quoted above, covering lease-purchase agreements.⁶⁷

Debt Limitations

The state is constitutionally limited in the debt it may incur.⁶⁸ Statutory limitations are imposed on the amount of debt that counties, municipalities and school districts may incur.⁶⁹

In *Reynolds v. City of Waterville*,⁷⁰ the court voided a contract by a city to lease-purchase a city hall.⁷¹ The court looked to the substance of the agreement and said it was a “purchase” rather than a

⁶²*Id.* § 10906.

⁶³*Id.* tit. 5, § 1812; *id.* § 1742-C. Additional resources concerning leases can be found in the Univ. Maine Syst. Pol’y Man. § 801, Univ. Maine Syst., Admin. Practice Letter IV-C (eff. 8/6/2010) (Signature Authority); Univ. Maine System, Admin. Practice Letter § II-G (Acquisition of Real Property Through Purchase, Gift, Lease, or License).

⁶⁴Univ. Maine Syst., Admin. Practice Letter § III-I (eff. 5/14/2012). <https://staticweb.maine.edu/wp-content/uploads/2013/08/III-I-Tax-Exempt-Debt-Compliance.pdf?565a1d>.

⁶⁵Me. Rev. Stat. Ann. tit. 22 § 2077. Projects covered include “any structure designed for use as a dormitory or other housing facility, dining facility, student union, academic building, administrative facility, library, classroom building, research facility, faculty facility, office facility, athletic facility, health care facility, laboratory, maintenance, storage or utility facility or other building or structure essential, necessary or useful for instruction in a program of education provided by an institution for higher education, including a parking facility, or any multipurpose structure designed to combine 2 or more of the functions performed by the types of structures enumerated in this paragraph. *Id.* § 2053.

⁶⁶*Id.* tit. 5 §§ 1767, 1770.

⁶⁷*Id.*

⁶⁸Me. Const. art. 9, § 14.

⁶⁹Me. Rev. Stat. Ann. tit. 30-A, §§ 932, 934 (counties); *id.* § 5702 (municipalities); *id.* tit. 20-A, § 1311 (school administrative districts); *id.* § 1702 (community school districts); *id.* § 1490 (regional school units).

⁷⁰42 A. 553 (Me. 1898).

⁷¹42 A. at 555. See also Opinion of the Justices, 79 A.2d 753 (Me. 1951) (state lacked authority to enter into long-term lease

“lease.”⁷² However, the court said that “ordinary current expenses” are not within the constitutional and statutory debt limitations as long as the “payment of liability” arose only after the service was rendered and was met by “annual appropriations and the levy of taxes.”⁷³

This was followed and narrowed in *Moores v. Inhabitants of Springfield*.⁷⁴ The case involved claims against the town on some notes or “town orders” which the town sought to invalidate because they were issued in excess of the constitutional debt limit.⁷⁵ The court said that current expenses to be paid out of current revenues, incurred by towns already beyond the constitutional debt limits, are not within the constitutional and statutory debt limits, but “an obligation for a current expense to be paid out of current revenues will be a debt or liability within the terms of the constitutional prohibition if there are no current revenues available for its payment *at the time such current expense is incurred*.”⁷⁶

In *KHK Associates v. Department of Human Services*,⁷⁷ the court upheld a grant of summary judgment in favor of the department on the lessor’s complaint against the department for violation of the lease agreement and a breach of an implied duty of good faith and fair dealing.

In 1989, the lessor constructed the building according to the department’s specifications and entered into a ten year lease agreement subject to “available budgetary appropriations.”⁷⁸ The contract stated “[i]n the event that the amount of funds appropriated is such that the department must restrict or terminate its . . . program, this Lease shall be terminated”⁷⁹ The agreement included the department’s warranty that it would request funding for the lease each biennium from the governor. In 1990, the legislature asked the department to cut its general fund budget by 15 percent in order to reduce state spending. The department had already requested the governor for funding, but went on to ask the legislature to cut funding of the lease rather than cut the department’s general fund, which the legislature did. The department terminated its lease and moved its employees to another building. The court held that the lease clearly stated that funding of the lease was “subject to available budgetary appropriations”, and that state law requires such contracts to be subject to legislative funding. It rejected the lessor’s argument that language in the lease prohibited the department from terminating the lease unless the entire program were restricted or terminated. The reduction in funding was held to be a “program restriction” within the terms of the lease. The court held that no promises to seek funding were breached because the contract only warranted that the department would request funding from the governor and it had done so. The court held that the department breached no implied duty of good faith and fair dealing when it identified the lease as a budget cut; the department had a duty to inform the legislature of ways to reduce state spending. The lessor also contended that the department was constitutionally and statutorily prohibited from reneging on the contract. The court found no merit in this argument because the lease contained a nonappropriation clause.

Interest Rate Limitations

No provisions regarding interest rate limitations were found.

with state building authority).

⁷²*Id.* at 558.

⁷³*Id.* at 555.

⁷⁴64 A.2d 569 (Me. 1949).

⁷⁵64 A.2d at 576.

⁷⁶*Id.* at 577 (emphasis in original).

⁷⁷632 A.2d 138 (Me. 1993).

⁷⁸*Id.* at 140.

⁷⁹*Id.*

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

MARYLAND 2018 REVISION

Current through legislation effective May 15, 2018, from the 2018 Regular Session of the General Assembly, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.² Generally counties may “acquire, by lease, purchase, . . . condemnation, or any other method, an interest in any property that is needed for a public purpose.”³ In addition, a county may “construct buildings on the property for the benefit of the county.”⁴ Counties may sell surplus property at public sale⁵ Specific legislation applicable to certain individual commission counties for leasing is set forth Local Government Code title 12.⁶ Counties may “dispose of any real or leasehold property,” and may be a “lessor” of county property.⁷ Contracts not authorized by appropriation are prohibited.⁸

Energy Performance Contracting

The Jane E. Lawton Conservation Loan Program provides low interest loans to counties for energy efficiency projects.⁹

Municipalities

Municipalities¹⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.¹¹ Municipalities may acquire real or leasehold property “by conveyance, purchase, or condemnation.”¹² Municipalities may “sell, at public or private sale after

¹“Charter county” means a county that has adopted charter home rule under Article XI-A of the Maryland Constitution, but does not include Baltimore City. Md. Code Ann., Local Gov’t § 1-101(b). “County” includes Baltimore City. *Id.* § 1-101(e). Counties may be “commissioner”, “charter home rule” or “code counties.” *Id.*; Md. Const. art. VII, § 1; Md. Const. art. XI-A, §§ 1, 1A; *id.* art. XI-F, § 2; Md. Code Ann., Local Gov’t § 1-101. Code counties have home rule powers. Md. Const. art. XI-F, § 1; Md. Code Ann., Local Gov’t § 9-303. Most powers granted to charter counties are granted to code counties. The general assembly must specifically authorize powers for commissioner counties. *See, id.* title 12, subtitle 4.

²*See generally id.* Local Gov’t tits. 16, 20 (tax); *id.*, Real Property, tit. 12 (eminent domain); *id.*, Local Gov’t tit. 13 (regulatory).

³*Id.* § 12-401 (charter and code counties; not applicable to Baltimore City). The court did find the power of a county to enter into an option agreement for the purchase of property under a prior repealed statute *id.* art. 25, § 11(A). *Mattingly v. Charlotte Hall School*, 377 A.2d 496 (Md. App. 1977).

⁴*Id.*

⁵*Id.*

⁶*See generally*, Md. Code Ann., Local Gov’t §§ 12-402 to 12-412.

⁷*Id.* § 10-312. The attorney general has opined that under a predecessor statute to *id.* § 10-312, article 25A, § 5, a charter county has authority to sell property to an investor and, as a part of the same transaction, leaseback the property with improvements under a long-term lease agreement. 67 Op. Att’y Gen. 264 (Md. 1982). The statute provides that the property no longer be needed for public use. The attorney general stated, “where a *particular interest* in property, such as a fee simple interest, is itself no longer needed to maintain a public use, *that interest* may be disposed of by the county under article 25A, § 5(B).” *Id.* (emphasis in original). It appears that the lease-back is a true lease and not a lease-purchase.

⁸Md. Code Ann., Local Gov’t, § 1-403.

⁹Md. Code Ann. State Gov’t, §§ 9-20A-01 to -10.

¹⁰“Municipality” means a municipality that is organized under Md. Const. art. XI-E. Md. Code Ann., Local Gov’t, § 1-101 (not the City of Baltimore which is treated legislatively as a county). Municipalities may be home rule. Md. Const. art. XI-E, § 3; Md. Code Ann., Local Gov’t, § 9-306.

¹¹*See generally id.* § 5-205 (tax), tit. 12 (real property), § 5-209 (regulatory).

¹²*Id.* § 5-204 (c).

twenty days' public notice . . . any real or leasehold property belonging to the municipality . . . no longer needed for any public use.”¹³

Energy Performance Contracting

The Jane E. Lawton Conservation Loan Program provides low interest loans to municipalities for energy efficiency projects.¹⁴

School Districts

School districts, which are locally called county boards of education or local educational agencies (LEAs),¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their eminent domain powers.¹⁶ In Maryland, the counties approve budgets proposed by the county boards of education and levy and collect taxes for the county boards of education.¹⁷ School districts may “[b]uy or otherwise acquire land, school sites, or buildings; and . . . [r]ent, repair, improve, and build school buildings” subject to the approval of the state superintendent.¹⁸ “A private entity or a county revenue authority may hold title to property used for a particular public school or local school system if the private entity or county revenue authority is contractually obligated to transfer title to the appropriate county board on a specified date.”¹⁹ Public school construction and capital improvements are subject to the regulation of and administration by the Interagency Commission on School Construction.²⁰

With the approval of the county governing body, county boards of education may enter into “sale-leaseback and lease-leaseback arrangements” for public school construction as set forth below.²¹

(a)(1) In this section, the following words have the meanings indicate.

(2) "Alternative financing methods" includes one or more of the following methods:

(i) Sale-leaseback arrangements, in which a county board agrees to transfer title to a property, including improvements, to a private entity that simultaneously agrees to lease the property back to the county board and, on a specified date, transfer title back to the county board;

(ii) Lease-leaseback arrangements, in which a county board leases a property to a private entity that improves the property and leases the property, with the improvements, back to the county board;

(iii) Public-private partnership agreements, in which a county board contracts with a county revenue authority or a private entity for the acquisition, design, construction, improvement, renovation, expansion, equipping, or financing of a public school, and may include provisions for cooperative use of the school or an adjacent property and generation of revenue to offset the cost of construction or use of the school;

(iv) Performance-based contracting, in which a county board enters into an energy performance contract to obtain funding for a project with guaranteed energy savings over a specified time period;

¹³*Id.*

¹⁴Md. Code Ann., State Gov't §§ 9-20A-01 to -10.

¹⁵Md. Code Ann., Educ. § 4-101. <http://www.marylandpublicschools.org/MSDE/schoolsystems>.

¹⁶Md. Code Ann., Educ. § 4-119.

¹⁷*Id.* §§ 5-102, 5-104.

¹⁸*Id.* § 4-115; *cf. id.* § 2-30321st Century School Facilities Act, 2018 Maryland Laws Ch. 14 (H.B. 1783).

¹⁹Md. Code Ann., Educ. § 4-114(c)(1) as amended by 21st Century School Facilities Act, 2018 Maryland Laws Ch. 14 (H.B. 1783).

²⁰Md. Code Ann., Educ. §§ 5-301, 5-302.

²¹*Id.* § 4-126, as amended by 21st Century School Facilities Act, 2018 Maryland Laws Ch. 14 (H.B. 1783). The Attorney General has taken the position that this statute does not apply to administration buildings; however, the power to lease is within the local school board's power to acquire land under section 4-115(b)(1) and the board has authority to enter into alternative financing methods under section 4-114(c). Op. Att'y Gen. dated 08/29/2006 (available at <http://www.oag.state.md.us/opinions>).

(v) Preference-based arrangements, by which a local governing body gives preference first to business entities located in the county and then to business entities located in other counties in the State for any construction that is not subject to prevailing wage rates under Title 17, Subtitle 2 of the State Finance and Procurement Article; and

(vi) Design-build arrangements, that permit a county board to contract with a design-build business entity for the combined design and construction of qualified education facilities, including financing mechanisms where the business entity assists the local governing body in obtaining project financing.

(vii) Design-construct-operate-maintain-finance arrangements that permit a county board to contract with a county revenue authority or a private entity for the design, construction, operation, and maintenance of a public school under terms agreed to by the parties.

(b)(1) Use in general. -- Except when prohibited by local law, in order to finance or to speed delivery of, transfer risks of, or otherwise enhance the delivery of public school construction, a county board, with the approval of the county governing body in accordance with subsection (d) of this section, may:

(i) Use alternative financing methods;

(ii) Engage in competitive negotiation, rather than competitive bidding, in limited circumstances, including construction management at-risk arrangements and other alternative project delivery arrangements, as provided in regulations adopted by the Interagency Commission on School Construction;

(iii) Accept unsolicited proposals for the development of public schools in limited circumstances, as provided in regulations adopted by the Interagency Commission on School Construction; and

(iv) Solicit proposals for the development of public schools;

(v) Lease property from a county revenue authority or a private entity for use as a public school facility; and

(vi) Use quality-based selection, in which selection is based on a combination of qualifications and cost factors, to select developers and builders, as provided in regulations adopted by the Interagency Commission on School Construction .

(2) The alternative financing methods described under paragraph (1)(i) of this subsection may include reserves sufficient to cover operation, facility renewal, maintenance, and energy costs as part of a contract. (c) Not prohibiting other allocations. -- Use of alternative financing methods under this section may not be construed to prohibit the allocation of State funds for public school construction to a project under the Public School Construction Program.

(d) Approval of county governing body. -- A county board may not use alternative financing methods under this section without the approval of the county governing body.

(e)(1)(i) Except as provided in paragraphs (2) and (3) of this subsection, § 2-303(f) and Title 5, Subtitle 3 of this article and the regulations that govern the Public School Construction Program do not apply to projects that use alternative financing methods under this section.

(ii) Nothing in this section may be construed to authorize or require State approval before an alternative financing method may be used by a local school system.

(2) If a project that receives State funding uses alternative financing methods under this section, the project shall be submitted to the Interagency Commission on School Construction for review.

(3) Projects that use alternative financing methods under this section and receive State funding shall comply with the following requirements:

(i) The State and local cost-share established for each county in regulations;

(ii) The maximum State construction allocation for each project approved for State funding;

- (iii) The approval of project funding by the Interagency Commission;
- (iv) Smart growth requirements;
- (v) Minority business enterprise requirements;
- (vi) Prevailing wage requirements;
- (vii) Environmental requirements; and
- (viii) A requirement for a procurement process that includes public notice and results in the most advantageous proposal.²²

The regulations contemplated in the above statute are as follows:

A. A county or an LEA may fund all or a portion of one or more public school construction projects using one or more of the following alternative financing methods:

- (1) A lease-leaseback, in which a private entity undertakes a public school construction project on property leased from, and subleased back to, an LEA if the property leased from the LEA reverts to the LEA upon a date certain;
- (2) A sale-leaseback, in which a private entity undertakes a public school construction project on property purchased from, and leased back to, an LEA, if:
 - (a) The property purchased from the LEA reverts to the LEA upon a date certain;
 - (b) The LEA and the county have determined that the property is eligible for conveyance under Education Article, §§4-114(c) (3) and 4-115, Annotated Code of Maryland; and
 - (c) The IAC and the Board of Public Works approve the conveyance;
- (3) Performance-based contracting, in which the LEA and a private entity enter into a contract such as an energy-performance contract funded by guaranteed savings over a specific time period;
- (4) Public-private partnerships, in which the LEA and a private entity enter into a shared use arrangement of one or more portions of one or more public school facilities in return for public school property enhancement, revenue, or both;
- (5) Donation or gift, in which a private entity contributes toward the cost of a project, either through donation of funds to the LEA or through in-kind contribution of materials, equipment, building services, or all three; and
- (6) With the concurrence of both the county and the IAC or its designee, such other financing methods as the LEA may deem appropriate for public school construction projects.²³

School districts are also directed to “adopt procedures for the selection and purchase of . . . necessary items, at the lowest price consistent with good quality” and to comply with public bidding laws.²⁴

²²*Id.*

²³Code of Maryland Regulations (“COMAR”) 23.03.05.05 (last accessed May, 2018). “Lease-leaseback” means an arrangement in which a private entity undertakes a public school construction project on property leased from, and subleased back to, an LEA on condition that the property leased from the LEA reverts to the LEA upon a date certain. *Id.* 23.03.01.01

²⁴Md. Code Ann., Educ. § 5-112, § 7-106. Necessary items are textbooks, supplementary readers, materials of instruction, visual and auditory aids, stationery and school supplies. *Id.*

Energy Performance Contracting

County boards of education may enter into energy performance contracts.²⁵ The Jane E. Lawton Conservation Loan Program provides low interest loans to county boards of education for energy efficiency projects.²⁶

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital districts

There appears to be no statutory framework for hospital districts.

²⁵*Id.* § 4-126.

²⁶Md. Code Ann., State Gov't §§ 9-20A-01 to -10.

State Entities

Authority for procurement by the executive branch of the state rests primarily with the Board of Public Works,²⁷ but much of it has been delegated to “primary procurement units” within the executive branch.²⁸ The board retains the authority to review and approve procurement contracts that are not delegated to units.²⁹ Procurement contracts must comply with the general procurement law, or be void or voidable.³⁰ Units have a range of procurement³¹ authority, but all units, unless otherwise specifically authorized,³² are generally required to purchase all supplies³³ through or with the approval of the Secretary of the Department of General Services³⁴ and according to standards set by the Secretary and under the general provisions of the procurement law.³⁵ The University System of Maryland, Morgan State University, and St Mary’s College of Maryland, are exempt from the review and approval requirement except for contracts of capital improvements with a value exceeding one million dollars.³⁶

Primary procurement units and their respective areas of authority over procurement are as follows:³⁷

- State Treasurer (banking and financial services, insurance, and insurance services)
- Department of Budget and Management (services, leases of motor vehicles)
- Department of General Services (leases of real property, supplies excluding insurance, information processing equipment, motor vehicle leases (with approval of the office of management and budget), construction and construction related services, and architectural or engineering services)
- Department of Transportation (without approval of any other primary unit: construction services and architectural or engineering services that are related to transportation, rolling stock and other property peculiar to operation of a transit system, supplies and services for aeronautics related activities)

²⁷Md. Code Ann., State Fin. & Proc. § 12-101(Eff. Oct. 1, 2008 to Sept. 30, 2019); § 11-101(d) (definition). Authority does not extend to capital expenditures by the Department of Transportation or the Maryland Transportation Authority.

²⁸*Id.* § 12-107 (effective Oct. 1, 2008 to Sept. 30, 2019), § 12-107 (effective Oct. 1, 2019); § 11-101(x) “Unit” means an officer or other entity that is in the Executive Branch of state government and is authorized by law to enter into a procurement contract. Primary procurement units include (1) the State Treasurer; (2) the Department of Budget and Management; (3) the Department of General Services; (4) the Department of Transportation; (5) the Maryland Transportation Authority; (6) the Maryland Port Commission; (7) the Department of Public Safety and Correctional Services; (8) the Department of Information Technology (9) the University System of Maryland; (10) the Morgan State University; and (11) the St. Mary’s College of Maryland. COMAR 21.02.01.04.

²⁹COMAR 21.02.01.05. Complete through Maryland Register Vol. 45, Issue 9, dated April 27, 2018, Westlaw.

³⁰Md. Code Ann., State Fin. & Proc. § 11-204.

³¹*Id.* § 11-101(m)(1). “Procurement” means the process of leasing real or personal property as lessee; or buying or otherwise obtaining supplies, services, construction, construction related services, architectural services, engineering services, or services provided under an energy performance contract. “Procurement” includes the solicitation and award of procurement contracts and all phases of procurement contract administration. *Id.*

³²*See, infra*, note 37 and accompanying text.

³³“Supplies” means tangible property, including equipment and materials. Md. Code Ann. State Fin. & Proc., § 4-301(c). “Supplies” includes leases of equipment. COMAR 21.02.01.01. “Commodity” means an item of purchase which may include office goods and materials, food, printing, copying, energy, building materials, and other items needed to support normal operations. “Commodity” differs from “supply” in that commodity does not include leases of real property. *Id.*

³⁴Md. Code Ann. State Fin. & Proc. § 4-310.

³⁵*Id.* § 4-312; § 11-202.

³⁶*Id.* § 11-203. Some exceptions apply. Other excluded departments and agencies and exceptions are listed in section 11-203.

³⁷*Id.* § 12-107 (effective July 1, 2008 to Sept. 30, 2019). Additional detailed grants of procurement authority can be found in COMAR 21.02.01.01, 21.02.01.04. Complete through Maryland Register Vol. 45, Issue 9, dated April 27, 2018, Westlaw.

- Maryland Port Commission (without approval of any other primary unit: supplies and services for port related activities, and leases for real property unless the lease payments are from the general fund)
- Department of Public Safety and Correctional Services (without approval of any other primary unit: construction, construction related services and supplies, materials, and equipment for state correctional facilities)
- Department of Information Technology (information processing equipment and associated services and telecommunication equipment)

The Secretary of the Department of General Services is authorized in state regulations to provide for the procurement of equipment and is responsible for leasing equipment and real property,³⁸ except for contracts for single items of equipment or single equipment leases in an amount over \$200,000.³⁹ Exceptions to the department's authority under these regulations include technology equipment, motor vehicles, certain leases and acquisitions under the purview of the Department of Transportation, and purchase of rolling stock by the Mass Transit Administration.⁴⁰ The Department of General Services may delegate purchase authority to agencies by commodity or dollar amount and agencies may request a delegation of procurement authority for the acquisition of a specific commodity.⁴¹

Regarding leases with an option to purchase, regulations provide:

A. A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding, competitive sealed proposals, or competitive small procurement procedures, or the leased supply or facility is the only supply or facility that can meet the State's requirements, as determined in writing by the agency head.

B. Before exercising the option, the procurement officer shall:

(1) Investigate alternative means of procuring comparable supplies;

(2) Compare estimated costs and benefits associated with the alternative means and the exercise of the option;

and

(3) Obtain review and approval of the appropriate Department.⁴²

Regarding multi-year contracts the statutory code provides:

(a) *"Multi-year contract" defined.* -- In this section, "multi-year contract" means a procurement contract that requires appropriations for more than 1 fiscal year.

(b) *Allowed.* --

(1) A unit may enter into a multi-year contract subject to:

(i) standards established by the Board; and

(ii) regulations adopted by the primary procurement unit that is responsible for the type of procurement involved.

³⁸COMAR 21.02.05.01.

³⁹COMAR 21.02.01.04

⁴⁰*Id.* Other restrictions apply.

⁴¹COMAR 21.02.05.04.

⁴²COMAR 21.06.03.08. Complete through Maryland Register Vol. 45, Issue 9, dated April 27, 2018, Westlaw.

(2) A multi-year contract shall be subject to review and approval by that primary procurement unit.

(c) *Conditions for approval.* -- A multi-year contract may not be approved unless each unit reviewing the multi-year contract determines that:

(1) the estimated requirements of the State:

- (i) cover the period of the multi-year contract;
- (ii) are reasonably firm; and
- (iii) are continuing; and

(2) the multi-year contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economy in State procurement.

(d) *Automatic termination.* --

(1) If money sufficient for the continued performance of a multi-year contract is not appropriated for any fiscal year, the multi-year contract terminates automatically on the earlier of:

- (i) the last day of the fiscal year for which money last was appropriated; or
- (ii) the date provided in the termination clause of the procurement contract.

(2) If the multi-year contract is terminated under this subsection, the unit shall reimburse the contractor for the reasonable value of any nonrecurring costs that were:

- (i) incurred as a result of the multi-year contract; but
- (ii) not amortized in the price of the supplies or services delivered under the multi-year contract.

(3) The cost of termination under this subsection may be paid from any appropriation available for that purpose.

(e) *Required contract clauses.* --

Except as provided in subsection (f) of this section, each multi-year contract, including a lease of real property, shall include an automatic termination clause that:

(1) is not inconsistent with the requirements of subsection (d) of this section; and

(2) discharges both parties to the multi-year contract from future performance of that contract, but not from their existing obligations.

(f) *Waiver.* --

(1) On the recommendation of the Secretary of General Services, the Board may waive the requirement to include an automatic termination clause under subsection (e) of this section for a multi-year contract to procure energy generated from a Tier 1 renewable source or a Tier 2 renewable source, as defined in § 7-701 of the Public Utilities Article.

(2) In determining whether or not to grant a waiver under paragraph (1) of this subsection, the Board shall consider the effect of imposing the termination clause requirement under subsection (e) of this section on the

ability of the energy supplier to obtain financing for the renewable energy generation project that produces the energy that the State is contracting to procure.⁴³

The regulations provide the following with regard to multi-year contracts:

A. Application. A multi-year contract is appropriate when it is in the best interest of the State to obtain uninterrupted services extending over more than one fiscal period, when the performance of the services involves high start-up costs, or when a changeover of services contractors involves high phase-in/phase-out costs during a transition period. The multi-year method of contracting is also appropriate when special production of definite quantities of supplies for more than one fiscal period is necessary to best meet the State needs but funds are available only for the initial fiscal period.

B. Objective. The objective of the multi-year contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurements which involve special production or high phase-in/phase-out costs during changeover of service contractors.

C. Conditions for Use of Multi-year Contracts. A multi-year contract may be used when it is determined by the procurement officer that:

(1) Special production of definite quantities or the furnishing of long-term services are required to meet State needs;

(2) Estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(3) A multi-year contract shall serve the best interests of the State by encouraging effective competition or otherwise promoting economies in State procurement. The following factors are among those relevant to this determination:

(a) Firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion shall be encouraged to participate in the competition when they are assured of recouping these costs during the period of contract performance;

(b) Lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(c) Stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

(d) The cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

D. Multi-year Contract Procedure.

(1) Solicitation. The solicitation shall state:

(a) The amount of supplies or services required for the proposed contract period;

(b) That a unit price shall be given for each supply or service, and that these unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

(c) That the multi-year contract shall be cancelled automatically if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's rights or the contractor's rights under any termination clause in the contract;

⁴³Md. Code Ann., State Fin. & Proc. § 13-217.

(d) That the procurement officer shall notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

(e) Whether bidders or offerors may submit prices for:

(i) The first fiscal period only,

(ii) The entire time of performance only, or

(iii) Both the first fiscal period and the entire time of performance;

(f) That a multi-year contract may be awarded and how prices shall be determined, if prices for the first fiscal period and entire time of performance are submitted;

(g) That the effect of termination is to discharge both parties from future performance of the contract, but not from their existing obligations. The contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract.

(2) Award. Award shall be made as stated in the solicitation and permitted under the procurement method utilized.⁴⁴

Regarding required clauses in procurement contracts, the statutory code provides:

(a) Each procurement contract shall include clauses covering:

(1) termination for default;

(2) termination wholly or partly by the State for its convenience if the head or the primary procurement unit determines that termination is appropriate;

(3) variations that occur between estimated and actual quantities of work in a procurement contract;

(4) liquidated damages, as appropriate;

(5) specified excuses for nonperformance;

(6) except for real property leases, the unilateral right of the State to order in writing:

(i) changes in the work, if the changes are within the scope of the procurement contract;

and

(ii) a temporary stop or delay in performance;

(7) the obligation of the contractor to comply with the political contribution reporting requirements under Title 14 of the Election Law Article, to which the contractor may be subject as required under § 17-402 of this article; and

(8) nonvisual access for information technology as required under § 3A-312 of this article.

(b) In addition to the clauses required under subsection (a) of this section, a procurement contract for construction shall include:

(1) a clause providing for contract modification if the condition of a site differs from the condition described in the specifications; and

⁴⁴COMAR 21.06.03.09 Complete through Maryland Register Vol. 45, Issue 9, dated April 27, 2018, Westlaw.

(2) a clause covering the requirements for notice of contract claims, submission of contract claims, and resolution of contract claims under § 15–219 of this article.

(c) Each procurement contract shall include a clause that gives to the parties notice that preexisting regulations apply to the procurement contract in accordance with § 11–206 of this article.

(d) At any time after the parties enter into a procurement contract they may include additional clauses in the procurement contract, by consent, without consideration.

(e) A clause required under this section for contract modification or change orders to a procurement contract for construction shall:

(1) make each contract modification or change order that affects the price of the procurement contract subject to:

(i) prior written approval from the unit and any other person responsible for the procurement contract; and

(ii) prior certification by the fiscal authority responsible for the unit about:

1. the availability of money; and

2. the effect of the contract modification or change order on the project budget or the total construction cost; and

(2) prohibit the contract modification or change order if the certification by the fiscal authority discloses that the contract modification or change order will increase the cost beyond budgeted and available money, unless:

(i) sufficient additional money is made available; or

(ii) the scope of the project is adjusted to allow completion within the project budget.⁴⁵

Regulations require in multi-year contracts the following:

Mandatory provision for all contracts and contract modifications to be effective in more than one fiscal year:

"If the General Assembly fails to appropriate funds or if funds are not otherwise made available for continued performance for any fiscal period of this Contract succeeding the first fiscal period, this Contract shall be cancelled automatically as of the beginning of the fiscal year for which funds were not appropriated or otherwise made available; provided, however, that this will not affect either the State's rights or the Contractor's rights under any termination clause in this Contract. The effect of termination of the Contract hereunder will be to discharge both the Contractor and the State from future performance of the Contract, but not from their rights and obligations existing at the time of termination. The Contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the Contract. The State shall notify the Contractor as soon as it has knowledge that funds may not be available for the continuation of this Contract for each succeeding fiscal period beyond the first."⁴⁶

Regulations require the following mandatory terms and conditions for purchase orders over \$25,000:

"If funds are not appropriated or otherwise made available to support continuation in any fiscal year succeeding the first fiscal year, this contract shall terminate automatically as of the beginning of the fiscal year for which funds are not available. The Contractor may not recover anticipatory profits or costs incurred after termination."⁴⁷

⁴⁵Md. Code Ann., State Fin. & Proc. § 13–218.

⁴⁶COMAR 21.07.01.10. Complete through Maryland Register Vol. 45, Issue 9, dated April 27, 2018, Westlaw.

⁴⁷COMAR 21.07.03.17.

There are numerous other mandatory contract provisions.⁴⁸ Regulations provide alternate clauses for “termination for convenience.”⁴⁹

Multi-year, as well as other contracts, are subject to review and approval:

Multiyear procurement contracts for services and supplies where the contract term, including the exercise of any option, extends beyond 1 fiscal year are subject to the review and approval procedures required under this chapter and, in addition, the departments shall determine and certify to the Board on the appropriate Action Agenda or PAAR [Procurement Agency Activity Report]:

A. That estimated requirements cover the period of the contract and are reasonably firm and continuing; and

B. That the contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in State procurement.⁵⁰

Every contract and any changes or additions to it are subject to prior written approval by the agency head or his designee in the using agency and certification by the appropriate fiscal authority as to the adequacy of appropriations and the availability of funds. Certification of the fund source of those contracts which are required to be reviewed and approved by the Board shall appear as an integral part of the corresponding Action Agenda or PAAR items of the submitting State agency.⁵¹

Land Acquisition and Leases

The Division of Land Acquisition in the Department of General Services is generally required to negotiate acquisitions of land subject to approval by the board of public works.⁵² Leases of building space exceeding 2,500 sq. ft. must be approved by the board of public works.⁵³

Capital Leases

Capital leases must comply with provisions in both Divisions I and II of the State Finance and Procurement Code. For example, the state treasurer may enter into capital leases pursuant to Division I section 8-403 et seq. (concerning debt) on behalf of units of state government where the approval process has been satisfied under Division II section 12-204(d). Section 12-204 applies to both fair market value leases and capital leases. It appears to say that if a lease fails to meet the requirements for a fair market value lease, such requirements are set forth in subsection 12-204(d)(1), below, the lease is viewed as a capital lease that has additional requirements for approval of the lease, as set forth in subsection 12-204(d) (2), set forth below.

Statutes from Division I relating to capital leases include:

§ 8-403

(a) *Authority to enter into capital lease.* --The State Treasurer, with the approval of the Board of Public Works, may enter into a capital lease on behalf of one or more units of State government.

⁴⁸COMAR 21.07.01.00 et seq. and 21.07.03.00 et seq. (contracts over \$25,000).

⁴⁹COMAR 21.07.01.12.

⁵⁰COMAR 21.02.01.06. See, *supra*, note 33 for the definition of “supplies,” which picks up tangible personal property, including equipment.

⁵¹COMAR 21.02.01.08.

⁵²Md. Code Ann., State Fin. & Proc. §§ 4-412, 4-415.

⁵³*Id.* §§ 4-318, 4-321.

(b) *Financing request.* -- Prior to submission of a capital lease to the Board of Public Works, the Treasurer shall submit to the Legislative Policy Committee the total financing request and any supporting information. The Legislative Policy Committee has 45 days within which to review and provide written comments on the financing.⁵⁴

§ 8-404

A capital lease authorized under this subtitle:

(1) shall be contingent on the availability of appropriated or other legally available funds, not including nonappropriated pension or retirement funds, that permit the timely payment of principal, interest, and other obligations, if any, imposed by the terms of the capital lease;

(2) may not be construed or deemed to be a debt of the State or a unit of State government; and

(3) may not constitute a pledge of the full faith and credit and taxing power of the State or a unit of State government.⁵⁵

§ 8-405

(a) *Capitalization of payments.* -- Except for capital leases used to finance energy performance contracts excluded from tax supported debt under § 8-104 of this title, the Treasurer shall, at a reasonable market rate, capitalize the payments on a capital lease authorized under this subtitle on an annual basis for each fiscal year the lease is in effect.

(b) *Annual estimate of Capital Debt Affordability Committee.* -- The greater of the amount determined for a given fiscal year under subsection (a) of this section or the amount of any purchase value at the termination of a capital lease authorized under this subtitle shall be included in the tax supported debt considered by the Capital Debt Affordability Committee in its annual estimate for that fiscal year under Subtitle 1 of this title.⁵⁶

§ 8-406

(a) *Escrow.* --

(1) The State Treasurer may deposit the proceeds of a capital lease authorized under this subtitle in an escrow account or similar arrangement.

(2) The proceeds may be withdrawn for the purpose of making payment due under the terms of the capital lease.

(3) A withdrawal made under the provisions of this section shall be made in accordance with the terms of the individual contract.

(b) *[Investment]* -- The State Treasurer may invest any unexpended proceeds held in escrow and the investment income on the proceeds in obligations authorized for the investment of State funds under § 6-222 of this article.⁵⁷

Statutes applicable to capital leases and expenditures from Division II include:

§ 12-202

(a) *Scope of section.* -- This section does not apply to capital expenditures by the Department of Transportation or the Maryland Transportation Authority, in connection with State roads, bridges, or highways.

⁵⁴*Id.* § 8-403.

⁵⁵*Id.* § 8-404.

⁵⁶*Id.* § 8-405.

⁵⁷*Id.* § 8-406.

(b) *Review and approval generally.* -- Before execution, a contract for a capital expenditure other than in connection with a State correctional facility, St. Mary's College of Maryland, Morgan State University, or the University System of Maryland shall be:

(1) reviewed by the Secretary of General Services; and

(2) except as provided in § 12-203 of this subtitle and § 13-108 of this article, after that review, approved by the Board [of Public Works].

(c) *[Review and approval for state correctional facilities]* -- Before execution, a contract for a capital expenditure in connection with a State correctional facility shall be:

(1) reviewed by the Secretary of Public Safety and Correctional Services; and

(2) except as provided in § 12-203 of this subtitle, after that review, approved by the Board.

(d) *Approval for University System of Maryland.* -- Before execution, a contract for a capital expenditure in connection with the University System of Maryland shall be:

(1) subject to the provisions of Title 4, Subtitle 4 of this article [public improvements and land acquisitions];

(2) approved by the Board of Regents of the University System of Maryland; and

(3) approved by the Board of Public Works.

(e) *Approval for St. Mary's College of Maryland.* -- Before execution, a contract for a capital expenditure in connection with St. Mary's College of Maryland shall be:

(1) subject to the provisions of Title 4, Subtitle 4 of this article;

(2) approved by the Board of Trustees of St. Mary's College of Maryland; and

(3) approved by the Board of Public Works.

(f) *Approval for Morgan State University.* -- Before execution, a contract for a capital expenditure in connection with Morgan State University shall be:

(1) subject to the provisions of Title 4, Subtitle 4 of this article;

(2) approved by the Board of Regents of Morgan State University; and

(3) approved by the Board of Public Works.

(g) *Supervision of Expenditures.* -- The Board shall supervise the expenditure of any money that the General Assembly appropriates for:

(1) buildings;

(2) equipment;

(3) new construction; or

(4) any other capital expenditure.⁵⁸

§12-203

⁵⁸*Id.* § 12-202.

(a) *Allowed by regulation.* –

(1) The Board may adopt regulations that allow a unit of the State government to enter into a contract or make a change order related to a capital project without approval.

(2) These regulations shall:

(i) comply with this section; and

(ii) be subject to the approval of the Joint Committee on Administrative, Executive, and Legislative Review.

(b) *Required by provisions.* –

(1) Regulations adopted under this section shall:

(i) establish an expenditure or use classification to determine which contracts or change orders may be made without Board approval;

(ii) set an amount for each classification and require a unit of the State government to obtain approval of the Board if the annual dollar value of a contract and its change orders exceeds that amount; and

(iii) require a unit of the State government to establish a reporting system approved by the Board to inform the Board about contracts or change orders entered into without Board approval.

(2) The amount established by the Board under paragraph (1)(ii) of this subsection shall be an amount that:

(i) frees the Board from direct review of relatively insignificant items; but

(ii) does not impair the strong public policy favoring direct review by the Board for items that have a substantial fiscal impact.⁵⁹

§12–204

(a) *Scope of section.* -- This section does not apply to a lease entered into on or before May 31, 1967, unless the lease is renewed after that date.

(b) *Board approval required.* –

(1) Except as otherwise provided in this section and § 13–108 of this article, before a unit executes or renews a lease of land, buildings, or office space, the Board [of Public Works] shall approve the lease or lease renewal.

(2) After review by the Secretary of General Services, the Board may designate the location of any unit.

(c) *Exception.* –

(1) Subject to paragraph (2) of this subsection, the Board may adopt regulations, in accordance with Title 10, Subtitle 1 of the State Government Article, that allow a unit to execute or renew a lease without Board approval.

(2) These regulations are subject to the approval of:

(i) the General Assembly; or

(ii) while the General Assembly is not in session, the Legislative Policy Committee.

(3) Regulations adopted under this section shall:

⁵⁹*Id.* § 12–203.

(i) establish an expenditure or use classification to determine which leases or lease renewals may be entered into without Board approval;

(ii) set an amount for each classification and require a unit to obtain approval if a lease or lease renewal exceeds that amount; and

(iii) require a unit to establish a reporting system approved by the Board to inform the Board about leases or lease renewals entered into without Board approval.

(d) *Conditions for approval of lease.* –

(1) Subject to paragraph (2) of this subsection, the Board may not approve a lease that:

(i) transfers ownership of the property to the lessee on or before the termination of the lease;

(ii) allows the lessee to purchase the property below fair market value or for a fixed amount;

(iii) is for a term that is 75% or more of the estimated useful economic life of the property; or

(iv) has payments with a present value that is 90% or more of the fair market value of the property.

(2) The Board may approve a lease described in paragraph (1) of this subsection if:

(i) the Capital Debt Affordability Committee has certified to the Governor and the General Assembly that the total amount of new State debt to be incurred by the lease may prudently be authorized; or

(ii) the General Assembly has approved the lease in the budget for the requesting unit.⁶⁰

§12–205

(a) *Scope of section.* -- This section does not apply to a lease entered into on or before May 31, 1967, unless the lease is renewed after that date.

(b) *Fair market value.* -- An appropriation may not be obligated or spent for the lease of a building or part of a building to be occupied by the State or a unit of the State government for a State purpose at an annual rent that exceeds 15% of the fair market value of the leased premises on the date of the lease.⁶¹

Capital projects must also comply with the requirements imposed on the Department of Management and Budget:

§3-602

(a) *Study required.* -- The Department shall study each capital project proposed by any unit of the State government.

(b) *Procedure.* -- Except for a capital project designated as an emergency by the unit of the State government proposing the project, any unit of the State government requesting a capital project shall submit its request to the Department on or before June 30 of the fiscal year preceding the fiscal year in which the capital project is to begin.

(c) *Proposed expenditures.* -- Each request for a capital project by a unit of the State government, including the University System of Maryland, St. Mary's College of Maryland, and Morgan State University, shall include a detailed list of all proposed expenditures for capital improvements to be funded from grants or nonbudgeted revenues.

⁶⁰*Id.* § 12–204.

⁶¹*Id.* § 12–205.

(d) *Preliminary planning program; design program.* –

(1) Before an appropriation may be authorized for preliminary planning of a proposed capital project:

(i) the unit of the State government requesting the appropriation shall submit to the Department a program describing, in detail, the scope and purpose of the project; and

(ii) the Secretary of Budget and Management must approve the program.

(2) Before an appropriation may be authorized for construction of a proposed capital project:

(i) the unit of State government requesting the appropriation shall submit to the Departments of Budget and Management and General Services a detailed design program, which shall include all information required by the Departments; and

(ii) both the Secretary of Budget and Management and the Secretary of General Services must approve the detailed design program.

(e) *Changes.* -- Except with the approval of the Secretary of Budget and Management and the Secretary of General Services, no change may be made in any proposed capital project after the preliminary plan for that project has been completed and approved.

(f) *Submission to General Assembly.* –

(1) This subsection applies only to capital projects that involve construction of permanent or long-time duration.

(2) When the request for an appropriation for a capital project is submitted to the General Assembly, the unit of the State government that would receive the capital project or a State officer on behalf of the unit shall submit to the General Assembly:

(i) preliminary plans and outline specifications for the project that show the size, the type of construction, and the arrangement of each building; and

(ii) a statement on the sufficiency of the proposed appropriation to pay fully for the costs of that project.

(g) *Alternative construction methods.* -- Total project funding may utilize alternative construction methods, such as:

(1) design/build which involves a single solicitation to design and build the facility; or

(2) "fast track" in which design and construction are implemented concurrently.

(h) *Authorization of request for total project funding.* -- A request for total project funding may be authorized jointly by the Secretaries of Budget and Management and General Services if:

(1) (i) the planning, design, construction, and equipment funds for the project have been authorized and itemized in the State budget bill or a supplementary appropriation bill; or

(ii) the Secretaries make a determination, supported in writing and submitted to the Legislative Policy Committee of the General Assembly and the Board of Public Works, that:

1. total project funding is time critical and will result in significant cost savings;

2. there is compelling reason why the procedure required in this paragraph cannot be adopted; and

3. circumstances necessitate that consideration of the total project funding occur during the legislative interim, rather than during the legislative session; and

(2) (i) the total project funding request has been submitted to the Legislative Policy Committee for its review and comment;

(ii) written comment from the Legislative Policy Committee has been received or 45 days have elapsed after the Legislative Policy Committee has received the request and all supporting information; and

(iii) the request has been approved by the Board of Public Works.

(i) *Exemptions for projects funded by Transportation Trust Fund.* -- The submissions and approvals required by subsections (b) through (h) of this section are not required in connection with any capital project funded by the Transportation Trust Fund.

(j) *"Total project funding" defined.* -- "Total project funding" means the funding for the planning, design, construction, and equipment of a capital project through a single appropriation or authorization or through a proposed capital lease.

(k) *"Capital lease" defined.* -- "Capital lease" means any lease, defined as a capital lease in accordance with generally accepted accounting principles, that is used to finance the acquisition, purchase, construction, and any related renovation or alteration of real property that is the subject of a capital project.⁶²

Motor Vehicles

The Department of General Services has authority over leases of motor vehicles subject to approval by the Board of Public Works and approval by the Secretary of Budget and Management.⁶³

§ 3-502

(a) *In general.*-- Consistent with Division II of this article, the Secretary [of Budget and Management]⁶⁴ shall approve and submit to the Board of Public Works for concurrence:

(1) standards for purchase by the Department of General Services of motor vehicles for State use; and

(2) all leases or rentals of motor vehicles for use by officials or employees of any unit of the Executive Branch of the State government, other than any individual motor vehicle lease or rental made under the Standard State Travel Regulations.

(b) *Basis.* -- As far as practicable and feasible, the standards for purchase of motor vehicles shall be based on the lowest possible life cycle cost.

(c) *Purchase.* -- The purchase of State-owned motor vehicles for any unit of the Executive Branch of the State government shall be reviewed and approved by the Secretary before the purchase to ensure compliance with this section and § 3-503 of this subtitle and any implementing regulations.⁶⁵

§ 3-503

(a) *Regulations.* --

(1) To ensure economical and efficient use of motor vehicles by units of the Executive Branch of the State government, the Secretary shall adopt and enforce regulations to carry out the provisions of this subtitle.

⁶²*Id.* § 3-602.

⁶³*Id.* § 12-107 (effective July 1, 2008 to Sept. 30, 2019); § 3-502. (The departments of transportation, the transportation authority and the Maryland Port Commission may procure motor vehicles without approval of any other unit.)

⁶⁴*Id.* § 3-101(c).

⁶⁵*Id.* § 3-502.

(2) The regulations adopted under this section shall apply to:

- (i) all phases of the use and maintenance of State-owned motor vehicles; and
- (ii) the reimbursement of owners of privately owned motor vehicles.

(3) The regulations shall be directed to:

- (i) requiring the effective, efficient, and inexpensive use of all motor vehicles; and
- (ii) compiling and maintaining accurate and detailed cost accounting records for all use of motor vehicles.

(4) The regulations shall provide that, unless the Secretary determines on the basis of published criteria that the use of a State-owned motor vehicle is required for the efficient operation of a State program regardless of miles traveled, State-owned motor vehicles shall be allocated to those State employees accumulating the greatest mileage for official use.

(b) *Reassignment of state-owned motor vehicles.* -- Consistent with this section, the Secretary may reassign State-owned motor vehicles between or among units of the Executive Branch of the State government if federally funded programs are substantially reduced or discontinued.

(c) *Report to General Assembly.* -- Subject to § 2-1246 of the State Government Article, the Secretary shall submit to the General Assembly an annual report that includes, in detail:

- (1) the text of any regulations that have been adopted under this section and are currently in effect; and
- (2) a statement of any problems involved in ensuring compliance with this subtitle.⁶⁶

Regulations provide that actual purchase of motor vehicles will be made by the Department of General Services:

A. Application.

(1) This regulation applies to all mopeds and motor vehicles as defined by Transportation Article, 11-134.1, 11-135, and 11-176, Annotated Code of Maryland.

(2) Exempt from this regulation are vehicles assigned persons exempted, in whole or in part, in writing by the Secretary.

B. Policies and Procedures.

(1) Acquisition of Vehicles.

(a) Standards for purchase shall be determined by the Department of Budget and Management, with the concurrence of the Board [of Public Works]. Standards shall be determined for the standard State automobile and such other classes as may be determined by the Secretary.

(b) Funds for vehicle acquisition shall be authorized by the budget or approved budget amendment.

(c) Vehicle purchase requests, with specifications, initially shall be submitted to the Secretary of Budget and Management in the form prescribed by the Secretary.

(d) Prior to purchase, each vehicle acquisition shall be reviewed and approved by the Secretary or designee for certification of funding authorization and for compliance with standards. Actual purchase shall be made by the Department of General Services.

⁶⁶*Id.* § 3-503.

(2) Gasoline and Oil. State personnel shall observe the following order of priority when obtaining gasoline and oil from:

- (a) State facilities;
- (b) Self-service commercial facilities;
- (c) Full-service commercial facilities.

(3) Accessories, Maintenance, and Repairs. Using agencies shall obtain vehicle accessories, maintenance, and repairs, in accordance with the following priority from:

- (a) An in-house facility;
- (b) The State's vehicle service contractor or contractors; or
- (c) The vendor that offers the most favorable price using applicable small procurement procedures (COMAR [Code of Maryland Regulations] 1.05.07).⁶⁷

Information Technology

The Department of Information Technology may control procurement of information processing equipment and associated services and telecommunications equipment, systems or services until October 1, 2019.⁶⁸ After October 1, 2019 the Department of General Services may engage in the procurement of information processing equipment and telecommunications equipment.⁶⁹ Individual units of government may have specific delegated authority to acquire information technology. Information technology of each unit of State government shall be consistent with the master plan established by the Department of Information Technology.⁷⁰ A special fund has been dedicated to support major information technology development.⁷¹ The secretary of Information Technology may approve and award procurement contracts within the Department's jurisdiction in the amount of \$200,000 or less.⁷²

All units except public institutions of higher education are required to comply with the following technology information provisions of the State Finance and Procurement Code:

§ 3A-307

- (a) *Consistency with master plan required.* --

⁶⁷COMAR 21.02.03.03 (amended Jan.2 2017).

⁶⁸Md. Code Ann., State Fin. & Proc. § 12-107(7) (effective July 1, 2008 to Sept. 30, 2019); § 3A-401 (provisions do not apply to a telecommunication system or service that is owned or operated by the University System of Maryland, Morgan State University, or a unit of the Legislative or Judicial Branch.)

⁶⁹*Id.* § 12-107 (eff. Oct. 1, 2019).

⁷⁰*Id.* § 3A-304; § 3A-306.

⁷¹*Id.* § 3A-309. "Major information technology development project" means any information technology development project that meets one or more of the following criteria: (1) the estimated total cost of development equals or exceeds \$ 1,000,000; (2) the project is undertaken to support a critical business function associated with the public health, education, safety, or financial well-being of the citizens of Maryland; or (3) the Secretary determines that the project requires the special attention and consideration given to a major information technology development project due to: (i) the significance of the project's potential benefits or risks; (ii) the impact of the project on the public or local governments; (iii) the public visibility of the project; or (iv) other reasons as determined by the Secretary. *Id.* § 3A-301(f). Expenditures from the fund must be made in accordance with appropriations. *Id.*

⁷²COMAR 21.02.01.04 (Amended Jan. 2, 2017; April 10, 2017).

(1) A unit of State government may not purchase, lease, or rent information technology unless consistent with the master plan.

(2) A unit of State government other than a public institution of higher education may not make expenditures for major information technology development projects⁷³ except as provided in § 3A-308 of this subtitle.

(b) *Review by Secretary.* –

(1) The Secretary may review any information technology project for consistency with the master plan.

(2) Any information technology project selected for review may not be implemented without the approval of the Secretary.

(c) *Advice regarding proposals, value of resources.* –

(1) A unit of State government shall advise the Secretary of any information technology proposal involving resource sharing, the exchange of goods or services, or a gift, contribution, or grant of real or personal property.

(2) The Secretary shall determine if the value of the resources, services, and property to be obtained by the State under the terms of any proposal submitted in accordance with the provisions of paragraph (1) of this subsection equals or exceeds \$100,000.

(3) If the value of any proposal submitted in accordance with this subsection equals or exceeds \$100,000 and the Secretary and unit agree to proceed with the proposal, information on the proposal shall be:

(i) advertised for a period of at least 30 days in the eMaryland Marketplace; and

(ii) submitted, simultaneously with the advertisement, to the Legislative Policy Committee for a 60-day review and comment period, during which time the Committee may recommend that the proposal be treated as a procurement contract under Division II of this article.

(4) Following the period for review and comment by the Legislative Policy Committee under paragraph (3) of this subsection, the proposal is subject to approval by the Board of Public Works.

(5) This subsection may not be construed as authorizing an exception from the requirements of Division II of this article for any contract that otherwise would be subject to the State procurement process.⁷⁴

§ 3A-308

(a) *Public institutions of higher learning excluded.* -- This section does not apply to a public institution of higher education.

(b) *Designation of major information technology development projects.* -- In submitting its information technology project requests, a unit of State government shall designate projects which are major information technology development projects.

(c) *Review by Secretary -- Redesignation.* -- In reviewing information technology project requests, the Secretary may change a unit's designation of a major information technology development project.

(d) *Review by Secretary -- Approval.* -- The Secretary shall review and, with the advice of the Secretary of Budget and Management, approve major information technology development projects and specifications for consistency with all statewide plans, policies, and standards, including a systems development life cycle plan.

(e) *Implementation oversight.* -- The Secretary shall be responsible for overseeing the implementation of major information technology development projects, regardless of fund source.

⁷³For definition of major information technology development, *see, supra*, note 71.

⁷⁴Md. Code Ann., State Fin. & Proc. § 3A-307.

(f) *Expenditures.* -- With the advice of the Secretary of Budget and Management, expenditures for major information technology development projects shall be subject to the approval of the Secretary who shall approve expenditures only when those projects are consistent with statewide plans, policies, and standards.

(g) *Requirements for approval of funding.* –

(1) The Secretary shall approve funding for major information technology development projects only when those projects are supported by an approved systems development life cycle plan.

(2) An approved systems development life cycle plan shall include submission of:

(i) a project planning request that details initial planning for the project, including:

1. the project title, appropriation code, and summary;

2. a description of:

A. the needs addressed by the project;

B. the potential risks associated with the project;

C. possible alternatives; and

D. the scope and complexity of the project; and

3. an estimate of:

A. the total costs required to complete through planning; and

B. the fund sources available to support planning costs; and

(ii) a project implementation request to begin full design, development, and implementation of the project after the completion of planning, including:

1. the project title, appropriation code, and summary;

2. a description of:

A. the needs addressed by the project;

B. the potential risks associated with the project;

C. possible alternatives;

D. the scope and complexity of the project; and

E. how the project meets the goals of the statewide master plan; and

3. an estimate of:

A. the total project cost; and

B. the fund sources available.

- (3) The Secretary may approve funding incrementally, consistent with the systems development life cycle plan.⁷⁵

Higher Education

Institutions of higher education are generally exempt from provisions of the state finance and procurement article applicable to other units of state government and may develop their own policies and procedures.⁷⁶ However, acquisition of real property is subject to approval of the Board of Public Works⁷⁷ and contracts for capital improvements and services with a value that exceeds one million dollars must be reviewed and approved by the Board of Public Works.⁷⁸ Capital expenditures are subject to the provisions of title 4, subtitle 4 of the state finance and procurement code and must be approved by the respective boards of the college and university systems.⁷⁹ Proposed capital expenditures must be reported to the Department of Budget and Management.⁸⁰ Procurements violating section 11-203 or the policies adopted by the universities are void or voidable.⁸¹

Universities may develop information technology policies and standards that are compatible with the State plan.⁸²

The University System of Maryland⁸³ may “acquire, hold, lease . . . and dispose of real and personal property.”⁸⁴

Additional statutes provide:

- (b) (1) The title to any land acquired by the University System of Maryland shall be in the State of Maryland for the use of the University System of Maryland.
- (2) All property of the University is the property of the State.
- (c) (1) The Board may borrow money to acquire interests in personal property, including fixtures for the University System of Maryland, on such terms and conditions as the Board considers proper.
- (2) Such borrowing may be secured by the personal property acquired or revenues derived from such property.
- (3) (i) Such borrowing does not create or constitute any indebtedness or obligation of the State or any political subdivision of the State other than the University.

⁷⁵*Id.* § 3A-308.

⁷⁶*Id.* § 11-203(e) (am. Oct. 1, 2018). Institutions include University System of Maryland, Morgan State University and St Mary’s College of Maryland. They are required to comply with the following provisions of State Finance and Procurement Division II: 1. § 11-205 (“Collusion”); 2. § 11-205.1 (“Falsification, concealment, etc., of material facts”); 3. § 13-219 (“Required clauses – Nondiscrimination clause”); 4. § 13-225 (“Retainage”); 5. Title 14, Subtitle 3 (“Minority Business Participation”); 6. Title 15, Subtitle 1 (“Procurement Contract Administration”); 7. § 15-226 (“Policy established; timing of payments; notice upon nonpayment; disputes; appeals”); and 8. Title 16 (“Suspension and Debarment of Contractors”). *Id.* § 11-203(e)(5).

⁷⁷Md. Code Ann., Educ. § 12-104(h) (Univ. System of Maryland); *id.* § 14-405(c) (St Mary’s College of Maryland); *id.* § 14-104(q)(6) (Morgan State Univ.).

⁷⁸Md. Code Ann., State Fin. & Proc. § 11-203. *Compare, id.* § 12-202, *supra*, note 58 and accompanying text.

⁷⁹*Id.* § 12-202.

⁸⁰*Id.* § 3-602, *infra*, note 62 and accompanying text.

⁸¹*Id.* § 11-203(e)(5).

⁸²Md. State Code Ann., Educ. § 12-112 (Univ. System of Maryland); § 14-109(b) (Morgan State University); § 14-405(f) (St Mary’s College of Maryland).

⁸³The Univ. System of Maryland is a body politic and corporate and is “an independent unit of (s)tate government” with government vested in the board of regents. Md. Code Ann., Educ. § 12-102. It has the power granted under its charter and the charter of any constituent institution. *Id.* § 12-104(d).

⁸⁴*Id.* § 12-104(b)(6).

(ii) Such borrowing does not constitute a debt or obligation contracted by the General Assembly or pledge the faith and credit of the State within the meaning of Article III, § 34 of the Maryland Constitution⁸⁵

The board of regents must “review, modify, as necessary, and approve consolidated budget requests for appropriations for the University System of Maryland with respect to: 1. The operating budget; and 2. The capital budget; and . . . submit these requests for appropriations organized by constituent institutions to the Commission, Governor, and General Assembly.”⁸⁶

The acquisition of real property must be approved by the board of public works.⁸⁷ The University System of Maryland has numerous bylaws and policies relating to procurement and leasing.⁸⁸

St Mary’s College of Maryland⁸⁹ may “acquire , lease, encumber, sell, or otherwise dispose of real property . . .” subject to the approval of the Board of Public Works and it may “acquire , lease, encumber, sell, or otherwise dispose of personal property.”⁹⁰ Title to land acquired is held by the State of Maryland for the use of St. Mary’s College.⁹¹ The board may “borrow money for the purposes and on the terms that the Board determines.”⁹²

Morgan State University⁹³ may “acquire, hold, lease, use, encumber, transfer, exchange, or dispose of real and personal property” with the acquisition of real property subject to approval of the Board of Public Works.⁹⁴ Additionally,

(S)ubject to the approval of the Board of Public Works, the University may borrow money from any source for any corporate purpose, including working capital for its operations, reserve funds or interest, and mortgage, pledge, or otherwise encumber the property or funds of the University, and contract with or engage the services of any person in connection with any financing, including financial institutions, issuers of credit, or insurers.⁹⁵

Energy Performance Contracting.

Primary procurement units are authorized to enter into energy performance contacts of up to 15 years duration, subject to numerous restrictions.⁹⁶

Debt Limitations

The State is constitutionally limited in the amount of debt which it may incur.⁹⁷ Historically, Commissioner counties were subject to specific limits set for specific counties by the general assembly.⁹⁸

⁸⁵*Id.* § 12-105(b), (c).

⁸⁶*Id.* § 12-105(a).

⁸⁷*Id.* § 12-104(h).

⁸⁸*See e.g.* Policy on Debt Management VII-12.00, Policy on Acquisition and Disposition of Real Property VIII-4.00, Procedures for the Acquisition and Disposition of Real Property VIII-4.01, USM Procurement Policies and Procedures VIII-3.00. available at <https://www.usmd.edu/regents/bylaws/SectionVIII/> (last accessed, May 2018).

⁸⁹St Mary’s College of Maryland is a public honors college with government vested in a board of trustees. Md. State Code Ann., Educ. § 14-401.

⁹⁰*Id.* § 14-405 (c).

⁹¹*Id.*

⁹²*Id.* § 14-405 (d).

⁹³ Morgan State University is a public corporation and an independent unit of State government with government vested in a board of regents. *Id.* § 14-101.

⁹⁴*Id.* § 14-104 (q), (6).

⁹⁵*Id.* § 14-104(c).

⁹⁶Md. Code Ann., State Fin. & Proc. § 12-301 (eff. Apr 9, 2013 to Sept. 30, 2019); § 12-301 (eff. Oct. 1, 2019).

⁹⁷Md. Const. art. III, § 34.

⁹⁸Such legislation was found generally in Md. Code Ann. art. 25, which has been repealed. The authors have not found any similar substitute statutes in the Local Gov’t Code. There are six commission counties: Calvert, Carroll, Garrett, St. Mary’s,

Code counties may limit their own indebtedness but these laws are subject to amendment or repeal by the general assembly.⁹⁹ Municipalities may limit their own debt by enacting a local law approved by a majority of voters, subject to amendment or repeal by the general assembly.¹⁰⁰ Bonded indebtedness of code and charter counties is also statutorily limited.¹⁰¹ The indebtedness of the City of Baltimore is constitutionally limited.¹⁰²

In *Hall v. Mayor of Baltimore*,¹⁰³ the court upheld a lease by the city of a warehouse for a term of fifteen years, with an option in the city to renew the term for another fifteen years.¹⁰⁴ The city also had an option to purchase the property, exercisable after the first six months of the lease, for a price to be determined by an independent appraiser.¹⁰⁵ In determining that the lease did not violate the constitutional debt limits, the court looked to whether the agreement was a “bona fide lease” rather than a purchase agreement.¹⁰⁶ The court found that it was because the rents were “fair and reasonable”¹⁰⁷ for the property, and no part of the rent was to be credited to the purchase price in the event the city exercised its purchase option.¹⁰⁸ The city was not obligated to purchase the property.¹⁰⁹

This was followed in *Eberhart v Mayor of Baltimore*,¹¹⁰ in which the court upheld a lease for a term of thirty years.¹¹¹ The case involved a sale-leaseback transaction.¹¹² Again the court looked to whether the agreement was in fact a “bona fide lease” rather than a purchase agreement.¹¹³ The court based its determination that the agreement was a bona fide lease, and thus valid under the constitution, upon the fact that the rent to be paid by the city was “fair and reasonable” for the property.¹¹⁴

In both *Hall* and *Eberhart* the court was analyzing transactions structured as true leases for a term of years and not lease-purchase transactions subject to annual termination for failure by the governing body to appropriate funding for rental payments.

Interest Rate Limitations

Except as otherwise provided by law, the legal rate of interest is 6 percent per annum on the unpaid principal balance of a loan.¹¹⁵ “[A] lender may charge an effective simple rate of interest not in

Somerset and Washington.

⁹⁹Md. Const. art. XI-F, § 8.

¹⁰⁰*Id.* art. XI-E, § 5; Md. Code Ann., Local Gov’t § 4-106.

¹⁰¹Md. Code Ann., Local Gov’t § 11-103 (code counties); *id.* § 10-203(charter counties).

¹⁰²Md. Const. art. XI, § 7.

¹⁰³252 Md. 416, 250 A.2d 233 (1969).

¹⁰⁴250 A.2d at 235.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 236.

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 240.

¹⁰⁹*Id.* at 236.

¹¹⁰291 Md. 92, 433 A.2d 1118 (1981).

¹¹¹433 A.2d at 1119.

¹¹²*Hall* involved a lease-leaseback transaction. 250 A.2d at 234-35. The situation involves a city’s conveyance or lease of unimproved property to a private corporation. In *Hall* the warehouse was constructed by the corporation and then leased to the city. *Id.* in *Eberhart* the city leased the underlying property and sold the existing building to a corporation and then the corporation leased both back to the city. 433 A.2d at 1119.

¹¹³433 A.2d at 1125.

¹¹⁴*Id.*

¹¹⁵Md. Com. Law § 12-102. For purposes of these interest rate limitations, a “person” to whom a loan is made includes . . . any . . . legal or commercial entity. *Id.* § 12-101(g).

excess of 8 percent per year on the unpaid balance of a loan if there is a written agreement signed by the borrower which sets forth the stated rate of interest charged by the lender.”¹¹⁶

Certain limitations apply to loans secured by residential real property and also to loans which are not secured by residential real property.¹¹⁷

Miscellaneous

The office of the attorney general has issued an opinion that state law does not require a local board of education to employ the competitive bidding process to refinance the private lease-purchase funding of school construction.¹¹⁸

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹¹⁶*Id.* § 12-103(a).

¹¹⁷*Id.* § 12-103.

¹¹⁸Op. Att’y Gen. No. 91-025 (1991) (available on Lexis, States library, MD file).

MASSACHUSETTS 2019

Current through ch. 294 of 2018 Mass. 2nd Annual Legislative Session, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Commission counties “may, subject to appropriation, acquire by eminent domain, or by purchase or otherwise, the fee or other lesser interest in such real property” for purposes of open space.⁵ In addition, commission counties are to “provide suitable jails, houses of correction, fireproof offices and other public buildings, including both the structures and the land upon which such structures are sited, necessary for its use.”⁶ County commissioners may “sell . . . or lease any real estate of the county.”⁷ Charter counties may “buy, sell, lease, hold and dispose of real and personal property.”⁸ “Rentals and leases of real property may be entered into for a period not to exceed five years, provided that such limitation shall not apply to leases with the judicial branch of the commonwealth.”⁹

County acquisitions of real property and equipment are covered by the Uniform Procurement Act.¹⁰ Counties may participate in collective purchasing programs with the commonwealth.¹¹

Energy Performance Contracting

Under supervision of the commissioner of energy resources and subject to numerous requirements, counties are authorized to enter into contracts extending beyond a fiscal year for modifications or installations designed to reduce energy consumption in public facilities and buildings.¹²

Municipalities

Municipalities¹³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁴ eminent domain¹⁵ and police powers.¹⁶ Municipalities may “purchase . . . any land within [their]

¹Counties may adopt charters and exercise home rule powers. Mass. Gen. Laws Ann. ch. 34A, § 2. Charter counties have taxation, eminent domain and police powers. *Id.* ch. 34A, § 16. Most county governments have been abolished, though the counties still exist as geographical entities: Berkshire County, Essex County, Franklin County, Hampden County, Hampshire County, Middlesex County, Suffolk County, Nantucket County and Worcester County. County functions have been turned over to state or regional government. *Id.* ch. 34B § 1; <http://www.mass.gov>.

²*Id.* ch. 35, § 30.

³*Id.* ch. 34, § 25.

⁴*Id.* ch. 147, § 8.

⁵*Id.* ch. 34, § 25.

⁶*Id.* ch. 34, § 3.

⁷*Id.* ch. 34, § 14. Certain conditions must be met prior to such sale or lease. *Id.*

⁸*Id.* ch. 34A, § 16(A)(vi). Charter counties may also “acquire . . . public improvements, projects or other enterprises for any public purposes, subject to such referendum as may otherwise be imposed by law.” *Id.* ch. 34A, § 16(A)(iii).

⁹*Id.* ch. 35, § 34.

¹⁰*Id.* ch. 30B, §§ 1 to 23 (the procurement code covers local government bodies). Pursuant to section 16 real property rentals exceeding thirty-five thousand dollars in value must be publicly bid.

¹¹*Id.* ch. 7 § 22A.

¹²*Id.* ch. 25A, § 11I.

¹³Municipalities, for purposes of this discussion, are either cities or towns. *Id.* ch. 40, § 1. Cities have all powers that towns have unless specifically prohibited. *Id.* Cities, or towns may adopt charters. Mass. Const. amend. art. 2, § 2. Current through amendments approved August 1, 2018. Cities and towns have home rule powers. *Id.* amend. art. 2, § 6; *but see id.* amend. art. 2, § 7 (limitations on local powers).

¹⁴Mass. Gen. Laws Ann. ch. 59, § 21D.

¹⁵*Id.* ch. 40, § 14.

¹⁶*Id.* ch. 40, § 21.

limits for any municipal purpose.”¹⁷ Municipalities may “make contracts for the exercise of [their] corporate powers”¹⁸

A city, town or district may by a two-thirds vote of its legislative body, if recommended by its chief executive officer, authorize any department of the city, town or district to enter into a lease purchase financing agreement to acquire equipment or improve a capital asset that may be financed by the issuance of debt under this chapter or otherwise authorized by law, for a term up to the useful life of the property to be procured as determined by its chief executive officer. Any lease purchase financing agreement under this section shall be considered a binding obligation of the city, town or district as if it were a debt authorization under this chapter, provided an appropriation available for the purpose has been made in the first fiscal year in which the lease becomes effective. Any city, town or district that follows the procedure in this section with respect to entering into a lease purchase financing agreement for the procurement of any personal property for the governmental entity, may refinance the purchase with the issuance of refunding bonds under section 21A to pay the balance of the lease obligation.¹⁹ [Emphasis added.]

Municipalities may “acquire off street parking areas and facilities . . . by lease not to exceed five years.”²⁰

Municipalities may purchase or lease land and erect public bath and wash houses.²¹

A municipality may “hold real estate . . . and may convey the same,” may “hold personal estate for the public use . . . and alienate and dispose of the same” and may “make such orders as it may deem necessary or expedient for the disposal or use of its corporate property.”²²

A municipality may “purchase, lease, or lease with an option to purchase, one or more voting machines . . . and may lease, purchase, or lease with an option to purchase, the marking units or automatic tabulating equipment necessary to any electronic voting system.”²³

Municipal acquisitions of real property and equipment are covered by the Uniform Procurement Act.²⁴

Municipalities may participate in statewide contracts for items like information technology.²⁵

Energy Performance Contracting

Under supervision of the commissioner of energy resources and subject to numerous requirements, municipalities are authorized to enter into contracts extending beyond a fiscal year for modifications or installations designed to reduce energy consumption in public facilities and buildings.²⁶

Municipalities may incur debt for up to 20 years “(f)or energy conservation, alternative energy or renewable energy improvements to public buildings or facilities owned or leased by the city or town, or

¹⁷*Id.* ch. 43, § 30, which provides: “No land shall be . . . purchased until an appropriation . . . has been made”

¹⁸*Id.* ch. 40, § 4. Such agreements must be approved by a town meeting, a city council with approval of the mayor or other appropriate means. *Id.*

¹⁹Mass. Gen. Laws Ann. ch. 44, § 21C. ““District” shall mean a fire, water, sewer, water pollution abatement, refuse disposal, light, or improvement district, or any other district, howsoever named, formed for the purpose of carrying out any of the aforementioned functions, whether established under general law or special act.” *Id.* § 1.

²⁰*Id.* ch. 40, § 22B. (“In a city or town that accepts this section and installs parking meters....”)

²¹*Id.* ch. 40, § 12.

²²*Id.* ch. 40, § 3.

²³*Id.* ch. 54, § 34.

²⁴*Id.* ch. 30B, §§ 1 to 23 (the procurement code covers local government bodies). Pursuant to section 16 real property rentals exceeding thirty-five thousand dollars in value, must be publicly bid.

²⁵*Id.* ch. 7, § 22A; ch. 30, §§ 51, 52; 801 Code Mass. Regs. 21.00; Exec. Order No 533 (Deval L. Patrick, May 2011).

²⁶*Id.* ch. 25A, §11I.

on property owned or leased by the city or town.”²⁷ Local government bodies may contract for energy conservation projects and the “costs associated with equipment purchase” that have a cost of \$100,000 or less directly with certain authorized providers.²⁸

School Districts

Municipalities are statutorily required to maintain and equip public schools.²⁹

In *United States Leasing Corp. v. City of Chicopee*,³⁰ it was held that a city school committee could not bind the city to a lease without mayoral approval because mayoral approval was required by the city’s charter. Municipalities may group to form a regional school district,³¹ which may qualify as a tax-exempt issuer for federal income tax purposes due to its eminent domain power.³² Regional school districts are authorized to “lease, or lease with an option to purchase, equipment for educational purposes”³³ and to “lease land and buildings for educational purposes.”³⁴ These leases are limited to terms not exceeding five years.³⁵

Regional school district acquisitions of real property and equipment are covered by the Uniform Procurement Act.³⁶

Energy Performance Contracting

Under supervision of the commissioner of energy resources and subject to numerous requirements, school districts are authorized to enter into contracts extending beyond a fiscal year for modifications or installations designed to reduce energy consumption in public facilities and buildings.³⁷

Fire Districts

Fire districts³⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁹ power.

[D]istricts may, at meetings called therefor, raise money by taxation for the purchase of engines and other articles necessary for the extinguishment of fires, for hydrant and water service, for the purchase of land, for the erection and repairs of necessary buildings, for the erection and maintenance of street lamps within their limits, for the purchase, operation and maintenance of ambulances, . . . and for other incidental expenses of the fire department.⁴⁰

A fire district may “hold real estate for public use . . . and may . . . lease for not more than ten years . . . land [or] a public building.”⁴¹ Actions must be taken by warrant process.⁴²

²⁷*Id.* ch. 44, § 7.

²⁸*Id.* ch. 25A § 14.

²⁹*Id.* ch. 71, §§ 1, 68.

³⁰521 N.E.2d 741 (Mass. 1988).

³¹Mass. Gen. Laws Ann. ch. 71, § 14B.

³²*Id.* ch. 71, § 16(c). Regional school districts also have authority to incur debt upon voter approval. *Id.* ch. 71, § 16(n).

³³*Id.* ch. 71, § 16(p).

³⁴*Id.* ch. 71, § 16(q).

³⁵*Id.* ch. 71, §§ 16(p), (q).

³⁶*Id.* ch. 30B, §§ 1 to 23 (the procurement code covers local government bodies). Pursuant to section 16 real property rentals exceeding thirty-five thousand dollars in value must be publicly bid.

³⁷*Id.* ch. 25A, § 11I.

³⁸*See generally, id.* ch. 48. Fire districts may be formed under general law or special act. *Id.* ch. 40, § 1A.

³⁹*Id.* ch. 48 § 69.

⁴⁰*Id.*

⁴¹*Id.* ch. 48, § 77A.

Like cities and towns, districts may enter into lease purchase financing agreements to acquire equipment or to improve a capital asset.⁴³

District acquisitions of real property and equipment are covered by the Uniform Procurement Act.⁴⁴

Energy Performance Contracting

Under supervision of the commissioner of energy resources and subject to numerous requirements, districts are authorized to enter into contracts extending beyond a fiscal year for modifications or installations designed to reduce energy consumption in public facilities and buildings.⁴⁵

Hospital Districts

There appears to be no statutory framework concerning hospital districts.

State Entities

Headed by the state purchasing agent, the Operational Services Division (OSD) of the Executive Office for Administration and Finance generally oversees procurement for the State.⁴⁶ The secretary of the Office for Administration and Finance has rule-making power over “equipment and other property for the various state departments, offices, and commissions except when they are for legislative or military purposes,”⁴⁷ so executive branch departments would have acquisition authority through delegation under the rules by the secretary of the Office for Administration and Finance. Rules covering the procurement of commodities (including information technology) by executive branch departments are codified at 801 CMR 21.00.⁴⁸ “All goods, supplies, equipment and services, except for legislative or military purposes, needed by the various executive and administrative departments and for other activities of the commonwealth shall be purchased by or under the direction of the operational services division”⁴⁹ All supplies and equipment must be purchased or contracted for as approved by the state purchasing agent. “Such approval may be specific or blanket form at the discretion of the state purchasing agent.”⁵⁰ The state purchasing agent’s authority includes management of motor vehicles.⁵¹ It has delegated its authority as to vehicles to the Office of Vehicle Management.⁵²

⁴²*Id.* ch. 48, § 66.

⁴³*Id.* ch. 44, § 21C. *See, supra*, note 19 and accompanying text.

⁴⁴*Id.* ch. 30B, §§ 1 to 23 (the procurement code covers local government bodies). Pursuant to section 16 real property rentals exceeding thirty-five thousand dollars in value must be publicly bid.

⁴⁵*Id.* ch. 25A, § 11I.

⁴⁶*Id.* ch. 7, §§ 4, 4A.

⁴⁷*Id.* ch. 7, § 22.

⁴⁸ The term “commodities” specifically includes “information technology resources, including automated data processing and telecommunications hardware, software and systems” and the term “Acquisition” includes lease-purchase. 801 CMR 21.02. 801 CMR 21.00 does not apply to the legislative branch, judicial branch, constitutional offices, elected office, public institutions of higher education, the military division or independent public authorities, although the use of 801 CMR 21.00 is encouraged. 801 Code Mass. Regs 21.01. Office of Administration and Finance (ANF), Operational Services Division (OSD) and the Office of the Comptroller (CTR) may issue additional policies, procedures and Contract forms to be used by Departments to carry out the purposes of 801 CMR 21.00.

⁴⁹*Id.* ch. 30, § 51.

⁵⁰*Id.* ch. 30, § 52.

⁵¹*Id.* ch. 7, § 4A. Authority of the secretary to promulgate regulations governing the purchase or lease of passenger vehicles and light duty pickups can be found in ch. 7, § 9A.

⁵²Office of Vehicle Management Policies and Procedures Manual, (Rev’d March 23, 2011), <http://www.mass.gov/anf/docs/osd/ovm/ovmmanual.doc>.

The commonwealth and local political subdivisions may participate in collective purchasing.⁵³

In addition to the statutory exception for the legislative branch and the military, the judiciary is also excepted from application of the above procurement statutes and rules by virtue of the constitutional provision for the separation of powers.⁵⁴ Institutions of higher education have their own statutory procurement authority for educational supplies and equipment.⁵⁵ However, excepted governmental entities, including local governmental units, are granted the option to use procurement and contract services, such as statewide commodities contracts, offered by the OSD.⁵⁶ Commodities not covered by 801 Mass. Code Regs (CMR) 21.00, discussed above as a controlling document for procurement by executive branch departments, include those involved in “horizontal construction,” which is overseen by the Massachusetts Highway Department.⁵⁷

The commissioner of the Division of Capital Asset Management and Maintenance (DCAMM) is responsible for the acquisition and disposal of real property and may acquire real property by purchase, eminent domain, lease, rental-purchase or otherwise.⁵⁸

The superintendent of state office buildings is responsible for repairs or improvements to state office buildings.⁵⁹

Extensive information, policies and requirements concerning the acquisition of property by executive and nonexecutive departments of government can be found online at <http://www.mass.gov>.

The department of transportation has statutory authority to “acquire, lease, hold and dispose of real and personal property” in the performance of its duties.⁶⁰

There is a standard Commonwealth Terms and Conditions form, which is jointly issued by the Executive Office for Administration and Finance (ANF), the Office of the Comptroller (CTR) and the Operational Services Division (OSD) for use by all Commonwealth of Massachusetts (“State”) Departments and Contractors. “Any changes or electronic alterations by either the Department or the Contractor to the official version of this form, as jointly published by ANF, CTR and OSD, shall be void.”⁶¹ Review of these terms and conditions is advisable, since they include troublesome provisions, including the following: “Payments to third party assignees will be processed as if such payments were being made directly to the Contractor and these payments will be subject to intercept, offset, counter

⁵³Mass. Gen. Laws Ann. ch. 7, § 22A. Exec. Order No 533 (Deval L. Patrick, May 2011). COMMBUYS <https://www.commbuys.com> provides an online record system for commonwealth executive departments.

⁵⁴Mass. Const. Part I, art. 30.

⁵⁵Mass. Gen. Laws Ann. ch. 75, § 13 (U. Mass. authority unlimited on purchases under \$100,000); ch. 73, § 15 (state colleges and community colleges); ch. 15A, § 24; ch. 15A, § 24A. “Where these statutes are silent, these entities fall under OSD’s statutes and authority.” Commodities and Services Joint Policy, (issued July 1 2004, rev’d Nov. 1, 2006), p 3.

⁵⁶Mass. Gen. Laws Ann. ch. 7, §§ 22A, 22B; 801 Code Mass. Regs 21.04; Commodities and Services Policy, *supra*, p. 2.

⁵⁷Mass. Gen. Laws Ann. ch. 6C, § 38. The division of highways has power to “acquire, lease and dispose of real and personal property.” *Id.* ch. 6C, § 3.

⁵⁸*Id.* ch. 7C, § 33.

⁵⁹*Id.* Mass. Gen. Laws Ann. ch. 8, § 6.

⁶⁰*Id.* ch. 6C, § 3(20).

⁶¹The authority for incorporation of Terms and Conditions is at 801 Mass. Code Regs 21.07(2)(c), which provides: “(b) Commonwealth Terms and Conditions. An authorized signatory of a Bidder must execute a Commonwealth Terms and Conditions, which is executed only once and must be filed as prescribed by CTR. A Commonwealth Terms and Conditions will be incorporated by reference into and shall apply to any Contract for Commodities or Services, or both, that is executed by the Bidder and any Department of the State.” A copy of said terms and conditions is available at: <http://www.mass.gov/osc/docs/forms/contracts/comm-termsconditions.pdf>

claims or any other Department rights which are available to the Department or the State against the Contractor.”⁶²

The Office of the Comptroller (CTR) and the Operational Services Division (OSD) promulgate joint policies concerning key state finance law and contracting requirements related to purchases.⁶³ The *Office of The Comptroller Expenditure Classification Handbook*, available through the state website, identifies compliance requirements for tax exempt lease purchases (TELPs) of non-IT equipment by various types of state entities as follows:

All Commonwealth departments are responsible for making contract obligations and expenditures in compliance with applicable laws and CTR Fiscal Policies (see Fixed Asset Acquisition Policy). All departments that take advantage of incidental purchases must comply with incidental purchase requirements identified by CTR and OSD. In addition:

- Executive departments “Level III” must comply with M.G.L. c. 7, § 22, 801 CMR 21.00 and the “Procurement Information Center” for 801 CMR 21.00 covered goods and services, and must purchase from available Statewide Contracts, and use specified Commonwealth contract forms. Exceptions from using Statewide Contracts will only be permitted with prior written approval from the State Purchasing Agent explained in Procurement Overview - OSD Legal Authority, Strategic Oversight and the Required Use of Statewide Contracts (Revised 10/1/2013). Departments are required to review Procurement Information Center (PIC)[superseded]
- Non-Executive departments “Level II” must comply with M.G.L. c. 7, § 22, internal procurement policies and procedures and use specified Commonwealth contract forms;
- Exempt departments “Level I” must comply with internal procurement policies and procedures and if the department takes advantage of MMARS document processing delegation, the department must use specified Commonwealth contract forms.⁶⁴

Information technology hardware can be obtained on a statewide contract.⁶⁵ All state agency contracts for information technology require approval of the chief information officer.⁶⁶

Higher Education

The University of Massachusetts is governed by a board of trustees.⁶⁷ It has responsibility to “manage and keep in repair all property, real and personal, owned or occupied by the university.”⁶⁸ “The trustees shall, on behalf of the commonwealth, manage and administer the university and all property, real and personal, belonging to the commonwealth and occupied or used by the university, and shall keep in repair houses, buildings and equipment so used or occupied.”⁶⁹

⁶²*Id.*

⁶³See Office of the Comptroller Joint Policy “Procurement/Contracts” issued July 1, 2004, rev’d May 20, 2011. <http://www.macomptroller.info/comptroller/docs/policies-procedures/contracts/po-procon-state-finan-law-gen-con-req.pdf>.

⁶⁴Expenditure Classification Handbook [PRF17] (Nov. 2014) p. 80, object class LL, <http://www.mass.gov>.

⁶⁵Mass. Gen. Laws Ann. ch. 7D, § 3; Statewide Contract User Guides, http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/buy-from-a-state-contract/statewide-contract-user-guides.html#SWCUG_ITT.

⁶⁶Mass. Gen. Laws Ann. ch. 7D, § 7(b) (rulemaking power allows for the CIO to set a minimum financial threshold above which and expenditure may be reviewed). “Information technology or “IT”, hardware, software, telecommunications equipment and related services designed for the storage, manipulation and retrieval of data by electronic or mechanical means including, but not limited to, personal computers, mainframes, wide and local area networks, servers, mobile or portable computers, peripheral equipment, telephones, wireless communications, handheld devices, cloud-based application and platform services, public safety radio services, facsimile machines, data centers, dedicated training facilities and switching facilities.” *Id.* § 1. State agency means “a legal entity of state government established by the general court as an agency, board, bureau, commission, council, department, office or division of the commonwealth with a specific mission and which is subject to the control of the governor or whose administration has been solely appointed by the governor.” *Id.*

⁶⁷Mass. Gen. Laws Ann. ch. 75, § 1.

⁶⁸*Id.* ch. 75, § 1A(d).

⁶⁹*Id.* ch. 75, § 12.

The board of trustees shall have the authority to make any purchase or purchases in the amount of one hundred thousand dollars or less, and to purchase without limitation of amount . . . educational and scientific supplies and equipment, . . . emergency repairs and replacement parts . . . without recourse to any other state board. Such purchases shall be subject to competitive bids wherever practicable. The board of trustees shall promulgate regulations further defining the process for the purchase of said supplies.⁷⁰

“The board shall . . . cause to be prepared and submit to the secretary and to the board of higher education, in this chapter called the council, estimates of maintenance and capital outlay budgets for the university.”⁷¹ “A complete financial report covering all receipts and expenditures shall be made annually to the governor and the general court. Monthly statements of receipts and expenditures shall be made to the state comptroller.”⁷² The university must comply with state procurement laws for design services and capital facilities projects.⁷³

According to University of Massachusetts procurement policy, the President and the Chancellors may delegate authority to enter into and execute agreements for goods and materials, leases for any items, and for real property. Agreements relating to real property may be subject to planning policy requirements and must be approved by the General Counsel prior to execution. Agreements for information technology must comply with separate information technology acquisition policies.⁷⁴

There is a University of Massachusetts Building Authority empowered to provide dormitories and other buildings and structures upon request of the university.⁷⁵

State universities, colleges and community colleges have individual boards of trustees⁷⁶ authorized to manage real and personal property owned or occupied by the institution.⁷⁷ Spending plans must be submitted to the secretary and council of the board of higher education for review and transmittal to the legislature.⁷⁸ State universities colleges and community colleges have procurement authority for supplies and equipment.⁷⁹

There is a Massachusetts State College Building Authority and a Health and Educational Facilities Authority (HEFA) empowered to provide dormitories and other buildings and structures to colleges and community colleges.⁸⁰ Universities and colleges may participate in statewide contracts or purchasing consortiums.⁸¹

Energy Performance Contracting

The Division of Energy Resources has broad powers concerning energy conservation, including the power to enter into contracts and the power to acquire real and personal property related to its

⁷⁰*Id.* ch. 75, § 13.

⁷¹*Id.* ch. 75, § 1A(a); the university receives its appropriation in one sum. *Id.* ch. 15A, § 15.

⁷²*Id.* ch. 75, § 10.

⁷³*Id.* ch. 75, § 1 (citing ch. 7C, §§ 44 to 58 (relating to authority of the Division of Capital Asset Management and Maintenance)).

⁷⁴Univ. Mass. Proc. Policy, Doc. T92-031 (Passed by the BoT 6/392, last rev'd 9/17/14) (citing Information Technology Acquisition Policy, Doc. T08-086), <https://www.umassp.edu/university-resources>.

⁷⁵Mass. Gen. Laws Ann. ch. 75 App. §§ 1-1 to 1-12.

⁷⁶Mass. Gen. Laws Ann. ch. 15A, § 21.

⁷⁷*Id.* ch. 15A, § 22.

⁷⁸*Id.*

⁷⁹*Id.* ch. 73, § 15; ch. 15A, § 24, ch. 15A § 24A (allowing institutions of higher education to form a purchasing consortium).

⁸⁰*Id.* ch. 73 App. § 1-3; ch. 15A, § 11.

⁸¹*Id.*

purposes.⁸² State agencies, local government bodies or the judiciary may contract for energy conservation projects and the “costs associated with equipment purchase” that have a cost of \$100,000 or less directly with certain authorized providers.⁸³

Debt Limitations

There are no constitutional debt limitations. Counties, municipalities, and districts are limited statutorily in the amount of debt they may incur.⁸⁴ Regional school districts are also limited statutorily in the ability to incur debt.⁸⁵

In *Smith v. Dedham*,⁸⁶ a ten-year contract to supply water to the town for fire protection was challenged as an illegal creation of debt.⁸⁷ The court found that the contract was not a debt in the aggregate amount because the service was rendered on a yearly basis and was payable out of current revenues.⁸⁸

In *Ayer v. Commissioner of Education*,⁸⁹ the court struck down a “contract for lease” between a state office building association, as lessor, and the state, as lessee. The contract for lease ran for at least twenty-three years, did not condition the state’s payment obligation on the appropriation of funds, and provided that should the building not be completed or should it be destroyed before completion, the state’s obligation to pay rentals would not abate.

In *KVS Information Systems, Inc. v. Tisbury*,⁹⁰ the court, on a motion for summary judgment, analyzed a nonappropriation clause which provided the town the right to terminate its agreement to purchase a computer system if the town “should not for any reason appropriate funds sufficient to operate or maintain the [computer] system . . . provided that the town does not appropriate funds for any identical or similar system.”⁹¹

Interest Rate Limitations

“All bonds, notes and other securities issued by any county after [April 22, 1920], shall bear such rate or rates of interest as the county treasurer, with the approval of the county commissioners, may fix.”⁹² “All bonds, notes and other securities issued by cities or towns shall bear such rate or rates of interest as fixed by the city or town treasurer, with the approval of the mayor or selectman”⁹³ No provisions regarding school district bond interest rate limitations were found.

“Whoever in exchange for . . . a loan of money or other property knowingly contracts for, charges, takes or receives, directly or indirectly, interest and expenses, the aggregate of which exceeds an amount greater than twenty percent per annum . . . shall be guilty of criminal usury”⁹⁴

⁸²*Id.* ch. 25A § 6; ch. 25A § 11, 111.

⁸³*Id.* ch. 25A § 14.

⁸⁴*Id.* ch. 35, § 34 (counties) (1999); *id.* ch. 44, § 10 (municipalities); *id.* ch. 44, § 9 (districts).

⁸⁵*Id.* ch. 71, § 16(d), (n).

⁸⁶10 N.E. 782 (Mass. 1887).

⁸⁷*Id.* at 787.

⁸⁸*Id.*

⁸⁹165 N.E.2d 885 (Mass. 1960).

⁹⁰753 F. Supp. 1020 (D. Mass. 1990).

⁹¹*Id.* at 1022 n.2.

⁹²Mass. Gen. Laws Ann. ch. 35, § 39.

⁹³*Id.* ch. 44, § 22.

⁹⁴*Id.* ch. 271, § 49.

Miscellaneous

In *Andrews v. City of Springfield*,⁹⁵ the court voided a lease (with option to purchase at the lease end for one dollar) of a build-to-suit regional animal control center. Although the city had complied with the legal requirements for the acquisition under a lease, the court held that the legal requirements for a construction project including bidding procedures should have been followed instead. The detailed specification and architectural plans dictated by the city, the city's right to review and approve any changes to design and construction documents, the city's right to hire a construction manager to inspect and approve each phase of construction, as well as the one dollar purchase option, all contributed to the court's determination that the transaction was a construction project and not just a lease.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁹⁵75 Mass. App. Ct. 678 (2009), 915 NE2d 1133 (2009), *appeal denied*, 457 Mass. 1102 (2010).

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Michigan Compiled Laws Annotated, current through P.A.2016, No. 406, also 408 to 429, 431 to 460, 462 to 468, 478, 481 to 486, 489, 492 to 495, 500, 501, 505 to 510, 513, 517, 519, 521, 524, 526, 527, 531, 535, 536, 538, 543 to 545, 547, 551, 557, 559 to 563 of the 2016 Regular Session, 98th Legislature, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase and hold real and personal estate for the use of the county.”⁵ Counties may “[p]urchase or lease, for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk’s office, or other county building in that county.”⁶ Counties may also sell or lease real estate belonging to the county.⁷

County commissioners may enter into installment contracts “for the purchase of lands, property, or equipment.”⁸ The contract period may not extend “more than ten years, or the useful life of the property, whichever is less.”⁹ The aggregate outstanding balance of installment contracts “excluding interest, shall not exceed one-half of one percent of the equalized assessed value of real and personal property in the county.”¹⁰ These installment contracts are not subject to nonappropriation; however, the county is not authorized to levy taxes in excess of statutory limitations without the approval of the voters.¹¹

Counties may enter into leases and contracts with an authority incorporated by the county.¹²

Subject to restrictions, counties may acquire health care facilities by lease or installment purchase agreement.¹³

Local Government Loan Program

All Michigan units of local government are eligible to participate in the local government loan program offered by the Michigan Finance Authority which allows installment purchase contracts for items such as equipment, school buses, fire trucks, real property, energy conservation improvement, and infrastructure needs.¹⁴

Energy Performance Contracting

The board of county commissioners may acquire energy conservation improvements to facilities or infrastructure by installment contract or a lease-purchase contract as defined by the statute.¹⁵ “Energy

¹Counties may adopt charters. Mich. Const. art. VII, § 1; art. VII § 2; Mich. Comp. Laws § 45.502.

²*Id.* §§ 45.514 (; *id.* 46.11(e), (h)).

³*Id.* §§ 213.21, 213.23.

⁴*Id.* § 46.11.

⁵*Id.* § 45.3.

⁶*Id.* § 46.11(a).

⁷*Id.* § 46.11(c).

⁸*Id.* § 46.11b.

⁹*Id.*

¹⁰*Id.* § 46.11b (1), (2). Contracts and leases with an authority (*see, infra*, notes 47-51, and accompanying text), a public corporation or a municipality are not included in this calculation. *Id.*

¹¹*Id.* § 46.11b (1), (4).

¹²*See, infra*, notes 47-51 and accompanying text.

¹³Mich. Comp. Laws § 331.1305.

¹⁴http://www.michigan.gov/treasury/0,4679,7-121-1753_55952----,00.html.

¹⁵*Id.* § 46.11c.

conservation improvements may include, but are not limited to, heating, ventilating, or air-conditioning system improvements, fenestration improvements, roof improvements, the installation of any insulation, the installation or repair of heating, ventilating, or air-conditioning controls, entrance or exit way closures, information technology improvements associated with an energy conservation improvement, and municipal utility improvements associated with an energy conservation improvement.”¹⁶ Such contracts may not extend beyond twenty years or the useful life of the improvements.¹⁷

Municipalities

Municipalities¹⁸ qualify as tax-exempt issuers for federal income tax purposes due to their tax,¹⁹ eminent domain²⁰ and police powers.²¹ Municipalities may “acquire and hold real and personal property for the purposes for which they are incorporated.”²² Municipalities may provide by charter the power to acquire real and personal property by “purchase, gift, condemnation, lease, construction, or otherwise.”²³

Municipalities may enter into installment contracts for the purchase of real or personal property.²⁴ The contract period shall be for “a period not to exceed fifteen years and not to exceed the useful life of the property,”²⁵ except that the determined useful life of school busses shall not exceed six years.²⁶ These installment contracts are not subject to nonappropriation; however, the municipality is not authorized to levy taxes in excess of statutory or charter limitations without the approval of the voters.²⁷ The contract period for acquiring fire trucks and apparatus shall not exceed six years.²⁸ The aggregate outstanding balance of installment contracts “exclusive of interest, shall not exceed one and one-fourth percent of the taxable value of the real and personal property in such [municipality].”²⁹

Municipalities may also enter into leases and contracts with an authority incorporated by the municipality.³⁰

Subject to restrictions, cities and villages may acquire health care facilities by lease or installment purchase agreement.³¹

Local Government Loan Program

All Michigan units of local government are eligible to participate in the local government loan program offered by the Michigan Finance Authority which allows installment purchase contracts for

¹⁶*Id.*

¹⁷*Id.* § 46.11c(2).

¹⁸Municipalities for purposes of this discussion are cities, townships and villages. Cities may be home rule. Mich. Const. art. VII, § 22; Mich. Comp. Laws § 81.1c. All may adopt charters. *Id.* §§ 42.1, 78.11, 81.1c.

¹⁹*Id.* § 117.3 (cities); *id.* § 41.3 (townships); *id.* § 69.1 (villages).

²⁰*Id.* §§ 213.21, 213.23.

²¹*See, supra*, note 18.

²²Mich. Comp. Laws § 81.15 (fourth class cities); *id.* §41.2 (townships; similar provision); *id.* § 61.12 (villages; similar provision).

²³*Id.* § 117.4e (cities); *id.* § 41.2 (townships, similar provision). Villages may “acquire, purchase, and erect public buildings, required for the use of the village . . .” *Id.* § 67.4.

²⁴*Id.* § 123.721 (LexisNexis 2012).

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* § 123.721.

²⁸*Id.* § 141.451.

²⁹*Id.* Contracts and leases with an authority (*see, infra*, notes 47-51 and accompanying text), a public corporation or a municipality are not included in this calculation. *Id.*

³⁰*See, infra*, notes 47-51 and accompanying text.

³¹Mich. Comp. Laws § 331.1305.

items such as equipment, school buses, fire trucks, real property, energy conservation improvement, and infrastructure needs.³²

Energy Performance Contracting

Subject to numerous requirements, municipalities may acquire energy conservation improvements or infrastructure by installment contract or by lease-purchase agreements as defined by the act.³³ “Energy conservation improvements may include, but are not limited to, heating, ventilating , or air-conditioning system improvements, fenestration improvements, roof improvements, the installation of any insulation, the installation or repair of heating, ventilating, or air-conditioning controls, entrance or exit way closures, information technology improvements associated with an energy conservation improvement, and municipal utility improvements associated with an energy conservation improvement.”³⁴ Such contracts may not extend beyond twentyyears.³⁵

School Districts

School districts qualify as tax-exempt issuers for federal income tax purposes due to their tax³⁶ and eminent domain powers.³⁷ School districts, like municipalities, may enter into contracts for the purchase of real or personal property.³⁸ “[A school district] may acquire by purchase, lease, or rental, with or without option to purchase, equipment necessary for the operation of the school program, including, but not limited to, heating, water heating, and cooking equipment for school buildings, and may pay for the equipment from operating funds of the district Heating and cooking equipment may be purchased on a title retaining contract or other form of agreement creating a security interest and pledging in payment money in the general fund or funds received from state school aid. The contracts may extend for not more than ten years.”³⁹

1. The governing body of a school district may enter into a contract for the purchase of telecommunication and related services for school purposes to be paid for in installments over a period not to exceed the useful life of the service or the term of the contract, whichever is shorter. However, if the governing body borrows funds to pay for telecommunication and related services, the total cost of principal, interest, and fees, and expenses of borrowed funds, shall not exceed the total amount of the original service installment contract.⁴⁰

School districts may also enter into leases and contracts with an authority incorporated by the school district.⁴¹

Local Government Loan Program

All Michigan units of local government are eligible to participate in the local government loan program offered by the Michigan Finance Authority which allows installment purchase contracts for items such as

³² http://www.michigan.gov/treasury/0,4679,7-121-1753_37610-5605--,00.html; Mich. Comp. Laws §§ 141.1051 to 2049a.

³³*Id.* § 41.75b (townships); *id.* § 68.36 (villages); *id.* § 78.24b (home rule villages); *id.* § 117.5f (cities).

³⁴*Id.*

³⁵*Id.*

³⁶Mich. Comp. Laws § 380.1613

³⁷*Id.* §§ 213.21 (LexisNexis 2004), 213.23 (LexisNexis Supp. 2012).

³⁸*See, supra*, notes 24-29 and accompanying text..

³⁹*Id.* § 380.1274(6). (school districts); *id.* § 380.623a(6) (intermediate school districts, similar provision). *See id.* § 380.1274(2) and (3) and § 380.623a(2), (3), and (4) for public bidding requirements applicable to certain transactions.

⁴⁰*Id.* § 123.721a.

⁴¹*See, infra*, notes 47-51 and accompanying text.

equipment, school buses, fire trucks, real property, energy conservation improvement, and infrastructure needs.⁴²

2. *Energy Performance Contracting*

The board of a school district or intermediate school district may acquire energy conservation improvements by contract.⁴³ These contracts may contain a written financial guarantee providing that the costs of improvements will be paid only if the energy savings are sufficient to cover them.⁴⁴ “Energy conservation improvements may include, but are not limited to, building envelope improvements; heating and cooling upgrades; lighting retrofits; installing or upgrading an energy management system; motor, pump, or fan replacements; domestic water use reductions; and upgrading other energy consuming equipment or appliances.”⁴⁵ These contracts are subject to public bidding requirements.⁴⁶

Authorities

A county, city, village, township, intermediate school district or other school district (the “incorporating unit or units”) may incorporate authorities for the purpose of acquiring, furnishing, equipping, owning, improving, enlarging, operating and maintaining various facilities.⁴⁷ The authority issues bonds to finance the facility and then leases the facility to the incorporating unit or units for a period not to exceed fifty years.⁴⁸ Unless specifically stated to the contrary in the contract of lease, the underlying lease is a general obligation of the incorporating unit or units.⁴⁹ No voter approval is required unless a referendum petition is filed.⁵⁰ The authority has the power of condemnation.⁵¹ The procedures for use of an authority are rather extensive and considerable case law interpreting these procedures exists.

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

Procurement for state agencies⁵² is centralized in the Department of Technology, Management and Budget (DTMB).⁵³ The State Administrative Board provides supervision over agencies and the

⁴²http://www.michigan.gov/treasury/0,4679,7-121-1753_37610-5605--,00.html; Mich. Comp. Laws §§ 141.1051 to 2049a.

⁴³*Id.* § 380.1274a.

⁴⁴*Id.*

⁴⁵*Id.* Note that the statutory language relating to energy conservation improvements for school districts differs from that for counties and municipalities.

⁴⁶*Id.*

⁴⁷Mich. Comp. Laws §§ 123.951 to 123.965. Two or more cities, villages, or townships may join to form a hospital authority and issue bonds for acquiring or maintaining or operating hospitals. *Id.* § 331.1.

⁴⁸*Id.* § 123.958.

⁴⁹*Id.* § 123.958a.

⁵⁰*Id.* § 123.958b.

⁵¹*Id.* § 123.959.

⁵²“State agency” means a department, board, commission, office, agency, authority, or other unit of state government. State agency does not include an institution of higher education or a community college or, for purposes of article 2 or 3, the legislative branch of government. For purposes of article 2 or 3, except for those sections pertaining to the authorization, planning, construction, and funding of a capital outlay project, including construction of a facility to house offices or functions necessary for operation of the judicial branch of government, state agency does not include the judicial branch of government. *Id.* §18.1115(4).

capital outlay process and exercises approval over expenditures and leases.⁵⁴ The DTMB is required to provide for supplies, third party financing, equipment, and “other items as needed by state agencies for which the legislature has not otherwise expressly provided” and “may enter into lease purchases or installment purchases for periods not exceeding the anticipated useful life of the items purchased unless otherwise prohibited by law.”⁵⁵ Acquisition of information technology is included within the authority of the DTMB,⁵⁶ as is the acquisition of telecommunications.⁵⁷ Competitive solicitation is generally required.⁵⁸ Contracts without fixed dollar values but which are estimated to be \$250,000 or more require State Administrative Board approval.⁵⁹

All executive branch departments and sub-units are generally required to use the services of DTMB Real Estate Division (RED) to purchase property for use by the state of Michigan and all purchases must be approved by the Legislature.⁶⁰

The DTMB is responsible for overseeing lease purchases for capital outlay⁶¹ projects or facilities for which an appropriation or other authorization has been made.⁶² However, it appears that acquisitions of buildings and facilities by the Department of Transportation, Department of Military and Veterans Affairs and Department of Natural resources may be excluded from the oversight of the DTMB.⁶³ “The attorney general shall review all standard lease and lease purchase agreement formats and approve any exception to the standard formats.”⁶⁴ Lease contracts are also subject to review of the State Administrative Board.⁶⁵

The following statute appears to be applicable to a fair market value lease:

- (1) Any type of contract which is in the best interest of the state may be used.
- (2) A short-term lease contract agreement (1 to 4 years) may be used when a building requires little or no remodeling in order to allow the department or agency maximum flexibility and mobility in accordance with siting policy objectives.
- (3) A long-term lease contract (5 to 10 years) may be used in the following situations:

⁵³*Id.* § 18.1261. Executive Reorganization Order 2009-39 reorganized government and renamed the Department of Management and Budget the Department of Technology, Management & Budget, transferring to powers and duties of the Department of Technology. References to the Department of Technology and Department of Management & Budget remain in the statutes.

⁵⁴*Id.* § 17.3; State of Michigan Administrative Guide to State Government, Procedure 0620.01, (Issued Sept. 3 1996, Rev. Jan. 31, 2014). Published and maintained in an electronic form on the DTMB website: http://www.michigan.gov/documents/dmb/0620.01_182495_7.pdf.

⁵⁵Mich. Comp. Laws § 18.1261.

⁵⁶*Id.* § 18.41; Mich. Admin. Guide to State Gov’t, Policy 1305.00, (Issued: April 12, 2007, Revised Dec. 21, 2012).

⁵⁷Mich. Comp. Laws § 18.33.

⁵⁸Mich. Comp. Laws § 18.1261.

⁵⁹Mich. Admin. Guide to State Gov’t, Policy, 0620.02, Submissions to the Finance and Claims Committee, (Issued Sept. 3, 1996, Rev. Jan. 13, 2014).

⁶⁰Mich. Comp. Laws § 18.1221; Mich. Admin. Guide to State Gov’t, 0110.05 Purchase of Real Property (Issued January 1 1994; Updated, January 12, 2012). Real Estate/Leasing Services for the state can be found online at <http://michigan.gov/dmb>.

⁶¹“Capital outlay” means a project or facility financed either in whole or in part with state funds, including lease purchase agreements, to demolish, construct, renovate, or equip a building or facility for which total project costs exceed \$1,000,000.00. These projects may be on state owned property, property owned by an institution of higher education, property owned by community colleges, or property under the control of the state building authority. Mich. Comp. Laws § 18.1113.

⁶²*Id.* § 18.1237; Mich. Admin. Guide to State Gov’t, 0110.07 (Issued 1/1/94, revised March 13, 2012); *id.* 0110.08 (Issued 1.1 1994, revised March 13, 2012).

⁶³Mich. Comp. Laws § 18.321. Reorganization of the executive branch by orders of the Governor leaves coverage unclear.

⁶⁴*Id.* § 18.237.

⁶⁵Mich. Admin. Code Rule 18.502 (Department of Technology, Management and Budget Real Estate Division); Mich. Admin. Guide to State Gov’t, 0620.01, Obtaining State Administrative Board Approval (Issued Sept. 3, 1996) (board approval requirement applies to universities and state agencies).

- (a) A building is to be extensively remodeled or rehabilitated by the lessor to meet state requirements.
- (b) A building is to be constructed for a specific use by a state department or agency.
- (c) The building and location best serves the interest of the state.⁶⁶

The following provides a tax-exemption from property taxes for an “installment lease agreement,” so long as the state is required to pay the taxes or reimburse the lessor for such payment.

Property acquired for the state or a state agency through an installment lease agreement is public property and shall be considered exempt for purposes of the general property tax act, Act No. 206 of the Public Acts of 1893, being sections 211.1 to 211.157 of the Michigan Compiled Laws, if the state as lessee under the installment lease agreement is required to pay any taxes or reimburse the lessor for any payments the lessor has made.⁶⁷

The state⁶⁸ may lease facilities and equipment through the State Building Authority.⁶⁹ The state may lease real property to and from any state public building corporation.⁷⁰

Higher Education

Each institution of higher education has “control and discretion of all expenditures from the institution’s funds.”⁷¹ Purchasing authorities for each institution differ and can be found in the bylaws and policies issued by an institution’s controlling board. Some policies of the University of Michigan, Michigan State University and Wayne State University are presented here.

The bylaws of the Board of Regents of the University of Michigan grant authority over finances, real property, and purchases of the university in the executive vice president and chief financial officer.⁷² All transactions involving the purchase of real property shall be approved and authorized by the board and conveyances of university property shall be executed by the president, the executive vice president, and chief financial officer.⁷³

All routine contracts for the purchase, sale or loan of supplies or equipment within authorized budgets may be executed by the executive vice president and chief financial officer, provided, however, that the executive vice president and chief financial officer is authorized to delegate in writing to the vice president and secretary, the associate vice president for finance, the associate vice president for business operations, [or] the purchasing agent, or other designated representatives authority to execute such contracts.⁷⁴

All other documents involving real or personal property transactions and vendor service contracts shall be executed by the executive vice president and chief financial officer; provided, however, that the executive vice president and chief financial officer may delegate in writing to the secretary, the associate vice president for finance, or other designated representatives authority to execute such documents.⁷⁵

⁶⁶Mich. Admin. Code Rule 18.504.

⁶⁷Mich. Comp. Laws. § 18.1222.

⁶⁸“State” means legislative, executive and judicial branches of state government and institutions of higher education. *Id.* § 830.411.

⁶⁹*Id.* §§ 830.411 to 830.425.

⁷⁰*Id.* § 17.251.

⁷¹Mich. Const. art. VIII (Regents of the University of Michigan; Board of Trustees of Michigan State University; Board of Governors of Wayne State University). Each institution has a president who is the principal executive officer. Other institutions of higher education are governed by a “board of control” and the president of the institution is the principal executive officer. *Id.* Art. VIII, § 6.

⁷²Univ. of Mich. Bd. of Regents Bylaws, sec. 3.01 (revised Nov. 1993).

⁷³*Id.* sec. 3.07 (revised Nov. 2015).

⁷⁴*Id.*

⁷⁵*Id.*

The Board of Trustees of Michigan State University bylaws provide that the acquisition of all real estate and other property for university purposes shall first be approved by the Board of Trustees.⁷⁶

By directive of the Michigan State University Board of Trustees, only the President, the Secretary to the Board, the Vice President for Finance and Operations and Treasurer, the Assistant Vice President for Finance and the Purchasing Department have the authority to bind the university's financial resources through the execution of lease, lease-purchase or installment purchase agreements. Individual university departments have not been granted that authority.

University departments considering a lease, lease-purchase or installment purchase agreement must submit a requisition and a proposed agreement to the Purchasing Department for review and approval.⁷⁷

Elsewhere, the Manual of Business Procedures provides the following information relating to lease-purchases:

A. External Lease agreements are to be signed by the Assistant Vice President for Finance and Operations or the Vice President for Finance and Operations and Treasurer or in certain cases by the Director of University Services.

B. Equipment lease agreements are signed by the Director of University Services or higher authority level.

C. As an alternative to external leases, University Services offers a Lease Purchase Program. Advantages to the lease purchase program include the university's ownership of the equipment mitigating potential personal property tax fees; ease of execution as there is no lease agreement requiring review by the buyer or by legal staff; the interest income remains within the institution.⁷⁸

Wayne State University's President or his/her designee is empowered to execute contracts, agreements, and leases as authorized by statute or resolution.⁷⁹ University statutes provide that [c]ontracts for the acquisition of equipment, whether by direct purchase or by a capital lease, with a purchase price of \$1,000,000 or more, shall first be approved by the Board.⁸⁰ All transactions involving the purchase, sale or other disposition of real property over \$100,000 shall be first approved and authorized by the Board.⁸¹

All contracts for the lease of real property by the University shall be executed by the President or his/her designee. Leases of real property for a period longer than 120 months or for more than \$200,000 annually in net rental cost during the original term of the lease must first be approved by the Board. For the purpose of this provision, if a lease includes an unconditional right of renewal for either party, then the duration of the lease is the original term together with the period covered by the unconditional right of renewal.⁸²

Contracts for the purchase of supplies, equipment or the services of independent contractors requiring the expenditure of budgeted funds in excess of \$25,000 shall be awarded on the basis of competitive bids. The President or his/her designee(s) may grant a written exception in the case of contracts requiring highly specialized service for which a public bid would not be appropriate. . . .⁸³

[A]ll contracts for the construction of new facilities shall require prior approval of the Board.⁸⁴

⁷⁶Mich. State Univ. Bd. Of Trustees Bylaws, Art. 11. Construction project approval is provided for in Policy 02-06-01(04-13-06, amended 02-22-08), expenditure policy 05-07-02 (12/3/76 as amended 12/2/83).

⁷⁷MBP 320: Lease, Lease-Purchase and Installment Purchase Agreements (Last Updated: April 2012), <http://usd.msu.edu/purchasing/about/mbp-320.html>. Additional information on the internal approval process for Purchasing is set forth therein.

⁷⁸*Id.* § 270.11.6.

⁷⁹Bd. Of Governors Bylaws, sec. 2.2 (Revised Nov. 28, 2007).

⁸⁰Wayne St Univ. Statute § 2.81.01.075 (Oct 15, 1976 as amended through Oct 3, 2012).

⁸¹*Id.* § 2.81.01.050.

⁸²*Id.* § 2.81.01.055.

⁸³*Id.* § 2.81.01.080.

⁸⁴*Id.* § 2.81.01.090.

All contracts (purchase orders) for furnishings and equipment related to new construction or alteration/modification projects in excess of \$200,000, which exceed \$200,000 for an item or the aggregate of an item shall require prior approval of the Board. The President or his/her designee shall execute such contracts upon approval.⁸⁵

Certain institutions of higher education have borrowing powers under substantially similar provisions to the following:

The board shall not borrow money on its general faith and credit, nor create any liens upon its property. The board, however, may borrow money to be used to acquire land or to acquire or erect buildings, or to alter, equip, or maintain them, to be used as dormitories, student centers, stadiums, athletic fields, gymnasiums, auditoriums, and other related activities, and it shall obligate itself for the repayment thereof, together with interest thereon, solely out of the fund derived from rentals or other income from the use and operation of the property so acquired, or from special fees and charges required to be paid by the students deemed by it to be benefited thereby; and may pledge all or any part of the fund as security therefor.⁸⁶

Institutions of higher education can lease property from the State Building Authority⁸⁷ and obtain low cost financing from the Michigan Finance Authority.⁸⁸

3. *Energy Performance Contracting*

A state agency may enter into a multi-year contract for energy conservation improvements to state facilities which would be paid for from the avoided operating costs for utility service or fuel produced by the improvements.⁸⁹

A state agency, department, or state authority may enter into a energy performance contract and may “implement other capital improvements in conjunction with an energy performance contract if the measures that are being implemented to achieve energy and operation and maintenance cost savings are a significant portion of an overall project.”⁹⁰ Installment contracts, lease-purchase agreements and provisions for third-party financing separate from the guaranteed energy savings contract are permitted.⁹¹

Debt Limitations

The state of Michigan is constitutionally and statutorily limited in the amount of debt it may incur.⁹² Counties are constitutionally limited in the amount of debt they may incur.⁹³ Municipalities and school districts are statutorily limited in the amount of debt they may incur.⁹⁴

⁸⁵*Id.* § 2.81.01.120.

⁸⁶Mich. Comp. Laws. § 390.646 (Wayne St. Univ.); *id.* § 390.558 (Central, Eastern, Northern, and Western Michigan Universities); *id.* § 390.396 (Lake Superior St. Univ.). There appears to be no similar statute for the University of Michigan.

⁸⁷*Id.* §§ 830.411 to 830.425.

⁸⁸Several authorities were consolidated as the Michigan Finance Authority under executive order 2019-2 March 4, 2010 (including the Higher Education Facilities Authority) Mich. Comp. Laws § 12.194...

⁸⁹Mich. Comp. Laws. § 18.1253(this provision appears to apply to personalty). “‘Energy conservation measure’ means improvement of a building structurally or the installation of equipment or materials in a building for the purpose of reducing energy consumption or cost, increasing energy efficiency, or allowing the use of a renewable resource for fuel.” *Id.* § 18.1113.

⁹⁰*Id.* § 18.1716 (a governmental unit shall not enter into an energy savings performance contract for a period of more than 1 year unless the governmental unit finds that the amount the governmental unit would spend on the cost-savings measures will not exceed the amount to be saved in energy, water, wastewater, and operating costs over 15 years or the average useful life of the measures from the date of installation).

⁹¹*Id.* § 18.1722.

⁹²Mich. Const. art. IX, §§ 12 to 15.; Mich. Comp. Laws § 17.452.

⁹³Mich. Const. art. VII, § 11. The limit is 10% of assessed value and the installment contracts authorized in the Counties section, *supra*, are designed to not exceed these limits.

⁹⁴*See, generally*, Mich. Comp. Laws ch. 141 (municipalities); *id.* ch. 380 (school districts).

In *Bacon v. City of Detroit*,⁹⁵ the court upheld a contract between the city and a county to provide incinerators for the disposal of garbage for a term of ten years.⁹⁶ The court said “a contract for future services to be paid for as rendered is not the incurring of indebtedness.”⁹⁷ In *Walinski v. Detroit-Wayne County Joint Building Authority*,⁹⁸ the court considered the validity of a proposed lease by the authority to the city and county. The court said that a long-term lease could be valid provided that the lease did not have attributes of a purchase.⁹⁹ In *People v. Doyle & Associates*,¹⁰⁰ the court again considered the validity of a long-term lease. The court held the lease, which unconditionally bound the county for ten years, to be invalid because the rental was unreasonable for the facility.¹⁰¹ The court said the agreement was in fact a purchase agreement and that “reasonable rental . . . would be very substantially less than the monthly payments agreed to be paid.”¹⁰²

Finally, in *Alan v. County of Wayne*,¹⁰³ the court considered a lease between a county and an authority for a stadium.¹⁰⁴ In this case the court reviewed the history of lease-purchase agreements and arrived at the following “bench marks,”¹⁰⁵ which the court would consider in determining whether an agreement was a lease and thus not creating a debt, or a purchase and thus creating a debt:

1. The municipality must for a true rent situation be the actual user of the public improvement
2. A true rent payment must be reasonable in that it must bear a direct relation to the economic or market value to the county of its actual use of the public improvement.
3. A true rent payment may include operating costs if they are a normal part of such a rental and the total payment of rent and/or including operating costs is reasonable
4. Whether the addition of passage of title to the public improvement at the conclusion of the “rent” payments creates a debt is something on which we express no present opinion
5. The municipality in connection with its contract to pay “rent” may make no unconditional covenant to pay despite such contingencies as would make the facility unavailable for use by the renter without creating a debt whether or not title passes.
6. The municipality may not pledge its full faith and credit to support its rent without creating a debt.¹⁰⁶

Interest Rate Limitations

“A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of

⁹⁵275 N.W. 800 (Mich. 1937).

⁹⁶*Id.* at 801.

⁹⁷*Id.* at 802. *See also* *County Drain Comm’r v. City of Royal Oak*, 10 N.W.2d 435, 446 (Mich. 1943) (no debt created in aggregate amount of contract). *But see* *Niles Water Works v. City of Niles*, 26 N.W. 525, 526 (Mich. 1886) (contract to provide water to city for a term of thirty years invalid, as exceeding city’s debt limit; city liable for aggregate amount of contract); *Putnam v. City of Grand Rapids*, 25 N.W. 330 (Mich. 1885) (contract to provide light to city for five years invalid because the city was without authority to bind itself for a term greater than one year).

⁹⁸39 N.W.2d 73 (Mich. 1949).

⁹⁹*Id.* at 80. The court said it would look to whether the rental payments were reasonable for the property and whether or not title to the property would be conveyed to the city and county at the end of the term. *Id.* at 80.

¹⁰⁰132 N.W.2d 99 (Mich. 1965).

¹⁰¹*Id.* at 102.

¹⁰²*Id.*

¹⁰³200 N.W.2d 628 (Mich. 1972).

¹⁰⁴*Id.* at 667-674.

¹⁰⁵*Id.* at 678.

¹⁰⁶*Id.* These provisions have been renumbered in the text above and those provisions which do not apply to lease-purchase agreements were omitted.

any money or other property, at a rate exceeding twenty-five percent at simple interest per annum or the equivalent rate for a longer or shorter period.”¹⁰⁷

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰⁷Mich. Comp. Laws § 438.41.

MINNESOTA 2017

Current with legislation through Chapter 10 of the 2017 Regular Session. the Statutes are subject to change as determined by the Minnesota Revisor of Statutes, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax² and eminent domain powers.³ Each county may “[a]cquire and hold real and personal property,”⁴ may “sell, lease, and convey real or personal estate . . . conducive to the interests of the county’s inhabitants”⁵ and may “[m]ake all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.”⁶

A home rule charter city, statutory city, county, town, or school district may purchase personal property under an installment contract, or lease real or personal property with an option to purchase under a lease-purchase agreement, by which contract or agreement title is retained by the seller or vendor or assigned to a third party as security for the purchase price, including interest, if any, but such purchases are subject to statutory and charter provisions applicable to the purchase of real or personal property. For purposes of the bid requirements contained in section 471.345, “the amount of the contract” shall include the total of all lease payments for the entire term of the lease under a lease-purchase agreement. The obligation created by a lease-purchase agreement for personal property or a lease-purchase agreement for real property if the amount of the contract for purchase of the real property is less than \$1,000,000 shall not be included in the calculation of net debt for purposes of section 475.53, and shall not constitute debt under any other statutory provision. No election shall be required in connection with the execution of a lease-purchase agreement authorized by this section. The city, county, town, or school district must have the right to terminate a lease-purchase agreement at the end of any fiscal year during its term.⁷

“Notwithstanding any other contrary law, a county may enter into a rental purchase agreement or conditional sales agreement to acquire road equipment but the seller shall be limited to the remedy of recovery of the property in case of nonpayment of all or part of the purchase price.”⁸ “The purchase price shall be payable over not more than five years.”⁹

Counties and other units of local government may acquire used public safety equipment by purchase or lease without competitive bidding or proposals “if the equipment is clearly and legitimately limited to a single source of supply, and the contract price may be best established by direct negotiation.”¹⁰ Long-term leases for a term of up to 15 years to acquire new or used public safety equipment do not constitute debt and no election is required in connection with their execution.¹¹

Energy Performance Contracting

Energy conservation or savings contracts may be financed, provided monthly payments under the financing agreement are not less than one twentieth of the price to be paid within two years from the date

¹Counties may adopt a home rule charter. Minn. Const. art. XII, § 4.

²Minn. Stat. Ann. § 275.07.

³*Id.* § 375.18 Subd. 9.

⁴*Id.* § 373.01 Subd. 1(a)(2).

⁵*Id.* § 373.01 Subd. 1(a)(4) Advertising for bids is required for leases exceeding \$15,000. *Id.* § 373.01 Subd. 1(b) and (c).

⁶*Id.* § 373.01 Subd. 1(5).

⁷*Id.* § 465.71. Counties, cities, school districts and other political subdivisions of the state are subject to the Uniform Municipal Contracting Law, *id.* § 471.345, cited herein.

⁸*Id.* § 373.01 Subd. 2.

⁹*Id.*

¹⁰*Id.* § 471.3455 (public safety equipment means “vehicles and specialized equipment used by a fire department, as defined in section 299N.01, subdivision 2, in firefighting, ambulance and emergency medical treatment services, rescue, and hazardous materials response”).

¹¹*Id.*

of the first operation and do not exceed twenty years.¹² These contracts are subject to detailed statutory requirements, including a provision that states “[t]he municipality shall include in its annual appropriations measure for each later fiscal year any amounts payable under guaranteed energy savings contracts during the year.¹³ Failure of a municipality to make such an appropriation does not affect the validity of the guaranteed energy savings contract or the [county’s] obligations under the contracts.”¹⁴

Counties may participate in standard financing arrangements, which include tax-exempt lease-purchase financing, for energy cost savings measures in buildings, pursuant to a program administered by the commissioner of commerce.¹⁵

Municipalities

Municipalities¹⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁷ eminent domain¹⁸ and police powers.¹⁹ “A home rule charter city [or] statutory city . . . may purchase personal property under an installment contract, or lease real or personal property with an option to purchase under a lease-purchase agreement.”²⁰ A home rule charter city or statutory city may acquire public safety equipment by lease.²¹

Municipalities must comply with public bidding laws and for contracts for materials or equipment estimated to exceed \$25,000, municipalities must consider participating in the state’s cooperative purchasing program authorized by section 16C.11.²²

Energy Performance Contracting

Energy conservation or savings contracts may be financed, provided monthly payments under the financing agreement are not less than one twentieth of the price to be paid within two years from the date of the first operation and do not exceed twenty years. These contracts are subject to detailed statutory requirements, including a provision that says: “The municipality shall include in its annual appropriations measure for each later fiscal year any amounts payable under guaranteed energy savings contracts during the year. Failure of a municipality to make such an appropriation does not affect the validity of the guaranteed energy savings contract or the municipality’s obligations under the contracts.”²³

Municipalities may participate in standard financing arrangements, which include tax-exempt lease-purchase financing, for energy cost savings measures in buildings, pursuant to a program administered by the commissioner of commerce.²⁴

¹²*Id.* § 471.345.13. *See also*, Minn. Dept. of Commerce website: <http://mn.gov/commerce/energy/topics/financial/Energy-Savings-Program/Performance-Contracts/index>.

¹³*Id.*

¹⁴*Id.*

¹⁵Minn. Stat. Ann. §§ 216C.42 and 216C.43.

¹⁶Municipalities for purposes of this discussion are cities of every class. Municipalities may adopt a home rule charter. Minn. Const. art. XII, §4; Minn. Stat. Ann. ch. 410.

¹⁷Minn. Stat. Ann. § 275.07.

¹⁸*Id.* § 465.01.

¹⁹*See generally id.* chapters 436, 437 and 471.

²⁰*Id.* § 465.71. *See, supra*, note 7 and accompanying text for discussion of this provision.

²¹*Id.* § 471.3455. *See, supra*, note 10 and accompanying text for discussion of this provision.

²²*Id.* § 471.345 Subd. 13.

²³*Id.* § 471.345.13.

²⁴*See, supra*, note 15 and accompanying text.

School Districts

School districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ “A . . . school district may purchase personal property under an installment contract, or lease real or personal property with an option to purchase under a lease purchase agreement” pursuant to section 465.71.²⁸

When a district finds it economically advantageous to rent or lease a building or land for any instructional purposes or for school storage or furniture repair, and it determines that the operating capital revenue authorized under section 126C.10, subdivision 13, is insufficient for this purpose, it may apply to the commissioner for permission to make an additional capital expenditure levy for this purpose. An application for permission to levy under this subdivision must contain financial justification for the proposed levy, the terms and conditions of the proposed lease, and a description of the space to be leased and its proposed use. . . . For agreements finalized after July 1, 1997, a district may not levy under this subdivision for the purpose of leasing: (1) a newly constructed building used primarily for regular kindergarten, elementary, or secondary instruction; or (2) a newly constructed building addition or additions used primarily for regular kindergarten, elementary, or secondary instruction that contains more than 20 percent of the square footage of the previously existing building The total levy under this subdivision for a district for any year must not exceed \$212 times the resident pupil units for the fiscal year to which the levy is attributable.²⁹

If the lease-purchase agreement was approved by the commissioner before July 1, 1990, or the district levied in 1989 for such lease-purchase payments, the district may levy annually the amount necessary to make payments required by a lease-purchase agreement pursuant to § 465.71.³⁰

When authorized by the voters at a regular meeting or at a special meeting called for that purpose, the board [of a common school district] may acquire necessary sites for school houses, or enlargements or additions to existing school house sites, by lease, [or] purchase . . . ; [may] lease . . . or purchase garages for . . . school buses . . . [and] may acquire by lease, [or] purchase . . . suitable tracts of land . . . for the purpose of instruction, experimentation and demonstration in agriculture.³¹

When authorized by a two-thirds majority of all the electors voting at an annual or special meeting, the board [of a common school district] may . . . purchase, or acquire a dwelling house for the use of its teachers.³²

Schools may acquire real property:

According to section 126C.40, subdivision 1, or 465.71, when funds are available, the board may locate and acquire necessary sites of schoolhouses or enlargements, or additions to existing schoolhouse sites by lease, purchase or condemnation under the power of eminent domain; it may erect schoolhouses on the sites; it may erect or purchase garages for district-owned school buses. When property is taken by eminent domain by authority of this subdivision when needed by the district for such purposes, the fact that the property has been acquired by the owner under the power of eminent domain or is already devoted to public use, shall not prevent its acquisition by the district. The board may sell or exchange schoolhouses or sites, and execute deeds of conveyance thereof.³³

²⁵School districts are classified as common, independent, or special districts. *Id.* § 123A.55.

²⁶*Id.* § 275.07.

²⁷*Id.* § 123B.74.

²⁸*See, supra*, note 7 and accompanying text for discussion of this provision.

²⁹Minn. Stat. Ann. § 126C.40 Subd. 1(a), (c), (e).

³⁰*Id.* Subd. 2.

³¹*Id.* § 123B.97.

³²*Id.* Subd. 3.

³³*Id.* § 123B.51.

Review and comment by the commissioner of education may be required prior to initiation of an installment contract for purchase or a lease agreement for construction.³⁴

Energy Performance Contracting

“A school district may enter into an installment payment contract for the purchase and installation of energy conservation measures. The contract must provide for payments of not less than one fifteenth of the price to be paid within two years from the date of the first operation, and the remaining costs to be paid monthly, not to exceed a 15-year term from the date of the first operation.”³⁵ Failure of the school district to make appropriations for payments under guaranteed energy savings contracts does not affect the validity of the contracts or the school district’s obligations.³⁶

School districts may participate in standard financing arrangements, which include tax-exempt lease-purchase financing, for energy cost savings measures in buildings, pursuant to a program administered by the commissioner of commerce.³⁷

Fire Districts

Although there are statutory references to fire districts there appears to be no statutory framework for them.

Hospital Districts

Hospital districts³⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.³⁹ Hospital districts “may acquire real and personal property as needed. It may hold, manage, control, sell, convey, or otherwise dispose of the property as its interests require.”⁴⁰ District boards may “lease, purchase, and contract for the purchase of real and personal property by option, contract for deed, conditional sales contract, or otherwise.”⁴¹ “Real, personal, or mixed properties that are acquired, owned, leased, controlled, used, or occupied by a district for the purposes of sections 447.31 to 447.37 are exempt from taxation by the state or its political subdivisions.”⁴² Hospital districts may acquire public safety equipment by lease.⁴³

Energy Performance Contracting

Energy conservation or savings contracts may be financed, provided monthly payments under the financing agreement are not less than one twentieth of the price to be paid within two years from the date of the first operation and do not exceed twenty years. These contracts are subject to detailed statutory

³⁴*Id.* § 123B.71.

³⁵*Id.* § 123B.65.. Energy conservation measure means . . . “a facility alteration designed to reduce energy consumption or operating costs” *Id.* § 123B.65 Subd. 1(a). *See also, Id.* § 471.345 Subd. 13 ,which provides that a contract that includes a written guarantee that savings will meet or exceed the cost of energy conservation measure is not subject to competitive bidding requirements or subject to section 123B.52.

³⁶*Id.*, Subd. 9.

³⁷*See, supra*, note 15 and accompanying.

³⁸Hospital districts are municipal corporations. *Id.* § 447.31 Subd. 6. Hospital districts are special taxing districts. *Id.* § 275.066.

³⁹*Id.* § 447.33 Subd. 2(7).

⁴⁰*Id.* § 447.31 Subd. 6.

⁴¹*Id.* § 447.33 Subd. 2(3).

⁴²*Id.* § 447.31, Subd. 6.

⁴³*Id.* § 471.3455. *See, supra*, note 10 and accompanying text.

requirements, including a provision that says “[t]he municipality [or other municipal corporation] shall include in its annual appropriations measure for each later fiscal year any amounts payable under guaranteed energy savings contracts during the year. Failure of a municipality to make such an appropriation does not affect the validity of the guaranteed energy savings contract or the municipality's obligations under the contracts.”⁴⁴

State Entities

The commissioner of administration is authorized to control and manage state real and personal property⁴⁵ and is responsible for acquiring all goods⁴⁶ and services⁴⁷ needed by agencies.⁴⁸ The commissioner may delegate these duties, with varying levels of authority, to individuals in state agencies.⁴⁹ Generally, the commissioner is required to approve contracts, with some exceptions; delegations and review functions must be filed with the secretary of state.⁵⁰ The use of lease-purchase agreements is permitted:

The commissioner is authorized to enter into lease purchases or installment purchases for periods not exceeding the anticipated useful life of the items acquired unless otherwise prohibited by law.⁵¹

The commissioner is authorized to enter into lease, lease purchase, rental, or installment agreements for the use or acquisition, whichever is applicable, of real or personal property.⁵²

Prior appropriation is required for payments; violators are subject to penalty.⁵³

“Technology system project” acquisition is specifically covered by the following code provision allowing lease-purchase financing:

Subdivision 1. Definitions.

The following definitions apply to this section.

(a) "Technology system project" means the development, acquisition, installation, and implementation of a technology system that is essential to state operations and is expected to have a long useful life.

(b) "Lease-purchase agreement" means an agreement for the lease and installment purchase of a technology system project, or a portion of the project, between the commissioner, on behalf of the state, and a vendor or a third-party financing source.

(c) "Technology development lease-purchase guidelines" means policies, procedures, and requirements established by the commissioner for technology system projects that are financed pursuant to a lease-purchase agreement.

⁴⁴Minn. Stat. Ann. § 471.345.13.

⁴⁵*Id.* § 16B.04.

⁴⁶Goods means “all types of personal property including commodities, materials, supplies, and equipment.” *Id.* § 16C.02 Subd. 8.

⁴⁷Services means, “unless otherwise indicated, both professional or technical services and service performed under a service contract.” *Id.* Subd. 17.

⁴⁸*Id.* § 16C.03 Subd. 3. Agency means “any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. Unless specifically provided elsewhere in [the] chapter, agency does not include the Minnesota State Colleges and Universities.” *Id.* § 16C.02 Subd. 2.

⁴⁹*Id.* § 16C.03 Subd. 16; Authority for Local Purchase [ALP] Manual, Bull. No. 00.07 (Sept. 2007, rev'd 07-01-16).

⁵⁰Minn. Stat. Ann. § 16C.05 Subds 1, 2.

⁵¹*Id.* § 16C.03 Subd. 6.

⁵²*Id.* § 16C.03 Subd. 7.

⁵³*Id.* § 16A.15 Subd. 3. *See also*, § 16A.14 (describing allotment and encumbrance system). Administrative rules provide that the director of the Materials Management Division of the Department of Administration may cancel a purchase or contract if funds are not appropriated by the legislature. Minn. Admin. Rules, Rule 1230.1200.

Subdivision 2. Lease-purchase financing.

The commissioner may enter into a lease-purchase agreement in an amount sufficient to fund a technology system project and authorize the public or private sale and issuance of certificates of participation, provided that:

- (1) the technology system project has been authorized by law to be funded pursuant to a lease-purchase agreement;
- (2) the term of the lease-purchase agreement and the related certificates of participation shall not exceed the lesser of the expected useful life of the technology system project financed by the lease-purchase agreement and the certificates or ten years from the date of issuance of the lease-purchase agreement and the certificates;
- (3) the principal amount of the lease-purchase agreement and the certificates is sufficient to provide for the costs of issuance, capitalized interest, credit enhancement, or reserves, if any, as required under the lease-purchase agreement;
- (4) funds sufficient for payment of lease obligations have been committed in the authorizing legislation for the technology system project for the fiscal year during which the lease-purchase agreement is entered into; provided that no lease-purchase agreement shall obligate the state to appropriate funds sufficient to make lease payments due under such agreement in any future fiscal year; and
- (5) planned expenditures for the technology system project are permitted within the technology development lease-purchase guidelines.

Subdivision 3. Covenants.

The commissioner may covenant in a lease-purchase agreement that the state will abide by the terms and provisions that are customary in lease-purchase financing transactions, including, but not limited to, covenants providing that the state:

- (1) will maintain insurance as required under the terms of the lease-purchase agreement;
- (2) is responsible to the lessor for any public liability or property damage claims or costs related to the selection, use, or maintenance of the technology system project, to the extent of insurance or self-insurance maintained by the state, and for costs and expenses incurred by the lessor as a result of any default by the state; or
- (3) authorizes the lessor to exercise the rights of a secured party with respect to the technology system project or any portion of the project in the event of default or nonappropriation of funds by the state, and for the present recovery of lease payments due during the current term of the lease-purchase agreement as liquidated damages in the event of default.

Subdivision 4. Credit and appropriation of proceeds.

Proceeds of the lease-purchase agreement and certificates of participation must be credited to a technology lease project fund in the state treasury. Net income from investment of the proceeds, as estimated by the commissioner, must be credited to the appropriate accounts in the technology lease project fund. Funds in the technology lease project fund are appropriated for the purposes described in the authorizing law for each technology development project and this section.

Subdivision 5. Transfer of funds.

Before the lease-purchase proceeds are received in the technology lease project fund, the commissioner may transfer to that fund from the general fund amounts not exceeding the expected proceeds from the lease-purchase agreement and certificates of participation. The commissioner shall return these amounts to the general fund by transferring proceeds when received. The amounts of these transfers are appropriated from the general fund and from the technology lease project fund.

Subdivision 6. Administrative expenses.

Actual and necessary travel and subsistence expenses of employees and all other nonsalary expenses incidental to the sale, printing, execution, and delivery of the lease-purchase agreement and certificates of participation may be paid from the lease-purchase proceeds. The lease-purchase proceeds are appropriated for this purpose.

Subdivision 7. Treatment of technology lease project fund.

Lease-purchase proceeds remaining in the technology lease project fund after the purposes for which the lease-purchase agreement was undertaken are accomplished or abandoned, as determined by the commissioner, must be transferred to the general fund.

Subdivision 8. Lease-purchase not public debt.

A lease-purchase agreement does not constitute or create a general or moral obligation or indebtedness of the state in excess of the money from time to time appropriated or otherwise available for payments or obligations under such agreement. Payments due under a lease-purchase agreement during a current lease term for which money has been appropriated is a current expense of the state.

Subdivision 9. Tax treatment.

Property purchased subject to a lease-purchase agreement under this section is not subject to personal property taxes. The purchaser of property for lease to the state under a valid lease-purchase agreement under this section is not subject to the sales tax on the purchase of the property or on the payments received under the agreement, but the state is subject to the tax under chapter 297A [general sales and use taxes] on property acquired under the agreement.

Subdivision 10. Refunding certificates.

The commissioner from time to time may enter into a new lease-purchase agreement and issue and sell certificates of participation for the purpose of refunding any lease-purchase agreement and related certificates of participation then outstanding, including the payment of any redemption premiums, any interest accrued or that is to accrue to the redemption date, and costs related to the issuance and sale of such refunding certificates. The proceeds of any refunding certificates may, in the discretion of the commissioner, be applied to the purchase or payment at maturity of the certificates to be refunded, to the redemption of outstanding lease-purchase agreements and certificates on any redemption date, or to pay interest on the refunding lease-purchase agreements and certificates and may, pending such application, be placed in escrow to be applied to such purchase, payment, retirement, or redemption. Any escrowed proceeds, pending such use, may be invested and reinvested in obligations that are authorized investments under section 11A.24. The income earned or realized on any authorized investment may also be applied to the payment of the lease-purchase agreements and certificates to be refunded, interest or premiums on the refunded certificates, or to pay interest on the refunding lease-purchase agreements and certificates. After the terms of the escrow have been fully satisfied, any balance of proceeds and any investment income may be returned to the general fund, or if applicable, the technology lease project fund, for use in a lawful manner. All refunding lease-purchase agreements and certificates issued under the provisions of this subdivision must be prepared, executed, delivered, and secured by appropriations in the same manner as the lease-purchase agreements and certificates to be refunded.⁵⁴

State agencies and the legislature may participate in a master lease program:

Subdivision 1. Authorization.

The commissioner of administration may determine, in conjunction with the commissioner of management and budget, the personal property needs of the various state departments, agencies, boards, commissions and the legislature that may be economically funded through a master lease program and request the commissioner of management and budget to execute a master lease.

The commissioner of management and budget may authorize the sale and issuance of certificates of

⁵⁴Minn. Stat. Ann. § 16A.81.

participation relative to a master lease in an amount sufficient to fund these personal property needs. The term of the certificates must be less than the expected useful life of the equipment whose purchase is financed by the certificates. The commissioner of administration may use the proceeds from the master lease or the sale of the certificates of participation to acquire the personal property through the appropriate procurement procedure in chapter 16C. Money appropriated for the lease or acquisition of this personal property is appropriated to the commissioner of management and budget to make master lease payments.

Subdivision 2. Covenants.

The commissioner of management and budget may covenant in a master lease that the state will abide by the terms and provisions that are customary in net lease or lease-purchase transactions including, but not limited to, covenants providing that the state:

- (1) will maintain insurance as required under the terms of the lease agreement;
- (2) is responsible to the lessor for any public liability or property damage claims or costs related to the selection, use, or maintenance of the leased equipment, to the extent of insurance or self-insurance maintained by the lessee, and for costs and expenses incurred by the lessor as a result of any default by the lessee;
- (3) authorizes the lessor to exercise the rights of a secured party with respect to the equipment subject to the lease in the event of default by the lessee and, in addition, for the present recovery of lease rentals due during the current term of the lease as liquidated damages.

Subdivision 3. Master leases not debt.

The commissioner of management and budget may not enter into a master lease unless the commissioner of management and budget has conducted a demand survey of the amount of projected rentals and determines that money has been appropriated and allotted for the payment of the maximum amount of rentals that are projected to be payable from state money and that are projected to be due or to become due during the appropriation period in which the lease contract is entered into. A master lease does not constitute or create a general or moral obligation or indebtedness of the state in excess of the money from time to time appropriated or otherwise available for the payment of rent coming due under the lease, and the state has no continuing obligation to appropriate money for the payment of rent or other obligations under the lease. Rent due under a master lease during a current lease term for which money has been appropriated is a current expense of the state.

Subdivision 4. Tax exemption.

Property subject to a master lease is not subject to personal property taxes. Property purchased by a lessor for lease to the state under a valid master lease and rent due under the lease are not subject to sales tax.

Subdivision 5. Investment income.

The net income from investment of the proceeds of the certificates of participation, as estimated by the commissioner of management and budget, must be credited to the fund whose assets will be used to pay off the certificates of participation.

Subdivision 6. Budget offset.

The commissioner of management and budget shall reduce the operating budgets of state agencies that use the master lease program. The amount of the reduction is the difference between the budgeted purchase price of the equipment and the actual master lease payments.⁵⁵

⁵⁵*Id.* § 16A.85.

The Department of Administration has promulgated the following policies and procedures document⁵⁶, which describes the master lease program:

Part One – The Loan Process

1. Division Responsibilities

A. It is the agencies/divisions responsibility to maintain and guarantee that master lease funds are spent and maintained in accordance to which it was intended. In the event that an agency/division ceases to exist, the agency/division must notify the Financial Management and Reporting (FMR) Division accountant for the proper procedure on completing the loan repayment process.

B. Issue a purchase order (PO) and encumber the money in the appropriate master lease fund (060).

C. The Department of Minnesota Management and Budget (MMB) will supply a master lease draw schedule (Refer to Exhibit A⁵⁷).

D. Requesting division will fill out a Certificate of Participation (Refer to Exhibit B⁵⁸) for each vendor with which a purchase is being made.

1. On the Certificate of Participation, the following items must appear:

- a. PO number
- b. Agency name
- c. Equipment information
 - 1. Description of equipment, and
 - 2. Vendor name and division
- d. Invoice information
 - 1. Date of invoice,
 - 2. Invoice number, and
 - 3. Amount of purchase
- e. Financial information
 - 1. Purchase price (includes sales tax if applicable), and
 - 2. Life of loan (terms of the loan, 2 to 5 years)

2. Attached to the Certificate of Participation will be the:

- a. Invoice
- b. PO
- c. If applicable, the following items should also be included:
 - 1. Receiving report (signed and dated by receiving agent),
 - 2. Packing slips (signed and dated by receiving agent),
 - 3. Bills of lading,
 - 4. Shippers inventory documents, and
 - 5. Shipping tickets.

3. Make two copies of the Certificates of Participation and all the attachments. Send these two copies to the FMR Division accountant.

E. Make a copy of the PO, receiving documents, packing slips, and invoices. Send these documents to the division's fixed asset coordinator. The division fixed asset coordinator will look at the purchase, and

⁵⁶Fin. Mgmt. and Rptg. Agcy. Policies and Procedures, Pol'y No: FMR-1F-01(Issue Date: Aug. 19, 1999) (available at <https://mn.gov/portal/>. Search "FMR-1F-01").

⁵⁷*Id.*

⁵⁸*Id.*

determine what equipment is a fixed asset, sensitive item, or a direct expense. The coordinator will then make the necessary adjustments to their fixed asset database and calculate depreciation per agency policy.

F. Upon receiving the loan funds in MAPS, the requesting division will pay the invoices from the appropriate master lease loan fund (060). Payment for equipment must be made within six months of receiving the cash or the equipment. Failure to spend down all cash in fund 060 will require the division to comply with IRS Section 148, Arbitrage.

2. FMR Responsibilities

A. The FMR Division accountant will sign as the authorized agency representative and forward one copy of the Certificate of Participation, with the attachments, to MMB. The FMR Division accountant will retain a second copy.

B. The FMR Division accountant will update the amortization spreadsheets and record the cash proceeds in the financial records for the correct accounting period.

C. When payment is made to the vendor, the FMR Division accountant will record the expense in the financial records.

D. After all payments have been made for the purchase of equipment, the FMR Division accountant should check the appropriation screen in MAPS, to see if all the money has been spent. If not, a reconciliation should be done to find discrepancies and notify the appropriate division of any corrections.

E. If a reconciliation is done and it is found that the requesting division asked for too much, or too little cash, the FMR Division accountant will adjust the next draw to correct the cash outlay. To do this correction, reduce or increase the next draws cash request.

F. If a governmental agency/division ceases to exist, the FMR Division accountant must notify the financial management director for the proper procedure on handling loan repayment of a nonexistent funding source.

Part Two – Semiannual Loan Repayment

Twice a year (December 1 and June 1), the Department of Minnesota Management and Budget will send a memo requesting payment of the current loan interest and principle due (Exhibit C⁵⁹). This request should be checked against the internal FMR Division information for verification of the amount due. Once this is verified, the FMR Division accountant will enter PV 2 transactions for the principle and interest portion of the memo.

Part Three – Demand Survey

1. MMB will request information on the estimated amount of master lease funds to be used in the following two years.

2. Each division using the master lease program must submit related information to the FMR Division accountant; this information must be documented in six-month increments. It should include the equipment type, financing term, and estimated cost.

3. The FMR Division will combine the agency survey results and submit the information to MMB.

⁵⁹*Id.*

Part Four – Early Payoff of Master Lease Loans

The amortization schedule (Exhibit D⁶⁰) from MMB includes information for early payoff of master lease loans. The Purchase Option Price column indicates the amount for early payoff, and when the option is available. There is a penalty for early payoff.

Example:

Looking at Exhibit D, the purchase option price for payment numbers 1, 2 and 3 are not applicable, indicating the early payoff option is not available. Early payoff of this master lease loan is available for \$13,888.85 at payment number four, on December 1, 2000.

1. To take advantage of early payoff of master lease, send a letter to the MMB and to the FMR Division accountant:

- A. Request early payoff of master lease,
- B. Specify which draws are being paid off,
- C. Specify the date the loan will be paid off, and
- D. Specify the amount of repayment.

2. Partial repayment is not allowed. If early payoff is elected, each loan must be paid in full.

The commissioner of administration has oversight of the State capitol area and buildings and may lease land or premises for state purposes for up to ten years.⁶¹ Properties leased in the Capitol Area may need to comply with guidelines set by the Capitol Area Architectural and Planning Board.⁶² Lease-purchases are specifically provided for:

(a) With the approval of the commissioner of management and budget and the recommendation of the Legislative Advisory Commission, the commissioner of administration may enter into lease-purchase agreements. A lease-purchase agreement must provide the state with a unilateral right to purchase the leased premises at specified times for specified amounts. Under these lease agreements, the lease rental rates shall not be more than market rental rates. Notwithstanding subdivision 6 [property lease], the term of the lease may be for more than ten years, but must not exceed 20 years. Prior to exercising the state's right to purchase the premises, the purchase must be approved by an act of the legislature.

(b) A lease-purchase agreement entered into under paragraph (a) must be subject to cancellation by the state for any reason except lease of other non-state-owned land or premises for the same use.⁶³

The commissioner of transportation oversees construction and management of transportation facilities and systems⁶⁴ and may acquire real property and equipment necessary for construction and maintenance of trunk highways by purchase or power of eminent domain.⁶⁵

⁶⁰*Id.*

⁶¹Minn. Stat. Ann. § 16B.24 Subd. 6. The commissioner has responsibility for repairs for all state buildings except those under the control of the transportation department, and the board of Trustees of the Minnesota State Colleges and Universities.

⁶²*Id.*

⁶³*Id.* § 16B.24 Subd. 6a.

⁶⁴*Id.* §§ 174.01 to .11.

⁶⁵*Id.* § 161.20.

Higher Education

There are two systems of higher education: the University of Minnesota and the Minnesota State Colleges and Universities System. The University of Minnesota with six campuses is governed by a board of regents.⁶⁶ The Board of Trustees of Minnesota State Colleges and Universities is headed by a chancellor⁶⁷ and governs 54 campuses. Some autonomy is provided to individual campuses.⁶⁸ Procurement laws relating to the two systems differ.

University of Minnesota

Pursuant to its charter the University of Minnesota Regents may “enact laws for the government of the University” and are authorized to “expend such portions of the [university’s] fund, which . . . may come under their control, as they may deem expedient for the erection of suitable buildings, and the purchase of apparatus.”⁶⁹ The regents have the power of eminent domain.⁷⁰ The state commissioner of administration has authority to provide goods and services under the procurement code to the University of Minnesota.⁷¹ The university has established policies covering purchasing.⁷² The board reserves authority to approve individual purchase of goods and services with a value greater than \$1 million Dollars.⁷³ University-wide contracts have been established.⁷⁴ Procedures for purchasing at different threshold levels have been established.⁷⁵

It appears that the University of Minnesota has developed some internal guidelines concerning the use of lease purchase financing, but no official online citation has been found.⁷⁶ The guidelines provide:

Lease Purchase Financing

Capital leasing is a frequently encountered practice in the business world of finance. The use of capital leases at the University of Minnesota can be an additional source of funding for the needs of the University. Consideration of this alternative funding source must be undertaken with a basic understanding of factors unique to the University as a whole in order to efficiently utilize this funding source alternative.

A capital lease is a transaction whereby the goods leased become property of the University at the end of the lease period. At times, this transfer will occur with a lease transfer payment that has been negotiated at the

⁶⁶Establishment of the Board of Regents of the University of Minnesota was done by Charter passed by the Legislative assembly of the Territory of Minnesota in the Territorial Laws 1851. It was perpetuated in the state constitution. Minn. Const. art. XIII, §3. Pursuant to the charter the Regents may enact laws for the government of the University. A perpetual fund was established under the charter, which grants the regents the authority “to expend such portions of the fund, which by the provisions of this act, may come under their control, as they may deem expedient for the erection of suitable buildings, and the purchase of apparatus, a Library, and a Cabinet of Natural History; and the selection, management and control of all lands, which may hereafter be granted by Congress for the endowment of said University, is hereby vested in the Board of Regents.” (Territorial Laws 1851, Chapter 3 sections 9, 15).

⁶⁷Minn. Stat. Ann. § 136F.07.

⁶⁸Minn. Stat. Ann. §§ 136F.06 and 136.07.

⁶⁹See, *supra*, note 67 and accompanying text.

⁷⁰Minn. Stat. Ann. § 137.02, subd.3.

⁷¹*Id.* § 16C.03, subd. 14. The constitutional grant of authority to the Regents to govern the university apparently exempts it from control of the state commissioner of administration. See, *supra*, note 48 for the definition of state “agency.” Section 16C.02 subd. 2 excludes the State Colleges and Universities from coverage by the term unless otherwise specifically provided, but does not mention the University of Minnesota. For purposes of Ch 13, Government Data Practices, the University of Minnesota is defined to be a state agency.

⁷²Univ. of Minn. Bd of Regents Pol’y, Purchasing (Adopted July 7 1978, last am. July 2008).

⁷³*Id.*, Reservation and Delegation of Authority, Section VII, Subd. 6 (Adopted Apr. 5, 2001 last am. March 1, 2012).

⁷⁴<http://uwidecontracts.umn.edu/>

⁷⁵Univ. of Minn. Admin. Proc. Purchasing Goods and Services.

http://www.policy.umn.edu/Policies/Finance/Procurement/PURCHASING_PROC02.html.

⁷⁶Univ. of Minn., Debt Management Guidelines (Aug. 31, 2012) Draft 3_8/22/2012.

beginning of the lease. In these leases, a portion of the periodic payment will be treated as interest and a portion will be treated as principal payment on the acquisition of the equipment financed by the lease.

The University of Minnesota has tax status as an integral part of the State of Minnesota. This tax status enables entities that provide funds under a lease to receive the interest portion of the lease free of income taxes. In order for a vendor to receive this benefit the University must adhere to specific covenants and restrictions as mandated by the Internal Revenue Service and must file an IRS reporting form series 8038 with the Internal Revenue Service shortly after the beginning of the lease. These tax favored leases create a burden upon the University because of the covenants and filing requirements with the IRS. The University must make sure that if it is going to enter into these transactions with tax-favored benefits going to the entity providing the funds, that the University receive a significant benefit in return to compensate for the additional legal covenants and IRS filing requirements. This compensation usually takes the form of a reduced interest rate on the transaction.

When evaluating Capital Lease Financing alternatives, it may be wise for the University to not grant tax-exempt status on the lease arrangement. It is important for University purchasing administrators and business units to understand that the university is in a powerful bargaining position in this matter and that the University must look to its own needs and responsibilities before granting tax-exempt status on its leases.

For the reason identified in the above paragraphs, the University should not grant tax-exempt status on any lease without first ensuring that the interest rate on the lease is the most advantageous rate available from the vendor. The University has an excellent credit rating and as such has available the most advantageous rates available to it when it seeks tax-exempt financing. Leasing vendors need to be aware of this condition when they quote a rate to the University. When a rate is quoted by a vendor that is not within an appropriate range given the University credit rating then administrators ought to look at other alternatives in acquiring capital equipment.

Guidelines to be followed related to a lease/buy analysis include:

1. Unless a target rate is achieved on the lease, then the University should consider using internal resources to acquire the equipment and require a lease-type payment from the affected department.
2. Leases over a certain threshold are reviewed in detail by another department – currently assigned to the Tax Management Office.
3. Purchasing agents across the University will be periodically trained on the principles identified in the above paragraphs.

The University of Minnesota Board of Regents reserves authority to “to approve the purchase or sale of real property with a value greater than \$1,250,000 or larger than ten (10) acres;” to “approve leases of real property, easements, and other interests in real property if the initial term amount to be paid by or to the University exceeds \$1,250,000,” and to “approve annual capital budgets consisting of projects with a value greater than \$500,000.”⁷⁷ The president may delegate authority to execute contracts.⁷⁸ University of Minnesota design-build projects are covered by the procurement code.⁷⁹ The chair of the board of regents is authorized to execute instruments and documents on behalf of the board. Acquisitions must support the University's educational, research, or outreach mission.⁸⁰ Transactions must conform to university administrative procedures.⁸¹ Responsibilities relating to real property acquisitions are:

⁷⁷Univ. Minn. Bd. Of Regents Pol’y, Reservation and Delegation of Authority (Adopted: Apr. 5, 2001, Amended: July 9, 2004; Dec. 10, 2004; July 9, 2008; Feb. 12, 2012; March 1, 2012) http://www1.umn.edu/regents/policies/delegation/Reservation_and_Delegation.pdf.

⁷⁸*Id.*

⁷⁹Minn. Stat. Ann. § 16C.33.

⁸⁰Admin Policy, Acquiring and Disposing of University Real Estate. (March 1995 Updated: Oct. 2015). [https://policy.umn.edu/operations/realestateacqdsp ..](https://policy.umn.edu/operations/realestateacqdsp..)

⁸¹*Id.*

Board of Regents

The Board of Regents has the exclusive authority and power on behalf of the University to approve the purchase or sale real estate when the property's value exceeds \$1,250,000 or the size exceeds 10 acres.

CFO and Vice President

The Vice President for Finance and CFO, as delegated by the President, has signature authority for agreements to purchase and sell real estate if the property's value does not exceed \$1,250,000 or the size of the parcel does not exceed 10 acres, subject to Approval Authority, Funding Approval and Legal Approval. The Vice President for Finance and CFO has re-delegated this authority to the Director of Real Estate. The CFO is also the signatory for agreements for real estate purchase and sale transactions approved by the Board of Regents.

Real Estate Office

The Real Estate Office is responsible for all transactions involving the acquisition or disposal of real estate, or an interest in real estate, including street vacations, permanent easements and dedications. Office maintains a historical database of University owned real estate

Environmental Health and Safety Office

Environmental Health and Safety performs or coordinates environmental assessments of all real estate prior to University acquisition by purchase or gift. Office estimates or obtains an estimate of remediation costs, if any.

Office of the General Counsel

The Office of General Counsel develops or approves agreements for the acquisition or disposal or real estate, or an interest in real estate.⁸²

Minnesota State Colleges and Universities

The Board of Trustees of Minnesota State Colleges and Universities system and individual institutions have the power to enter into contracts and are subject to the provisions of the Uniform Municipal Contracting Law.⁸³ The contracting law includes authority to enter into contracts for energy conservation measures.⁸⁴ In addition, the board “may utilize any contracting options available to the commissioner of administration under chapter 16A, 16B, or 16C;” which would include lease-purchase and master purchase agreements.⁸⁵ Minnesota State Colleges and Universities may not enter into capital lease arrangements for under \$100,000 and must obtain approval for arrangements in excess of \$100,000 from the Vice Chancellor of Finance.⁸⁶

Construction, alteration, repair, or enlargement of state college and university buildings, structures, and improvements in excess of \$1,500,000 must be reported to the legislature:

Subdivision 1. General authority; construction; improvements.

(a) Specific legislative authority is not required for repairs or minor capital projects financed with operating appropriation or institutional receipts that:

(1) are undertaken for asset preservation or code compliance purposes; or

⁸²*Id.*

⁸³Minn. Stat. Ann. § 471.345; *id.* § 136F.581, subd. 1.

⁸⁴*Id.* § 471.345, Subd. 13; *id.* § 136F.581, subd. 1.

⁸⁵*Id.* § 136F.581 Subd. 1. *See, supra*, notes 51, 52, 54 and 55, and accompanying text relating to provisions of chapters 16A and 16C discussed therein.

⁸⁶Minn. St. Col. and Univ. Syst. Proc. Ch. 7, Guideline 7.3.6.1 (04/25/06, rev 11/10/14).

(2) do not materially increase the net square footage of the institution; and

(3) do not materially increase the costs of instructional programs.

For any project under this section with a cost in excess of \$1,500,000, unless the Board of Trustees determines that an emergency exists, the board must notify the chair of the Finance Committee of the senate, and the chairs of the Ways and Means Committee and the Capital Investment Committee of the house of representatives in writing before incurring any contractual obligations.

(b) The board shall supervise and control the preparation of plans and specifications for the construction, alteration, repair, or enlargement of state college and university buildings, structures, and improvements for which appropriations are made to the board. The board shall advertise for bids and award contracts in connection with the improvements, supervise and inspect the work, approve necessary changes in the plans and specifications, approve estimates for payment, and accept the improvements when completed according to the plans and specifications.

Subd. 2.Plans.

Plans and specifications must be accompanied by a detailed statement of the cost, quality, and description of all material and labor required for the completion of the work. No plan may be adopted, and no improvement made or building constructed, that contemplates the expenditure for its completion of more money than the appropriation for it, unless otherwise provided by law.

Subd. 3.Dispute resolution.

In contracting for projects, the board must not restrict its access to litigation or limit its methods of redress to arbitration or other nonjudicial procedures.⁸⁷

The Board of Trustees may acquire real property by eminent domain⁸⁸ and has certain reporting requirements to the legislature on the acquisition of real property as follows:

The board may purchase property adjacent to or in the vicinity of the campuses as necessary for the development of a state college or university. Before taking action, the board shall consult with the chairs of the senate Finance Committee and the House Of Representatives Ways and Means Committee about the proposed action. The board shall explain the need to acquire property, specify the property to be acquired, and indicate the source and amount of money needed for the acquisition. The funds needed may be spent from sums previously appropriated for purposes of the state colleges and universities, including, but not limited to, general fund appropriations for instructional or noninstructional expenditures, general fund appropriations carried forward, or state college and university activity fund appropriations. The board may pay relocation costs, at its discretion, when acquiring property.

Subd. 2. Methods of acquisition and real property transactions.

(a) If money has been appropriated to the board to acquire lands or sites for public buildings or real estate, the acquisition may be by gift, purchase, or condemnation proceedings. Condemnation proceedings must be under chapter 117.

(b) The board may accept gifts to improve or acquire facilities as provided in this paragraph:

(1) for remodeling existing facilities if the remodeling does not materially increase the square footage of the facility;

(2) for the acquisition, construction, or remodeling costs of facilities for which state capital appropriations have been made and whose use will not be substantially changed; or

⁸⁷*Id.* § 136F.64.

⁸⁸*Id.* § 136F.60.

(3) for capital projects not authorized by the legislature if the board first certifies that project revenues, other gifts or grants, or other sources of capital funds are available for project costs and that no tuition revenues or state or federal appropriations are used for the capital or operating costs, including all program costs, salaries, and benefits, of the facility.

(c) The board may convey or lease real property under the board's control, with or without monetary consideration, to provide a facility for the primary benefit of a state college or university or its students if the board certifies that project revenues, other gifts or grants, or other sources of funds are available for project costs and that no tuition revenues or state or federal appropriations are used for the capital cost of the facility. Agreements under this paragraph must demonstrate to the board's satisfaction the financial viability of the proposed project, including all proposed financial and contractual obligations, and operating costs, including all program costs, salaries and benefits, and other costs reasonably expected to be incurred or binding upon the college or university. Siting and design of the facility must be consistent with the campus master plan and Minnesota State Colleges and Universities building standards. Agreements under this paragraph to convey, or to lease for a term not to exceed 30 years, subject to section 16A.695, may be made following requests for proposal or by direct negotiation. Conveyances by the board under this paragraph must be by quitclaim deed in a form approved by the attorney general. Land conveyed by the board must revert to the state if it is no longer used for the primary benefit of a state college or university or its students.

(d) For purposes of this subdivision, "facility" includes student unions, recreational centers and athletic centers, or facilities for which state capital appropriations have been made and the use of which will not be substantially changed. "Facility" also includes self-supporting student housing.

(e) The board must report in a timely manner to the chairs of the house of representatives and senate committees with jurisdiction over higher education finance, capital investment, and ways and means any capital project under paragraphs (b) or (c) with a cost of \$3,000,000 or more⁸⁹

The Minnesota Higher Education Facilities Authority assists institutions of higher education in the construction, financing, and refinancing of projects such as dormitories, research facilities, classrooms, etc.⁹⁰

Energy Performance Contracting

The commissioner of administration may enter into lease-purchase agreements for energy-savings measures or projects for a term not to exceed 15 years and less than the average expected useful life of the energy saving measures implemented under a project, subject to numerous restrictions.⁹¹ Minnesota State Colleges and Universities may enter into contracts for energy conservation measures under the Municipal Contracting Law.⁹²

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.⁹³ The University of Minnesota is statutorily limited in the amount of debt it may incur.⁹⁴ Counties, municipalities and school districts are statutorily limited in the amount of debt they may incur.⁹⁵ "The obligation created by a lease-

⁸⁹*Id.*

⁹⁰*Id.* §§ 136A.25 to 136A.55.

⁹¹*Id.* § 16C.14 (equipment); *id.* § 16C.144 (guaranteed energy savings agreements, utilities); *id.* §§ 16B.321, -322 (energy improvement financing program).

⁹²*See, supra*, notes 86 to 87 and accompanying text.

⁹³Minn. Const. art. XI, §§ 4, 5.

⁹⁴Minn. Stat. Ann. § 137.09.

⁹⁵*See generally id.* chapter 475.

purchase agreement shall not be included in the calculation of net debt . . . and shall not constitute debt under any other statutory provision.”⁹⁶

The attorney general has advised that counties may enter into lease-purchase agreements without violating debt limitations as long as the agreement provides for an option in the county to renew the lease each year.⁹⁷ The attorney general has stated that an installment contract or lease-purchase agreement is “one by which title is retained by the seller or vendor or assigned to a third party as security.”⁹⁸ A lease-purchase agreement which automatically transfers title of the personal property to the political subdivision subject only to the right of reversion in the event of a breach is not authorized by statute.⁹⁹ The right to terminate the lease-purchase agreement cannot “be subject to restrictions, which for all practical purposes, [would] obviate the possibility of the exercise of that right.”¹⁰⁰

In *Franklin High Yield Tax-Free Income Fund vs. County of Martin*¹⁰¹, an authority was created to finance a rental housing project for five Minnesota counties. Revenue bonds would be issued by the authority, but the counties added additional security for the bonds by entering into operating deficit agreements. Each agreement provided that the counties would pay their proportionate share of the deficit through a special benefit tax levied by the authority with the consent of each county. The agreement also provided that each county would use its’ “best efforts” to approve the levy, reserving discretion to deny the levy request for any reason. Later when there was an operating deficit, each county denied the request for a levy by the authority. The court (Eighth Circuit) held that the counties did not satisfy the best efforts obligation as a matter of law, and based on the facts, a reasonable jury could conclude the actions of the county breached the best efforts provision.

In *Schowalter vs. Minn Dep’t of Mgmt & Budget*,¹⁰² the Commissioner of the Department of Management and Budget sought validation of certain refunding bonds. The original bonds were secured by tobacco settlement payments and issued under legislation passed for their creation. The legislature created a continuing appropriation to pay, but the bond documents provided that the State was not required to appropriate funds to make debt service payments. The court held that because of the nonappropriation language in the bonds, the continuing appropriation did not create public debt subject to the constitutional debt limits of article XI § 4.

Interest Rate Limitations

“Interest on obligations issued after April 1, 1986, is not subject to any limitation on rate or amount.”¹⁰³ “The provisions of this section shall supersede any maximum interest rate fixed by any other

⁹⁶When entered into under section 465.71. See, *supra*, note 7 and accompanying text. In *Ambrozich v. City of Eveleth*, 274 N.W. 635 (Minn. 1937), a true lease of real property was held to be a contingent liability because under the law particular to leases the obligation to pay rent may never arise. 274 N.W. at 640. As a contingent liability the city did not incur an obligation to pay the aggregate rental amount which would have violated its charter imposed debt limitation. *Id.* at 641. The *opinion* does not indicate whether a nonappropriation clause was included in the lease. The court reaffirmed its prior holding that public service contracts calling for payment in installments create present liability for the entire contract price at the time of contracting. *Id.* at 639.

⁹⁷125-a 40 Op. Att’y Gen. (Minn. 1979). See also *First Trust Co. v. State*, 449 N.W.2d 491 (Minn. Ct. App. 1989) (analysis of state’s nonappropriation on an installment obligation) and *United States Fire Insurance Company v. Minnesota State Zoological Board*, 307 N.W. 2d 490 (Sup. Ct. Minn. 1981) (where the court holds that the state cannot be required to make payments under an agreement unless and until the legislature appropriates funds for such purposes).

⁹⁸166-b Op. Att’y Gen. (Minn. 1986).

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Franklin High Yield Tax-Free Income Fund v. County of Martin*, 152 F.3d 736 (1998).

¹⁰²822 NW2d 292 (Minn. 2012).

¹⁰³Minn. Stat. Ann. § 475.55.1a. Obligations are “any promise to pay a stated amount of money at a fixed future date, or upon demand of the obligee, regardless of the source of funds to be used for its payment, made for the purpose of incurring debt,

law or a city charter with respect to obligations of the state or any municipality or governmental or public subdivision . . . of whatsoever kind, including warrants or orders issued in evidence of allowed claims for property or services furnished to the issuer.”¹⁰⁴

Miscellaneous

Counties can enter into leasing arrangements with statutory or home rule cities to construct jails, subject to numerous restrictions.¹⁰⁵

Purchases under installment contracts or lease purchase agreements under section 465.71 by school districts, local governments, the University of Minnesota, state universities, community colleges, and other entities are exempt from sales and use taxes, subject to numerous exceptions.¹⁰⁶

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

including the purchase of property through an installment purchase contract or any other deferred payment agreement for which funds are not appropriated in the current year’s budget” *Id.* § 475.51 Subd. 3.

¹⁰⁴*Id.* § 475.55 Subd. 2.

¹⁰⁵*Id.* § 641.24.

¹⁰⁶*Id.* § 297A.70.

MISSISSIPPI 2017

The Statutes and Constitution are current through the end of the 2016 First and Second Extraordinary Sessions and the 2016 Regular Session, Westlaw, West's Annotated Mississippi Code¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties may “purchase for the county, so much real estate, in fee simple, at the place where the courts may be required to sit, as may be convenient and necessary for the building and use of the courthouse and jail.”⁴ Counties may also “acquire, by lease or purchase, grounds and buildings or may erect buildings on grounds owned by the county . . . , to be used by the county . . . in storing and preserving road machinery, trucks, teams or other county . . . property.”⁵ Counties are also authorized to furnish county courthouses and county offices “with necessary record books, stationery, seals, presses, iron safes, tables, chairs, furniture and all other necessary articles.”⁶

Counties may “sell, convey or lease” real property no longer needed for county purposes.⁷ Counties have the power to sell and dispose of personal property at public sale.⁸

Counties may purchase commodities⁹ covered by state contracts from any source offering an identical item at a price below or equal to the state contract price without going through the competitive bidding process.¹⁰ Purchases less than \$5,000 are not subject to public bidding laws.¹¹

Counties may acquire “equipment” by lease-purchase agreement¹² and may obtain financing from the vendor or third party.¹³

¹Miss. Code Ann. § 27-39-303.

²*Id.* § 17-1-3.

³*Id.* § 19-3-41.

⁴*Id.* § 19-7-1. The authority to purchase real estate for a courthouse and jail would, in addition, allow a county to lease such building. The county may not pay more than the fair market value for the lease of the building. Op. Att’y Gen. No. 96-0305, June 7, 1996.

⁵*Id.*

⁶*Id.* § 19-7-23. A municipality’s authority to purchase real and personal property has been interpreted to implicitly include the authority to lease property. *American LaFrance, Inc. v. City of Philadelphia*, 184 So. 620 (Miss. 1938); Op. Att’y Gen. (Miss. Feb. 2, 1989) (addressed to Barry Gilmer) (Ag Lexis 53); Op. Att’y Gen. (Miss. Dec. 18, 1991) (addressed to James A. Riley) (Ag Lexis 920).

⁷Miss. Code Ann. § 19-7-3 (public bidding is required).

⁸*Id.* § 19-7-5.

⁹“Commodities” “means and includes the various commodities, goods, merchandise, furniture, equipment, automotive equipment of every kind, and other personal property purchased by the agencies of the state and governing authorities, but not commodities purchased for resale or raw materials converted into products for resale.” *Id.* § 31-7-1(e) (Editor’s and Revisor’s notes indicate that the 2016 amendment to this section appears to have omitted subsection e along with subsections d through k in error).

¹⁰*Id.* § 31-7-12(2), (3). This statutory section applies to municipalities, school districts, hospitals and other political subdivisions. *Id.* § 31-7-1(b).

¹¹*Id.* § 31-7-13(a).

¹²*Id.* § 31-7-13(e). “The term equipment shall be construed to include: automobiles, trucks, tractors, office appliances and all other equipment of every kind and description.” *Id.* § 31-7-1 (i). Under section 31-7-13(e), which also applies to municipalities, school districts, hospital districts and other political subdivisions, equipment means “equipment, furniture and, if applicable, associated software and other applicable direct costs associated with the acquisition”. *Id.* § 31-7-13(e). Competitive bidding is required generally. *Id.* § 31-7-13. Single source items, certain information technology products, energy efficiency equipment and numerous other items are excepted. *Id.* § 31-7-13(m).

¹³*Id.* For general discussion of this section *see* Op. Att’y Gen. (Miss. Apr. 22, 1992) (addressed to Robt. W. Elliott) (Ag Lexis 202).

The term of such lease-purchase agreement shall not exceed the useful life of property covered thereby as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines.¹⁴

Counties may not acquire items of equipment with a total acquisition cost in the aggregate of less than \$10,000 by a single lease-purchase transaction.¹⁵ Equipment lease-purchase agreements must contain an “annual allocation dependency clause” substantially similar to the following:¹⁶

The continuation of each equipment schedule to this agreement is contingent in whole or in part upon the appropriation of funds by the Legislature to make the lease-purchase payments required under such equipment schedule. If the Legislature fails to appropriate sufficient funds to provide for the continuation of the lease-purchase payments under any such equipment schedule, then the obligations of the lessee and of the agency to make such lease-purchase payments and the corresponding provisions of any such equipment schedule to this agreement shall terminate on the last day of the fiscal year for which appropriations were made.

Counties must maintain an itemized statement of the cash price, interest rates, interest costs, commissions, debt service schedules and all other costs and expenses paid by the state incident to the lease-purchase of equipment under such agreement.¹⁷ Lease-purchase payments for equipment and the equipment are “exempt from all Mississippi sales, use and ad valorem taxes” and “interest paid on any lease-purchase agreement [under section 31-7-13(e)] shall be exempt from State of Mississippi income taxation.”¹⁸ Lease or lease-purchase contracts executed pursuant to the bidding requirements in Section 31-7-13 may also be exempted from other limitations:

No board of supervisors of any county shall expend from, or contract an obligation against, the budget estimates for road and bridge construction, maintenance and equipment, made and published by it during the last year of the term of office of such board, between the first day of October and the first day of the following January, a sum exceeding one-fourth ($\frac{1}{4}$) of such item of the budget made and published by it, except in cases of emergency. The clerk of any county is prohibited from issuing any warrant contrary to the provisions of this section. No board of supervisors nor any member thereof shall buy any machinery or equipment in the last six (6) months of their or his term unless or until he has been elected at the general election of that year. The provisions of this section shall not apply to a contract, lease or lease-purchase contract executed pursuant to the bidding requirements in Section 31-7-13 and approved by a unanimous vote of the board. Such unanimous vote shall include a statement indicating the board's proclamation that the award of the contract is essential to the efficiency and economy of the operation of the county government.¹⁹

Counties may enter into lease agreements to acquire public buildings, facilities and equipment for use of the lessor for a primary term not to exceed twenty years for the following purposes:

- (a) Public buildings;
- (b) Courthouses;
- (c) Office buildings;
- (d) Jails;
- (e) Auditoriums;
- (f) Community centers;
- (g) Civic art centers;
- (h) Public libraries;
- (i) Gymnasiums; and

¹⁴*Id.* § 31-7-13(e); Op. Att’y Gen. (Miss. July 29, 1992) (addressed to Michael D. Cooke) (Ag Lexis 406).

¹⁵*Id.* § 31-7-13(e).

¹⁶*Id.* §§ 31-7-13(e), 31-7-10(8).

¹⁷*Id.* §§ 31-7-13(e), 31-7-10(13).

¹⁸*Id.* § 31-7-13(e).

¹⁹*Id.* § 19-11-27.

(j) Machinery and equipment for use in connection with any of the above, but shall not include office furniture and/or office machines, provided that the primary term of a lease with respect to machinery and equipment shall not exceed the estimated useful economic life of such machinery and equipment, as such useful economic life is mutually agreed upon by the lessor and lessee.²⁰

All such leases shall contain an option to purchase “at a price not to exceed the unpaid principal balance at such time.”²¹ Such leases may include, at the discretion of the governing authorities entering into them, the following:

a pledge of the full faith and credit of such county or municipality for the payment of its monetary obligations thereunder; or may contain a provision that so long as no default of any monetary obligation of the lessee has occurred, the lessee’s obligation to pay any amounts due or perform any covenants requiring or resulting in the expenditure of money shall be contingent and expressly limited to the extent of any specific appropriation made by the governing authorities to fund such lease agreement and that nothing contained in the lease agreement shall be construed as creating any monetary obligation on the part of the lessee beyond such current and specific appropriation. Obligations incurred by a county or municipality under the provisions of this chapter secured by a pledge of its full faith and credit shall be included within the limitation on bonded indebtedness established by law for counties and municipalities.²²

Where a lease agreement is secured by a pledge of full faith and credit, the county is required to publish notice for proposals.²³ If a written protest is filed, referendum procedures must be followed.²⁴

Energy Performance Contracting

Detailed provisions apply to lease-purchase of “energy efficient equipment and services.”²⁵ Energy efficient equipment includes air conditioning systems.²⁶ Energy efficiency services and equipment acquired by governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14 are excepted from bidding requirements.²⁷

Municipalities

Municipalities²⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²⁹ eminent domain³⁰ and police powers.³¹ Municipalities may “purchase and hold real estate, either within or without the corporate limits, for all proper municipal purposes.”³² Municipalities may “purchase and hold personal property for all proper municipal purposes,”³³ and may acquire “equipment” by lease-purchase agreement.³⁴

²⁰*Id.* §§ 31-8-1 to -13. This chapter applies to municipalities also. This chapter does not authorize the acquisition of public school buildings. *Id.* § 31-8-3. Leases are subject to competitive bidding. *Id.* § 31-8-11.

²¹*Id.* § 31-8-5.

²²*Id.* § 31-8-9.

²³*Id.* § 31-8-11.

²⁴*Id.*

²⁵*Id.* § 31-7-14. Counties are “governing authorities” under the statute. *Id.* § 31-7-1.

²⁶*Id.*

²⁷*Id.* § 31-7-13(m)(xii).

²⁸Municipalities for purposes of this discussion are towns, villages and cities. *Id.* § 21-1-1.

²⁹*Id.* § 21-33-1.

³⁰*Id.* § 21-37-47.

³¹*Id.* §§ 21-19-1 to -69.

³²*Id.* § 21-17-1(1).

³³*Id.*

³⁴*Id.* § 31-7-13(e). *See, supra*, and notes 12-24 and accompanying text.

Limitations against expenditures during a governing authorities' last term of office do not apply to lease-purchase contracts entered into pursuant to section 31-7-13.³⁵

Municipalities may sell and convey any real and personal property and dispose of real property by lease subject to certain limitations.³⁶ Municipalities may enter into lease agreements to acquire public buildings, facilities and equipment.³⁷

A City sought to finance the purchase of real property and the construction of two public projects by the issuance of certificates of participation pursuant to the "Lease-Purchase Law" (Section 31-8-1 et. seq.).³⁸ Both transactions were submitted to the State's Bond Attorney, whose opinion indicated that each issue was in accordance with law. Both transactions were also validated by the Chancery Court as required by law. Subsequent to the validation proceedings, plaintiff taxpayer contested the validity of certain agreements entered into by the City and the Public Improvement Corporation. The taxpayer had not entered a protest prior to the validation hearing. The court held that the validity of the certificates of participation could not be challenged by the taxpayer after the decree of the Chancery Court.

Municipalities have the authority to donate surplus land to a not-for-profit civic corporation organized under state law. However, the attorney general has advised that the municipality does not have the authority to enter into a lease-purchase agreement in which the not-for-profit civic corporation has improved the land and is leasing back to the municipality the land plus the improvement.³⁹ The attorney general has advised that municipal governing authorities cannot bind subsequent governing authorities to contracts which take from the subsequent governing authorities rights and powers conferred by law.⁴⁰

Energy Performance Contracting

Detailed provisions apply to lease-purchase of "energy efficient equipment and services."⁴¹ Energy efficient equipment includes air conditioning systems.⁴² Energy efficiency services and equipment acquired by governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14 are excepted from bidding requirements.⁴³

School Districts

School districts⁴⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their power of taxation⁴⁵ and eminent domain.⁴⁶ School districts may acquire "equipment" by lease-purchase agreement.⁴⁷ School districts have the authority to lease or lease-purchase school buildings for a term not to exceed twenty years.⁴⁸ School buildings must be used for classroom purposes and include the site,

³⁵Miss. Code Ann. § 21-35-27.

³⁶*Id.* § 21-17-1.

³⁷*Id.* § 31-8-1. *See, supra*, notes 20-24 and accompanying text.

³⁸*McBride v. Meridian Public Improvement Corporation*, 730 S.2d 548 (1998).

³⁹*Op. Att'y Gen.* (Miss. Nov. 23, 1982) (addressed to R.M.P. Short) (Ag Lexis 65); *Op. Att'y Gen.* (Miss. Apr. 10, 1991) (addressed to William H. Austin Jr.) (Ag Lexis 327).

⁴⁰*Op. Att'y Gen.* (Miss. Feb. 7, 1990) (addressed to Raymond D. Carter) (Ag Lexis 48).

⁴¹*Id.* § 31-7-14. Municipalities are "governing authorities" under the statute. *Id.* § 31-7-1.

⁴²*Id.*

⁴³*Id.* § 31-7-13(m)(xii).

⁴⁴School districts have home rule powers. *Id.* § 37-7-301.1.

⁴⁵Miss. Code Ann. §§ 37-7-359, -57-1.

⁴⁶*Id.* §§ 37-7-301(aa), 37-7-357.

⁴⁷*Id.* § 31-7-13(e). *See, supra*, notes 12-24 and accompanying text. School districts are "governing authorities" under § 31-7-1.

⁴⁸*Id.* § 37-7-301(v)(i). *See Cox v. Jackson Municipal Separate School District*, 503 So. 2d 265 (Miss. 1987) (upheld validation of lease agreement pursuant to this statute).

necessary support facilities, equipment and appurtenances.⁴⁹ These lease agreements are subject to referendum upon submission of petitions by qualified voters.⁵⁰ Such lease contracts can be done jointly with other school districts.⁵¹

The Emergency School Leasing Act authorizes lease financing as follows:

Any school district by resolution of the school board is hereby empowered, without public or competitive biddings to sell, lease, lend, grant or convey to a corporation, individual or partnership . . . or to permit such corporation, individual or partnership to use, maintain or operate as part of any public school facility, any real or personal property which may be necessary, useful or convenient for the purposes of the school district. Any such conveyances may include sale-leaseback or lease-leaseback arrangements, without the necessity of complying with [laws] with regard to disposal of surplus property. Any such sale, lease, loan, grant, conveyance or permit may be made or given with or without consideration and for a period of time not to exceed twenty years for agreements entered into under any agreement and on any terms and conditions which may be approved by such school district. Provided, however, that any such sale, lease, loan, grant, conveyance or permit executed under authority of this section shall provide that title to any real property transferred by a local school district shall revert to the school district at the expiration of the term.⁵²

School districts have authority to “expend . . . available transportation funds . . . [for] the purchase of transportation equipment . . . and to establish, erect and equip school bus stops or garages, and purchase land therefor.”⁵³ School boards must purchase school buses in compliance with the requirements of section 37-41-101.⁵⁴ Prior to the 2000 enactment of legislation authorizing school district participation in the state master lease-purchase program the attorney general opined that school districts lack authority to “lease-purchase” buses.⁵⁵ Subsequently, the attorney general opined that a school district may enter into a lease under the state master lease-purchase program pursuant to section 31-7-10 (15) where it has complied with section 37-41-101.⁵⁶

State law allows the diversion of monies school districts are entitled to receive from the State of Mississippi to secure leases and other obligations owed to lenders as follows:

With respect to any lawful, written obligation of a school district, including, but not limited to, leases (excluding leases of sixteenth section public school trust land), bonds, notes, or other agreement, to agree in writing with the obligee that the Department of Revenue or any state agency, department or commission created under state law may:

- (i) Withhold all or any part (as agreed by the school board) of any monies which such local school board is entitled to receive from time to time under any law and which is in the possession of the Department of Revenue, or any state agency, department or commission created under state law; and
- (ii) Pay the same over to any financial institution, trustee or other obligee, as directed in writing by the school board, to satisfy all or part of such obligation of the school district.

The school board may make such written agreement to withhold and transfer funds irrevocable for the term of the written obligation and may include in the written agreement any other terms and provisions acceptable

⁴⁹*Id.* Miss. Code Ann. § 37-7-301(v)(i).

⁵⁰*Id.*

⁵¹*Id.* § 37-7-301(v)(ii).

⁵²*Id.* § 37-7-355(1). This statute is subject to referendum upon submission of petitions by qualified voters after a resolution has been published. *Id.* § 37-7-355(2). This statute also provides for taxing authority for the purpose of lease rental payments under the lease-purchase agreement. *Id.* § 37-7-359. The district has a general obligation to make debt service payments. *Id.* For a discussion of this statute *see* 2 MS Prac. Encyclopedia MS Law § 11:37. *See, infra*, note 131 and accompanying text for a decision validating a lease-purchase transaction under this statute.

⁵³*Id.* § 37-41-83.

⁵⁴*Id.* § 37-41-85.

⁵⁵Op. Att’y Gen. (Miss. May 29, 1992) (addressed to Gary Carnathan) (Ag Lexis 251).

⁵⁶Op. Att’y Gen (Miss. April 23, 2001) (Thompson) 2001 WL 523493.

to the school board. If the school board files a copy of such written agreement with the Department of Revenue, or any state agency, department or commission created under state law then the Department of Revenue or any state agency, department or commission created under state law shall immediately make the withholdings provided in such agreement from the amounts due the local school board and shall continue to pay the same over to such financial institution, trustee or obligee for the term of the agreement.

This paragraph (tt) shall not grant any extra authority to a school board to issue debt in any amount exceeding statutory limitations on assessed value of taxable property within such school district or the statutory limitations on debt maturities, and shall not grant any extra authority to impose, levy or collect a tax which is not otherwise expressly provided for, and shall not be construed to apply to sixteenth section public school trust land⁵⁷

Energy Performance Contracting

Detailed provisions apply to lease-purchase of “energy efficient equipment and services.”⁵⁸ Energy efficient equipment includes air-conditioning systems.⁵⁹ Energy efficiency services and equipment acquired by school districts on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14 are excepted from bidding requirements.⁶⁰

Fire Districts

Fire districts do not appear to have powers independent of the municipality or other governing authority which creates them.⁶¹

Hospital Districts

“Community hospitals”⁶² qualify as tax-exempt issuers for purposes of federal income tax law due to their power of taxation.⁶³ The board of trustees of any community hospital has the following powers:

To contract by way of lease, lease-purchase or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health-care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any division or department thereof, or any related activity . . . ;⁶⁴

To let contracts for the construction, remodeling, expansion or acquisition, by lease or purchase, of hospital or health-care facilities, including real property, within the service area for community hospital purposes where such may be done with operational funds without encumbrancing the general funds of the county or municipality, provided that any contract for the purchase of real property must be ratified by the owner;⁶⁵

To borrow money and enter other financing arrangements for community hospital and related purposes and to grant security interests in hospital equipment and other hospital assets and to pledge a percentage of hospital revenues as security for such financings where needed; provided that the owner shall

⁵⁷*Id.* § 37-7-301(tt).

⁵⁸*Id.* § 37-7-301(t); *id.* § 31-7-14.

⁵⁹*Id.*

⁶⁰*Id.* § 31-7-13(m)(xii).

⁶¹*See generally*, §§ 21-25-21 to -31.

⁶²*Id.* § 41-13-15. “Community hospital” shall mean any hospital, nursing home and/or related health facilities or programs, including without limitation, ambulatory surgical facilities, intermediate care facilities, after-hours clinics, home health agencies and rehabilitation facilities, established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees. *Id.* § 41-13-10(c).

⁶³*Id.* § 41-13-25.

⁶⁴*Id.* § 41-13-35(5)(g). *See id.* § 41-13-15 (leasing and conveying assets by political subdivisions).

⁶⁵*Id.* § 41-13-35(5)(j).

specify by resolution the maximum borrowing authority and maximum percent of revenue which may be pledged by the board of trustees during any given fiscal year;⁶⁶

To establish and operate medical offices, child care centers, wellness or fitness centers and other facilities and programs which the board determines are appropriate in the operation of a community hospital for the benefit of its employees, personnel and/or medical staff which shall be operated as an integral part of the hospital and which may, in the direction of the board of trustees, be offered to the general public. If such programs are not established in existing facilities or constructed on real estate previously acquired by the owners, the board of trustees shall also have authority to acquire, by lease or purchase, such facilities and real property within the service area, whether or not adjacent to existing facilities, provided that any contract for the purchase of real property shall be ratified by the owner. . . .⁶⁷

Hospital governing boards participating in group purchasing programs are exempt from the public bidding requirements of sections 31-7-9, 31-7-10, 31-7-11, 31-7-12 and 31-7-13.⁶⁸

Public hospitals may lease-purchase commodities for a term not to exceed five years, subject to bidding requirements.⁶⁹

Energy Performance Contracting

Public hospitals may enter into lease-purchase contracts for energy efficiency equipment subject to numerous restrictions.⁷⁰

State Entities

The Department of Finance and Administration (DFA) oversees the State's fiscal affairs.⁷¹ In relation to real property the department may

. . . enter into purchase contracts, lease-purchase agreements, rental agreements or other similar contracts for the ultimate acquisition of real property by the state. Before entering into any purchase contract or lease-purchase agreement, the office must first demonstrate to the Public Procurement Review Board [PPRB]⁷² satisfactory evidence that the contract would be economically advantageous to the state and that any consolidation of agencies into buildings at a common location would not impair or impede the function of that agency in this location. The contracts shall be approved by the Public Procurement Review Board and the State Bond Commission.

(3) Acquisitions shall be made only with legislative approval and be in accordance with a long-range development plan which the department shall annually prepare and present to the Legislature as a part of the Governor's capitol budget recommendation; however, if in the opinion of the Department of Finance and Administration circumstances involving a proposed acquisition are such that waiting for legislative approval will not be economically advantageous to the state or may cause the state financial loss, then such acquisition may be made upon approval by the State Bond Commission after consultation with the Chairman of the

⁶⁶*Id.* § 41-13-35(5)(k).

⁶⁷*Id.* § 41-13-35(5)(o).

⁶⁸*Id.* § 31-7-38.

⁶⁹*Id.* § 31-7-13(l).

⁷⁰*Id.* § 31-7-14.

⁷¹*Id.* § 27-104-103.

⁷²The PPRB was created within DFA and is composed of three (3) members: the Executive Director of DFA, the Director of the Division of Budget and Policy Development, and an employee of the Office of General Services who is familiar with State purchasing laws. Two (2) members make a quorum. Regarding the Bureau, PPRB has the power and responsibility to: 1. Adopt regulations governing the approval of contracts let for construction and maintenance of state buildings and facilities; 2. Adopt regulations governing any lease or rental agreement by any state agency or department, including any state agency financed entirely by federal funds, for space outside the buildings under the jurisdiction of the Office of General Services." Miss. Code Ann. § 27-104-7; BOB Manual 100.10 (June 2011). <http://www.dfa.ms.gov/dfa-offices/bureau-of-building-grounds-and-real-property-management/bob-procedure-manual/>

Public Property Committee of the Senate and the Chairman of the Public Buildings, Grounds and Lands Committee of the House of Representatives. Acquisition of lands and buildings shall be based upon appraisals approved by the Department of Finance and Administration. The office shall not pay an amount in excess of the appraised value of the land and buildings to be acquired. The appraised value shall be determined by taking the average of two (2) appraisals performed by two (2) appraisers to be selected by the Department of Finance and Administration. Further, the office shall file quarterly reports describing this process and its progress with the Chairman of the Senate Public Property Committee and the Chairman of the House Public Buildings, Grounds and Lands Committee.

(4) With the exception of the Public Employees' Retirement System, whenever any contract or agreement entered into is for and on behalf of the State of Mississippi, title to property, when acquired, shall vest in the State of Mississippi and not in the name of any state agency. Any building subject to a lease purchase agreement with the state shall be considered a state-owned building and therefore exempt from the Assessment and levy of ad valorem taxes.

(5) All contracts executed under this section shall include provisions whereby the obligation of the state for any payment in excess of reasonable rental of the property while actually occupying the property is dependent upon the availability of appropriated funds for the purchase of the property. . . .⁷³

DFA may acquire real property in its own name or the name of another agency of the state with the approval of the public procurement review board by eminent domain.⁷⁴ DFA may build and equip buildings.⁷⁵ State construction projects are subject to numerous requirements.⁷⁶ Capital improvements for new facilities by any agency costing in excess of two million dollars are subject to review and evaluation by the Bureau of Building, Grounds and Real Property Management, and are funded in two phases by the legislature.⁷⁷ Capitol grounds and public buildings and buildings not under the supervision of any other agency are supervised by DFA.⁷⁸ The department is responsible for approving or disapproving lease agreements by state agencies and departments, with the concurrence of the Public Procurement Review Board.⁷⁹

DFA has supervision over purchasing⁸⁰ by each state agency.⁸¹ DFA shall supervise the performance of "negotiations and execution of purchasing agreements and contracts through and under which the Office of General Services may require state agencies to purchase."⁸² The DFA has established a mandatory master lease program for equipment to be used by state agencies:

(1) For the purposes of this section, the term "equipment" shall mean equipment, furniture, and if applicable, associated software and other applicable direct costs associated with the acquisition.⁸³ In addition to its other powers and duties, the Department of Finance and Administration shall have the authority to develop a

⁷³*Id.* § 27-104-107; See generally, *id.* § 29-5-2(d) (duties of DFA).

⁷⁴*Id.* § 31-11-25. See also, *id.* § 29-1-1 (signature and other requirements for conveyances of public lands).

⁷⁵*Id.* § 31-11-3.

⁷⁶*Id.* § 31-11-1 to -35. Authority to build and manage projects is in the Bureau of Building, Grounds and Real Property Management of DFA.

⁷⁷*Id.* § 31-11-30 .

⁷⁸*Id.* § 29-5-2.

⁷⁹*Id.* See also, <http://www.dfa.ms.gov/media/1238/rpmmanual-1.pdf> (RPM means Real Property Management).

⁸⁰"Purchase" means buying, renting, leasing or otherwise acquiring. Miss. Code Ann. § 31-7-1(h) (Laws 2016, Ch. 330 (S.B. 2591), § 1, appears to have omitted subsecs. (d) through (k) in error. WestLaw.

⁸¹Miss Code Ann. § 31-7-11. "Agency" "means any state board, commission, committee, council, university, department or unit thereof created by the Constitution or statutes if such board, commission, committee, council, university, department, unit or the head thereof is authorized to appoint subordinate staff by the Constitution or statute, except a legislative or judicial board, commission, committee, council, department or unit thereof; and except the Mississippi State Port Authority." *Id.* § 31-7-1. Procurement is managed by the Office of Purchasing, Travel and Fleet Management. Miss. Admin. Code tit. 12, Pt. 6.

⁸²Miss Code Ann. § 31-7-7.

⁸³Generally, "Equipment" "shall be construed to include: automobiles, trucks, tractors, office appliances and all other equipment of every kind and description." *Id.* § 31-7-1(i) (Laws 2016, Ch. 330 (S.B. 2591), § 1, appears to have omitted subsecs. (d) through (k) in error). Computer equipment and telecommunications are generally procured under the oversight of the Department of Information Technology. See, *infra*, Information Technology section.

master lease-purchase program and, pursuant to that program, shall have the authority to execute on behalf of the state master lease-purchase agreements for equipment to be used by an agency, as provided in this section. Each agency electing to acquire equipment by a lease-purchase agreement shall participate in the Department of Finance and Administration's master lease-purchase program, unless the Department of Finance and Administration makes a determination that such equipment cannot be obtained under the program or unless the equipment can be obtained elsewhere at an overall cost lower than that for which the equipment can be obtained under the program. Such lease-purchase agreements may include the refinancing or consolidation, or both, of any state agency lease-purchase agreements entered into after June 30, 1990.

(2) All funds designated by agencies for procurement of equipment and financing thereof under the master lease-purchase program shall be paid into a special fund created in the State Treasury known as the "Master Lease-Purchase Program Fund," which shall be used by the Department of Finance and Administration for payment to the lessors for equipment acquired under master lease-purchase agreements.

(3) Upon final approval of an appropriation bill, each agency shall submit to the Public Procurement Review Board a schedule of proposed equipment acquisitions for the master lease-purchase program. Upon approval of an equipment schedule by the Public Procurement Review Board with the advice of the Department of Information Technology Services, the Office of Purchasing, Travel and Fleet Management, and the Division of Energy and Transportation of the Mississippi Development Authority as it pertains to energy efficient climate control systems, the Public Procurement Review Board shall forward a copy of the equipment schedule to the Department of Finance and Administration.

(4) The level of lease-purchase debt recommended by the Department of Finance and Administration shall be subject to approval by the State Bond Commission. After such approval, the Department of Finance and Administration shall be authorized to advertise and solicit written competitive proposals for a lessor, who will purchase the equipment pursuant to bid awards made by the using agency under a given category and then transfer the equipment to the Department of Finance and Administration as lessee, pursuant to a master lease-purchase agreement. The Department of Finance and Administration shall select the successful proposer for the financing of equipment under the master lease-purchase program with the approval of the State Bond Commission.

(5) Each master lease-purchase agreement, and any subsequent amendments, shall include such terms and conditions as the State Bond Commission shall determine to be appropriate and in the public interest, and may include any covenants deemed necessary or desirable to protect the interests of the lessor, including, but not limited to, provisions setting forth the interest rate (or method for computing interest rates) for financing pursuant to such agreement, covenants concerning application of payments and funds held in the Master Lease-Purchase Program Fund, covenants to maintain casualty insurance with respect to equipment subject to the master lease-purchase agreement (and all state agencies are specifically authorized to purchase any insurance required by a master lease-purchase agreement) and covenants precluding or limiting the right of the lessee or user to acquire equipment within a specified time (not to exceed five (5) years) after cancellation on the basis of a failure to appropriate funds for payment of amounts due under a lease-purchase agreement covering comparable equipment. The State Bond Commission shall transmit copies of each such master lease-purchase agreement and each such amendment to the Joint Legislative Budget Committee. To the extent provided in any master lease-purchase agreement, title to equipment leased pursuant thereto shall be deemed to be vested in the state or the user of the equipment (as specified in such master lease-purchase agreement), subject to default under or termination of such master lease-purchase agreement. A master lease-purchase agreement may provide for payment by the lessor to the lessee of the purchase price of the equipment to be acquired pursuant thereto prior to the date on which payment is due to the vendor for such equipment and that the lease payments by the lessee shall commence as though the equipment had been provided on the date of payment. If the lessee, or lessee's escrow agent, has sufficient funds for payment of equipment purchases prior to payment due date to vendor of equipment, such funds shall be held or utilized on an as-needed basis for payment of equipment purchases either by the State Treasurer (in which event the master lease-purchase agreement may include provisions concerning the holding of such funds, the creation of a security interest for the benefit of the lessor in such funds until disbursed and other appropriate provisions approved by the Bond Commission) or by a corporate trustee selected by the Department of Finance and Administration (in which event the Department of Finance and Administration shall have the authority to enter into an agreement with such a corporate trustee containing terms and conditions approved by the Bond Commission). Earnings on any amount paid by the lessor prior to the acquisition of the equipment may be used to make lease payments under the master lease-purchase agreement or applied to pay costs and expenses incurred in connection with such lease-purchase agreement. In such event, the equipment-use agreements with the user agency may provide for lease payments to commence upon the date of payment

by the lessor and may also provide for a credit against such payments to the extent that investment receipts from investment of the purchase price are to be used to make lease-purchase payments.

(6) The annual rate of interest paid under any lease-purchase agreement authorized under this section shall not exceed the maximum interest rate to maturity on general obligation indebtedness permitted under Section 75-17-101.

(7) The Department of Finance and Administration shall furnish the equipment to the various agencies, also known as the user, pursuant to an equipment-use agreement developed by the Department of Finance and Administration. Such agreements shall require that all monthly payments due from such agency be paid, transferred or allocated into the Master Lease-Purchase Program Fund pursuant to a schedule established by the Department of Finance and Administration. In the event such sums are not paid by the defined payment period, the Executive Director of the Department of Finance and Administration shall issue a requisition for a warrant to draw such amount as may be due from any funds appropriated for the use of the agency which has failed to make the payment as agreed.

(8) All master lease-purchase agreements executed under the authority of this section shall contain the following annual allocation dependency clause or an annual allocation dependency clause which is substantially equivalent thereto: "The continuation of each equipment schedule to this agreement is contingent in whole or in part upon the appropriation of funds by the Legislature to make the lease-purchase payments required under such equipment schedule. If the Legislature fails to appropriate sufficient funds to provide for the continuation of the lease-purchase payments under any such equipment schedule, then the obligations of the lessee and of the agency to make such lease-purchase payments and the corresponding provisions of any such equipment schedule to this agreement shall terminate on the last day of the fiscal year for which appropriations were made."

(9) The maximum lease term for any equipment acquired under the master lease-purchase program shall not exceed the useful life of such equipment as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and Regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines. The Department of Finance and Administration shall be deemed to have met the requirements of this subsection if the term of a master lease-purchase agreement does not exceed the weighted average useful life of all equipment covered by such agreement and the schedules thereto as determined by the Department of Finance and Administration. For purposes of this subsection, the "term of a master lease-purchase agreement" shall be the weighted average maturity of all principal payments to be made under such master lease-purchase agreement and all schedules thereto.

(10) Interest paid on any master lease-purchase agreement under this section shall be exempt from State of Mississippi income taxation. All equipment, and the purchase thereof by any lessor, acquired under the master lease-purchase program and all lease-purchase payments with respect thereto shall be exempt from all Mississippi sales, use and ad valorem taxes.

(11) The Governor, in his annual executive budget to the Legislature, shall recommend appropriations sufficient to provide funds to pay all amounts due and payable during the applicable fiscal year under master lease-purchase agreements entered into pursuant to this section.

(12) Any master lease-purchase agreement reciting in substance that such agreement has been entered into pursuant to this section shall be conclusively deemed to have been entered into in accordance with all of the provisions and conditions set forth in this section. Any defect or irregularity arising with respect to procedures applicable to the acquisition of any equipment shall not invalidate or otherwise limit the obligation of the Department of Finance and Administration, or the state or any agency of the state, under any master lease-purchase agreement or any equipment-use agreement.

(13) There shall be maintained by the Department of Finance and Administration, with respect to each master lease-purchase agreement, an itemized statement of the cash price, interest rates, interest costs, commissions, debt service schedules and all other costs and expenses paid by the state incident to the lease-purchase of equipment under such agreement.

(14) Lease-purchase agreements entered into by the Board of Trustees of State Institutions of Higher Learning pursuant to the authority of Section 37-101-413 or by any other agency which has specific statutory authority other than pursuant to Section 31-7-13(e) to acquire equipment by lease-purchase shall not be made

pursuant to the master lease-purchase program under this section, unless the Board of Trustees of State Institutions of Higher Learning or such other agency elects to participate as to part or all of its lease-purchase acquisitions in the master lease-purchase program pursuant to this section.

(15) The Department of Finance and Administration may develop a master lease-purchase program for school districts and, pursuant to that program, may execute on behalf of the school districts master lease-purchase agreements for equipment to be used by the school districts. The form and structure of this program shall be substantially the same as set forth in this section for the master lease-purchase program for state agencies. If sums due from a school district under the master lease-purchase program are not paid by the expiration of the defined payment period, the Executive Director of the Department of Finance and Administration may withhold such amount that is due from the school district's minimum education or adequate education program fund allotments.

(16) The Department of Finance and Administration may develop a master lease-purchase program for community and junior college districts and, pursuant to that program, may execute on behalf of the community and junior college districts master lease-purchase agreements for equipment to be used by the community and junior college districts. The form and structure of this program must be substantially the same as set forth in this section for the master lease-purchase program for state agencies. If sums due from a community or junior college district under the master lease-purchase program are not paid by the expiration of the defined payment period, the Executive Director of the Department of Finance and Administration may withhold an amount equal to the amount due under the program from any funds allocated for that community or junior college district in the state appropriations for the use and support of the community and junior colleges.

(17) From and after July 1, 2016, the expenses of this agency shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized under this section shall be deposited into the State General Fund as authorized by law.

(18) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent or other charge for services or resources received by authority of this section.⁸⁴

Leases which do not fall within the master lease program or lease-purchases by a “governing authority,”⁸⁵ are covered by the following code provision, which incorporates certain requirements of the master lease provision.

. . . For the purposes of this section, the term "equipment" shall mean equipment, furniture and, if applicable, associated software and other applicable direct costs associated with the acquisition. Any lease-purchase of equipment which an agency is not required to lease-purchase under the master lease-purchase program pursuant to Section 31-7-10 and any lease-purchase of equipment which a governing authority elects to lease-purchase may be acquired by a lease-purchase agreement under this paragraph (e). Lease-purchase financing may also be obtained from the vendor or from a third-party source after having solicited and obtained at least two (2) written competitive bids, as defined in paragraph (b) of this section, for such financing without advertising for such bids. Solicitation for the bids for financing may occur before or after acceptance of bids for the purchase of such equipment or, where no such bids for purchase are required, at any time before the purchase thereof. No such lease-purchase agreement shall be for an annual rate of interest which is greater than the overall maximum interest rate to maturity on general obligation indebtedness permitted under Section 75-17-101, and the term of such lease-purchase agreement shall not exceed the

⁸⁴*Id.* § 31-7-10. Online information about the master lease program is maintained by the Department of Administration Office of Purchasing, Travel and Fleet Management at <http://www.dfa.ms.gov/dfa-offices/purchasing-travel-and-fleet-management/purchasing-and-travel/master-lease-purchase-program/>.

⁸⁵"Governing authority" "means boards of supervisors, governing boards of all school districts, all boards of directors of public water supply districts, boards of directors of master public water supply districts, municipal public utility commissions, governing authorities of all municipalities, port authorities, Mississippi State Port Authority, commissioners and boards of trustees of any public hospitals, boards of trustees of public library systems, district attorneys, school attendance officers and any political subdivision of the state supported wholly or in part by public funds of the state or political subdivisions thereof, including commissions, boards and agencies created or operated under the authority of any county or municipality of this state. The term "governing authority" shall not include economic development authorities supported in part by private funds, or commissions appointed to hold title to and oversee the development and management of lands and buildings which are donated by private individuals to the public for the use and benefit of the community and which are supported in part by private funds." *Id.* § 31-7-1 (b).

useful life of equipment covered thereby as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines. Any lease-purchase agreement entered into pursuant to this paragraph (e) may contain any of the terms and conditions which a master lease-purchase agreement may contain under the provisions of Section 31-7-10(5),⁸⁶ and shall contain an annual allocation dependency clause substantially similar to that set forth in Section 31-7-10(8).⁸⁷ Each agency or governing authority entering into a lease-purchase transaction pursuant to this paragraph (e) shall maintain with respect to each such lease-purchase transaction the same information as required to be maintained by the Department of Finance and Administration pursuant to Section 31-7-10(13). However, nothing contained in this section shall be construed to permit agencies to acquire items of equipment with a total acquisition cost in the aggregate of less than Ten Thousand Dollars (\$ 10,000.00) by a single lease-purchase transaction. All equipment, and the purchase thereof by any lessor, acquired by lease-purchase under this paragraph and all lease-purchase payments with respect thereto shall be exempt from all Mississippi sales, use and ad valorem taxes. Interest paid on any lease-purchase agreement under this section shall be exempt from State of Mississippi income taxation.⁸⁸

The administrative code provides the following in relation to leases, leases with options to purchase, lease-purchases, and rentals:

3.502. Lease Contracts.

3.502.01 Description.

A lease is a contract for the use of equipment or other commodities or real property under which title will not pass to the State at any time. Section 3.502.03 (Option Provisions) applies to a lease with purchase option where title may pass to the State.

3.502.02 Use.

A lease may be entered into provided:

- (a) it is in the best interest of the State;
- (b) all conditions for renewal and costs of termination are set forth in the lease; and
- (c) the lease is not used to circumvent normal procurement procedures.

3.502.03 Option Provisions.

3.502.03.1 Contract Provision. When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation.

3.502.03.2 Exercise of Option. Before exercising any option for renewal, extension, or purchase, the Procurement Officer should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to the State than renewal or extension of the existing contract.

3.502.03.3 Lease with Purchase Option. Because a purchase option changes the nature of the procurement, it has been determined that agencies shall not enter into lease contracts which contain a purchase option.

Commentary:

The justification for prohibiting the lease with an option to purchase has several issues. If an agency were to solicit bids and enter into a contract based upon the lowest lease cost, and then, at the end of the contract period, determine that they desire to take advantage of a purchase option, it is possible that the change from a lease to a purchase would have caused a different bidder to actually be the lowest bidder. In addition, during a lease, funds generally come from a contractual service fund while in a purchase, funds come from the "equipment" budget. If an agency were to lease an item for a period of time and then take advantage of the purchase option, they would have used "contractual service" funds to purchase equipment. Finally, since all lease/purchase by state agencies shall fall under the Master Lease Purchase program, the implementation of the purchase option would create a situation where the agency has lease/purchased the item without using the Master Lease Purchase Program.

⁸⁶See, *supra*, note 84 and accompanying text.

⁸⁷*Id.*

⁸⁸*Id.* § 31-7-13 (e). For exceptions from bidding requirements see section 31-7-13(m).

3.502.04 Lease-Purchase Contracts.

3.502.04.1 General. Lease-purchase contracts are authorized under Sections 31-7-10 and 31-7-13 (m) Mississippi Code 1972. These are extended term contracts requiring payment over a specified period of time up to the useful life of the equipment as determined by the Asset Depreciation Range (ADR) established by the Federal Internal Revenue Service. Such contracts almost certainly will transcend a fiscal year. Therefore, it is required that any such contract shall include a nonappropriation clause. This clause provides that should the contract be canceled for nonavailability of funds the equipment shall be returned to the lessor with no further obligations on the part of the lessee except that all payments due up to the end of the fiscal year in which funding was available shall be paid. No agency shall enter into any lease-purchase contract without approval of the Department of Finance and Administration. Any lease-purchase contract is considered to be a purchase transaction; therefore, payments made pursuant to such contracts shall be made from the funding category of capital outlay equipment. The universities should preview the Institutions of Higher Learning's policies concerning lease-purchase contracts.

3.502.05 Multi-year or Short-term Rental Lease Agreements.

3.502.05.1 General. Multi-year or short-term rental lease agreements may be used when:

- (a) it would promote economy in procurement by obtaining the benefits of reduced monthly rental cost due to extended term rental and sufficient funds are not available for purchase;
- (b) the equipment requested is for a special project that would not warrant a purchase as the project is of short duration and with the termination of that project there would be no further need for the equipment; and
- (c) such reason as may be prescribed by law for certain entities.

3.502.05.2 Procedures. Section 2.103.03 of this manual sets forth the procedures for state agencies to follow when entering into a rental agreement.

COMMENTARY:

Careful evaluation of the economics of leasing versus buying is required prior to making the decision to award a lease or lease-purchase contract. Such evaluation examines the comparative costs of leasing and the costs of outright purchase and maintenance, projected as total costs for the estimated use of the item, and the consideration of other pertinent factors such as continuing need and functional obsolescence or inefficiencies which could result from technological advancements. The question of leasing versus buying involves policy matters important to the budget function as well as to procurement, and the budget and procurement entities need to collaborate in establishing criteria or guidelines applicable to lease and lease-purchase. Any contract that by the terms of such contract obligates the lessee to make payments for any period past the last day of the fiscal year in which the contract was entered into shall include a nonappropriation clause.

3.502.05.3 Automatic Renewal Clause. Agencies shall not enter into contracts which contain an automatic renewal clause without first obtaining the written approval of the Office of Purchasing and Travel.

3.502.05.4 Rental Agreement for use by Mississippi Departments and Vendors. All rentals under the terms of a state contract shall utilize the Rental Agreement shown in Appendix C. In addition agencies are urged to use the rental agreement for all other rentals.

3.502.06 Lease Termination.

Multi-year agreements frequently offer lower monthly rental charges as they carry a certain assurance that the equipment will be in service for the specified time, thereby providing a greater return to the owner on the original investment. Early cancellation of leases may result in termination removal charges. Therefore, only two reasons are considered justifications for requesting cancellation:

- (1) Equipment is inoperative or inefficient and the lessor either cannot or will not correct the situation.
- (2) Funding for the succeeding fiscal year is not available and the provisions of the funding-out clause must be exercised.

In the case of inoperative or inefficient equipment, no termination or removal charges will be paid by state agencies.

When exercising provisions of the "funding-out" clause, the removal charges as presented in the original contract shall be due and payable; however, no payment of termination charges will be allowed.⁸⁹

⁸⁹Miss. Admin. Code 12-1-6:3.502 (Amended May 10, 2012. Current through the Mississippi Administrative Rules Listing of Filings, dated June 2012).

In regard to motor vehicles the statutory code provides:

No state department, institution or agency shall purchase, rent, lease or acquire any motor vehicle, regardless of the source of funds from which the motor vehicle is to be purchased, except under authority granted by the Department of Finance and Administration. The Bureau of Fleet Management, Department of Finance and Administration, shall promulgate rules and regulations governing the purchase, rental, lease or acquisition of any motor vehicle by a state department, institution or agency with regard to the appropriateness of the vehicle to its intended use. The Bureau of Fleet Management, Department of Finance and Administration, shall only grant authority to purchase, rent, lease or acquire a motor vehicle which is the lowest cost vehicle to carry out its intended use. Before the disposal or sale of any vehicle, the Bureau of Fleet Management shall make a determination that the lifetime use and mileage of the vehicle has been maximized and that it would not be feasible for another state agency to use the vehicle.⁹⁰

Information Technology

The Mississippi Department of Information Technology Services (MDITS) (also called “the authority”) oversees and coordinates the acquisition of computer equipment and services⁹¹ used by agencies,⁹² including institutions of higher education and other political subdivisions upon request.⁹³ The executive director of MDITS shall review all contracts for computer equipment or services and “act as the purchasing and contracting agent for the State of Mississippi in the negotiation and execution of all contracts for the acquisition of computer equipment or services.”⁹⁴ The authority holds title to all information technology equipment.⁹⁵ The authority may provide for procedures governing acquisitions of computer and telecommunications equipment⁹⁶ and services.⁹⁷ It may delegate purchasing responsibility⁹⁸ and it may provide exemptions from involvement by MDITS to agencies and institutions in some situations.⁹⁹ It serves as purchasing agent and reviews and approves acquisition requests and executes contracts.¹⁰⁰ Contracts above a certain threshold must be submitted to the authority for approval before final execution.¹⁰¹

The authority is authorized to purchase, lease, or rent computer equipment or services and to operate said equipment and utilize said services in providing services to one or more state agencies when in its opinion such operation will provide maximum efficiency and economy in the functions of any such agency or agencies.¹⁰²

⁹⁰Miss Code Ann.. § 25-1-77 (3).

⁹¹Computer equipment or services “means any information technology, computer or computer related telecommunications equipment, electronic word processing and office systems, or services utilized in connection therewith, including, but not limited to, all phases of computer software and consulting services, and insurance on all state-owned computer equipment.” *Id.* § 25-53-3 (2)(c).

⁹²*Id.* § 25-53-3(e) (“Agency” means and includes all the various state agencies, officers, departments, boards, commissions, offices and institutions of the state).

⁹³*Id.* § 25-53-5.

⁹⁴*Id.* § 25-53-21.

⁹⁵*Id.* § 25-53-5 (c).

⁹⁶“Telecommunications equipment, systems, related services” “are limited to the equipment and means to provide: (i) Telecommunications transmission facilities. (ii) Telephone systems, including voice processing systems. (iii) Facsimile systems. (iv) Radio paging services. (v) Mobile telephone services, including cellular mobile telephone service. (vi) Intercom and paging systems. (vii) Video teleconferencing systems. (viii) Personal communications networks and services. (ix) Any and all systems based on emerging and future telecommunications technologies relative to (i) through (viii) above.” *Id.* § 25-53-3 (2)(l) .

⁹⁷*Id.* § 25-53-5 (d); *id.* § 25-53-109.

⁹⁸*Id.* § 25-53-2; § 25-53-25; Miss. Admin. Code 36-203.3:005-200.

⁹⁹*Id.* 36-207.3:013-040; Miss. Code Ann. § 25-53-5 (b) (MDITS may take into consideration the special needs of institutions of higher education).

¹⁰⁰Miss. Code Ann.. § 25-53-5(k).

¹⁰¹*Id.* § 25-53-5 (k). Miss. Admin. Code 36-209.3:018-030.

¹⁰²Miss. Code Ann. § 25-53-5 (l).

Expenditures in excess of the dollar amounts established in the public purchasing statute, section 31-7-13(c), shall be subject to public bidding.¹⁰³ MDITS procurement procedures applicable to the lease-purchase of computer and telecommunications equipment are coordinated with procurement requirements overseen by the Office of General Services of the Department of Finance and Administration:

When applicable, the authority may procure equipment, systems and related services in accordance with the law or regulations, or both, which govern the Bureau of Purchasing of the Office of General Services or which govern the Mississippi Department of Information Technology Services procurement of telecommunications equipment, software and services.¹⁰⁴

Examples of equipment and services under the procurement oversight of MDITS, exceptions, and extensive additional information can be found online at the MDITS website.¹⁰⁵

Agencies must procure wireless communication devices from vendors appearing on an approved MDITS list.¹⁰⁶

MDITS has sole authority to acquire telecommunications systems for state agencies whether acquired by lease or purchase.¹⁰⁷ “No agency shall rent, lease, lease/purchase, purchase or in any way own or pay for the operation of any telecommunications system out of any funds available for the use by that agency without the written approval of the bureau.”¹⁰⁸

The bureau shall, subject to the provisions of Sections 25-53-101 through 25-53-125, have sole authority and responsibility for defining the specific telecommunications equipment, systems and related services to which the provisions of Sections 25-53-101 through 25-53-125 shall be applicable. However, the provisions of Sections 25-53-101 through 25-53-125 shall not be applicable with respect to computer and telecommunications equipment, systems and related services that are only available from a sole source.¹⁰⁹

* * *

(1) The types of contracts permitted in the procurement of telecommunications equipment, systems and related services are defined herein, and the provisions in Sections 25-53-101 through 25-53-125 supplement the provisions of Chapter 7, Title 31, Mississippi Code of 1972.

(2) The Mississippi Department of Information Technology Services may, on behalf of any state agency, enter into an equipment support contract with a vendor of telecommunications equipment or services for the purchase or lease of such equipment or services in accordance with the following provisions:

(a) Specifications for equipment support contracts shall be developed in advance and shall conform to the following requirements:

(i) Specifications for equipment support contracts shall cover a specific class or classes of equipment and service and may include all features associated with that class or classes.

(ii) Specifications in the request for proposals for equipment support contracts shall be developed by the Mississippi Department of Information Technology Services.

¹⁰³*Id.* § 25-53-5 (o) (generally, over \$50,000.00).

¹⁰⁴*Id.* § 25-53-5 (p).

¹⁰⁵<http://www.its.ms.gov/procurement/Pages/default.aspx>. Proc. Hdbk. (Oct. 2015, under revision to comply with Senate Bill 2593, 2016 Reg. Sess.).

¹⁰⁶Miss. Code Ann. § 25-53-191. (The University of Mississippi Medical Center and its employees, the Mississippi State University Extension Service and its agents and faculty members, the Mississippi State University Agricultural and Forestry Experiment Station and its faculty members, the Mississippi State University Forestry and Wildlife Research Center and its faculty members, and the Mississippi State University College of Veterinary Medicine and its faculty members are exempt from the application of this section.)

¹⁰⁷*Id.* § 25-53-111.

¹⁰⁸*Id.* § 25-53-115.

¹⁰⁹*Id.* § 25-53-119.

(iii) Specifications shall be based on the projected needs of user agencies.

(iv) Specifications for equipment support contracts for purchase or lease of telecommunications equipment may include specifications for the maintenance of the equipment desired.

(b) The initial procurement of an equipment support contract, and procurement of equipment and services to be utilized by agencies under an equipment support contract, shall be as follows:

(i) Equipment support contracts shall be awarded by competitive sealed bidding.

(ii) A using agency may procure required telecommunications equipment and service available under an equipment support contract through release of a purchase order for the required equipment and service to the vendor holding an equipment support contract. However, such procurement by purchase order shall be accomplished in accordance with the procedures and regulations prescribed by the Mississippi Department of Information Technology Services, and shall be subject to all other statutory requirements including approval by the bureau.

(c) The final authority for entering into equipment support contracts shall rest with the bureau, and such contracts shall be executed by the Mississippi Department of Information Technology Services in accordance with the procedures and regulations defined by said authority.

(d) Equipment support contracts shall include the following terms and conditions:

(i) Equipment support contracts shall be valid for not more than one (1) fiscal year with the Mississippi Department of Information Technology Services having an option to renew for two (2) additional fiscal years. The vendor may vary lease or purchase prices for the optional renewal period(s) by an amount equal to the lesser of the lease or purchase price permitted by that vendor's contract with the General Services Administration of the United States Government for such equipment and services, or any variance in that vendor's published list prices for such equipment and services during that fiscal year, provided that any increase may not exceed five percent (5%) and the variance must have been authorized by the initial equipment and service order contract.

(ii) The prices stated in such contract shall not change for the period of the contract.

(iii) Individual items of telecommunications equipment and service which may be included under an equipment support contract may not have a purchase price greater than Fifty Thousand Dollars (\$50,000.00) or a monthly lease price greater than Three Thousand Dollars (\$3,000.00). Such price shall not include costs of maintenance, taxes or transportation.

(iv) Equipment support contracts shall include the following annual appropriation dependency clause:

“The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the Legislature. If the Legislature fails to appropriate sufficient monies to provide for the continuance of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated.”

(3) The Mississippi Department of Information Technology Services may on behalf of any state agency enter into contracts for the lease or purchase of telecommunications equipment systems or services in accordance with the following provisions:

(a) The bureau may directly contract for or approve contracts for regulated or tariffed telecommunications services upon determination by the bureau that the application of such service is in the best interests of the State of Mississippi.

(b) All other contracts of this type shall be entered into through request for proposals as defined in Sections 25-53-101 through 25-53-125.

(c) The justification of such contracts must be presented to the bureau prior to issuance of a request for proposals. Such justification shall identify and consider all cost factors relevant to that contract.

(d) The term of a lease contract shall not exceed sixty (60) months for a system lease valued less than One Million Dollars (\$1,000,000.00) and shall not exceed one hundred twenty (120) months for a system lease valued One Million Dollars (\$1,000,000.00) or more.

(e) All lease contracts must contain the following annual appropriation dependency clause:

“The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the Legislature. If the Legislature fails to appropriate sufficient monies to provide for the continuation of a contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated.”

(f) The Mississippi Department of Information Technology Services shall maintain a list of all such contracts. This list shall show as a minimum the name of the vendor, the annual cost of each contract and the term of the contract or the purchase cost.

(g) Upon the advance written approval of the bureau, state agencies may extend contracts for the lease of telecommunications equipment, systems and related services on a month-to-month basis for a period not to extend more than one (1) calendar year for the stated lease prices.¹¹⁰

The State Board of Education is authorized to lease-purchase equipment and related materials to administer a driver educational and training program.¹¹¹

Institutions of Higher Education

Institutions of higher education¹¹² are managed and controlled by the Board of Trustees of State Institutions of Higher Learning.¹¹³ Individual institutions of higher education have statutory authority to acquire or receive and hold real and personal property.¹¹⁴ Universities are generally subject to public purchasing laws applicable to other state agencies.¹¹⁵ These institutions may lease-purchase equipment¹¹⁶ through a program the board is authorized to establish:

(1) As used in this section, the term "state institutions of higher learning" means those institutions identified in Section 37-101-1 and the University Research Center.¹¹⁷

(2) The Board of Trustees of State Institutions of Higher Learning may establish an equipment leasing and purchase program for the use of the state institutions of higher learning. In establishing and administering the program, the board may perform the following actions:

(a) Adopt policies and procedures to implement the program;

(b) Establish offices or subordinate units as may be necessary for the administration of the program;

¹¹⁰*Id.* § 25-53-121.

¹¹¹*Id.* § 37-25-23.

¹¹²The University of Mississippi, The Mississippi State University of Agriculture and Applied Science, The Mississippi State College for Women, The University of Southern Mississippi, The Delta State College, The Alcorn Agricultural and Mechanical College, The Jackson State College, The Mississippi Valley State College, and any other of like kind which may be hereafter established by the state. Miss. Const. art. 8 § 213-A.

¹¹³*Id.*; Miss. Code Ann. § 37-101-15; § 37-101-1.

¹¹⁴*Id.* § 37-113-7 (West 2009) (Miss. St. Univ.); *id.* § 37-115-1 (Univ. of Miss.); *id.* 37-117-1 (Miss. Univ. for Women); *id.* 37-119-1 (Univ. So. Miss.); *id.* §§ 37-121-1 to -3; (Alcorn State, incorporating laws applicable to Miss. St. Univ.); *id.* § 37-123-1 (Delta St. Univ.); *id.* § 37-125-1 (Jackson St. Univ.); *id.* § 37-127-1 (Miss. Valley St. Univ.).

¹¹⁵*Id.* § 31-7-11; § 31-7-1; § 25-53-3.

¹¹⁶Computer equipment is generally procured by public universities through the Department of Information Technology unless approval of purchases has been delegated to the public university's chief information officer for purchases under a certain threshold. *Id.* § 25-53-25; Miss. Admin. Code 36-203.3; 005-200. See preceding section of text relating to the department of technology.

¹¹⁷*See, supra*, note 112 listing institutions.

- (c) Adopt rules and regulations pertaining to the program;
 - (d) Acquire by purchase, lease or lease-purchase contract and retain or transfer ownership or possession of instructional and other equipment;
 - (e) Contract for the leasing of such properties and for the financing of leases and purchases;
 - (f) Enter into contracts with others to provide any services deemed necessary and advisable by the board;
 - (g) Make purchases and enter into leases according to the requirements of the state public purchasing laws and the requirements of those laws establishing the Mississippi Department of Information Technology Services;
 - (h) Enter into lease financing agreements in connection with purchases made under the authority of this section;
 - (i) Require the transfer of appropriations of general funds or self-generated funds from the state institutions to those funds that the board may determine are required in connection with any lease financing agreements;
 - (j) Develop administrative methods for determining age, useful life, replacement value, current use, condition and other characteristics of instructional and research equipment at the state institutions and research facilities;
 - (k) Determine obsolescence of the equipment and establish priorities for replacement or provision of the equipment or its transfer to another state institution that can continue to utilize it; and
 - (l) Develop long-range plans for the orderly and systematic acquisition and utilization of the instructional and research equipment in order to eliminate waste and duplication, provide the maximum efficiency of use for expenditures, and achieve equitable allocations of equipment funds to the state institutions consistent with the roles of the institutions and disciplines served.
- (3) All institutions of higher learning desiring to purchase, lease or lease-purchase equipment involving an expenditure or expenditures of more than Five Thousand Dollars (\$ 5,000.00) must procure that equipment under the equipment leasing and purchase program unless funds for the procurement of the equipment under the program are unavailable or the equipment can be procured elsewhere at an overall cost lower than that for which the equipment can be procured under the program.¹¹⁸

The board of trustees is not obligated to participate in the state's master lease program:

Lease-purchase agreements entered into by the Board of Trustees of State Institutions of Higher Learning pursuant to the authority of Section 37-101-413 or by any other agency which has specific statutory authority other than pursuant to Section 31-7-13(e) to acquire equipment by lease-purchase shall not be made pursuant to the master lease-purchase program under this section [Section 31-7-13(e)], unless the Board of Trustees of State Institutions of Higher Learning or such other agency elects to participate as to part or all of its lease-purchase acquisitions in the master lease-purchase program pursuant to this section.¹¹⁹

The Board of Trustees of State Institutions of Higher Learning may enter into a lease/leaseback arrangement involving institutional real property for construction for housing and dormitory facilities with private individuals or corporations for a term not exceeding thirty-five (35) years.¹²⁰ The board may delegate this authority to individual institutions, but arrangements involving the lease/leaseback of such "auxiliary facilities" must be approved by the board.¹²¹ The board of trustees may lease facilities from educational building corporations established for that purpose.¹²²

¹¹⁸Miss. Code Ann. § 37-101-413.

¹¹⁹*Id.* § 31-7-10 (14).

¹²⁰*Id.* § 37-101-41 to -43.

¹²¹*Id.* § 37-101-41. "Auxiliary facilities" is the term used in the statute to describe dormitories.

¹²²*Id.* § 37-101-71.

Energy Performance Contracting

State agencies, including institutions of higher education,¹²³ may enter into a lease, energy services contract or lease-purchase contracts for energy efficiency equipment, services relating to the installation, operation and maintenance of equipment or improvements for a period not to exceed 20 years and subject to numerous requirements.¹²⁴ Energy efficiency services and equipment acquired by institutions of higher learning and state agencies or other applicable governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14 are excepted from bidding requirements.¹²⁵

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.¹²⁶ There are no constitutional debt limitations for counties, municipalities and school districts. Counties and municipalities are statutorily limited in the amount of bonded indebtedness which they may incur.¹²⁷ Indebtedness “shall not be construed to apply to contract obligations in any form . . . which are subject to annual appropriations.”¹²⁸ School districts are also statutorily limited in the amount of bonded indebtedness they may incur.¹²⁹

In *Cox v. Jackson Municipal Separate School District*,¹³⁰ the court upheld the validation proceedings of a multi-year lease-purchase agreement pursuant to the Emergency School Leasing Authority Act of 1986.¹³¹

The attorney general has stated that a town can lease equipment¹³² and a county can lease-purchase equipment.¹³³ A city lacks authority to refinance previously incurred indebtedness or to roll-over and refinance existing debt,¹³⁴ but a county is not prohibited by section 13-7-13(e) (authorizing the use of lease-purchase financing) from refinancing a contract on equipment already purchased.¹³⁵ A county may acquire tractors, trucks and other machinery for public road construction by lease-purchase.¹³⁶ A county may borrow money to pay the balance due on a lease-purchase contract for road equipment.¹³⁷ The attorney general’s office has advised the board of trustees of a county hospital that it is authorized to acquire property by use of a lease with an option to purchase.¹³⁸ A city is authorized to

¹²³“Agency” “means any state board, commission, committee, council, university, department or unit thereof created by the Constitution or statutes if such board, commission, committee, council, university, department, unit or the head thereof is authorized to appoint subordinate staff by the Constitution or statute, except a legislative or judicial board, commission, committee, council, department or unit thereof; and except the Mississippi State Port Authority.” *Id.* § 31-7-1(b). The board of trustees of the State Institutions of Higher Learning has power to enter into energy performance lease-purchase contracts. *Id.* § 37-101-15.

¹²⁴*Id.* § 31-7-14); *id.* § 37-101-15 (h) (additional authority for board of institutions of higher learning); *Id.* § 31-7-73

¹²⁵*Id.* § 31-7-13(m)(xii).

¹²⁶Miss. Const. art. 4, § 115.

¹²⁷Miss. Code Ann. § 19-9-5 (counties); *id.* § 21-33-303 (municipalities).

¹²⁸*Id.*

¹²⁹*Id.* § 37-59-5; *id.* §§ 37-59-7, 37-7-359.

¹³⁰503 So. 2d 265 (Miss. 1987).

¹³¹Miss. Code. Ann. §§ 37-7-351, *et seq.*, and *see supra* note 52 and accompanying text. The court states that the act allows “multi-year leasing authority with discretionary funding.” 503 So. 2d at 266.

¹³²Op. Att’y Gen. (Miss. June 1, 1987) (addressed to Mayor Griffing) (Ag Lexis 327).

¹³³Op. Att’y Gen. (Miss. September 29, 1988) (addressed to Honorable James W. Henley) (Ag. Lexis 337).

¹³⁴Op. Att’y Gen. (Miss. Dec. 19, 1990) (addressed to Honorable David W. Ellis) (Ag. Lexis 680).

¹³⁵Op. Att’y Gen. (Miss. March 31, 1993) (addressed to W. J. Gamble, III) (Ag Lexis 159).

¹³⁶Op. Att’y Gen. (Miss. Jan. 3, 1991) (addressed to Hoke Stone) (Ag. Lexis 1) (applying Miss. Code Ann. § 37-7-13(e)).

¹³⁷Op. Att’y Gen. (Miss. July 15, 1992) (addressed to Robert M. Logan) (Ag Lexis 390).

¹³⁸Op. Att’y Gen. (Feb. 15, 1990) (addressed to Martin T. Smith) (Ag. Lexis 68).

lease-purchase facilities with federal grant funds under the rental contract law.¹³⁹ Section 19-9-1 does not authorize counties to lease-purchase equipment with bond proceeds.¹⁴⁰

In *Northeast Mental Health-Mental Retardation Commission v. V.M Cleveland*,¹⁴¹ the Court held that a 99 year lease that the Commission entered into for a facility was voidable at the Commission's discretion as a matter of law, since, without statutory authority to enter into a 99 year lease, the rule against binding successors would be applicable.

Interest Rate Limitations

The legal rate of interest specified in statutory law does not apply to "the state, or to a political subdivision thereof" since they are not set forth in such statutes.¹⁴²

Provisions limiting the interest rate on obligations of political subdivisions are specific and most do not apply to lease-purchase agreements.¹⁴³ The annual rate of interest paid under any lease-purchase agreement authorized by section 31-7-14, relating to public contracts of energy efficiency services, shall not exceed the maximum interest rate to maturity on general obligation indebtedness. Lease-purchase agreements covering equipment shall not be for an annual rate of interest greater than the overall maximum interest rate to maturity on general obligation indebtedness.¹⁴⁴

Miscellaneous

The Mississippi attorney general is of the opinion that "any acquisition of real property procured with public funds will be subject to Miss. Code Ann. Section 43-37-1 et seq, which includes, among other things, an appraisal of the property."¹⁴⁵

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

¹³⁹Miss. Code Ann. §§ 31-8-1 to -13 (West 1999 and Supp. 2009); Op. Att'y Gen. (March 7, 1991) (addressed to Kathryn Merkle) (Ag Lexis 252).

¹⁴⁰Op. Att'y Gen. (Miss. July 16, 1992) (addressed to David Chandler) (Ag Lexis 372).

¹⁴¹187 So.3d 601(Miss. 1930).

¹⁴²*City of Natchez v. McGehee*, 127 So. 902, 903 (Miss. 1930).

¹⁴³*See* Miss. Code Ann. § 75-17-101 (general obligation and limited obligation tax bonds limited to 11 percent); *id.* § 75-17-103 (revenue bonds limited to 13 percent); *id.* § 75-17-105 (tax anticipation notes limited to 11 percent); *id.* § 75-17-107 (interim financing limited to 9 percent).

¹⁴⁴*Id.* § 31-7-13(e).

¹⁴⁵Op. Att'y Gen. (Miss. Aug. 17, 2007) (addressed to Mr. W. Price Elliott, Esq.), 2007 WL 2744784; Miss. Code Ann. Section 43-37-3(b) (this statute requiring appraisal applies to counties, school districts and other political subdivisions). *Id.* § 43-37-2.

MISSOURI 2018 REVISION

Current through the end of the 2017 First Regular Session and First and Second Extraordinary Sessions of the 99th General Assembly.
Constitution is current through the November 8, 2016 General Election, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties have authority to “purchase [or] lease . . . any property, real or personal, for the use and benefit of the county, and may sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same”⁵

Counties of the second, third and fourth class have authority to “purchase or lease” dumping grounds.⁶ Counties of the first class not having a charter form of government “may lease to any person real or personal property and other facilities . . . for a term not to exceed fifty years.”⁷ Counties may “acquire a site, construct, reconstruct, remodel, repair, maintain and equip the courthouse and jail.”⁸ Counties may provide a system of public recreation and may do so by “purchase, gift, lease, condemnation, exchange or otherwise”⁹

Energy Performance Contracting

Subject to restrictions, counties may enter into lease-purchase agreements for energy cost savings measures designed to reduce energy consumption or operating costs in public facilities.¹⁰

Municipalities

Municipalities¹¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹² eminent domain¹³ and police powers.¹⁴ Municipalities may “purchase, hold, lease, sell or otherwise dispose of any property, real or personal.”¹⁵

¹Missouri has first, second, third and fourth class counties. Mo. Stat. Ann. § 48.020. Certain counties may adopt home rule charters. Mo. Const. art. VI, § 18(a).

²*Id.* art. VI, § 26(f).

³Mo. Stat. Ann. § 49.300.

⁴*See generally id.* ch. 64.

⁵*Id.* § 49.270.

⁶*Id.* § 64.490.

⁷*Id.* § 49.287.1.

⁸*Id.* § 49.310.

⁹*Id.* § 67.755. This statute is also applicable to municipalities.

¹⁰*Id.* § 8.231.

¹¹Municipalities for purposes of this discussion are towns, villages, third and fourth class cities and constitutional charter cities. Mo. Stat. Ann. ch. 80 (towns and villages); *id.* ch. 77 (third class cities); *id.* ch. 79 (fourth class cities); *id.* ch. 82 (constitutional charter cities). Missouri also has special charter towns and cities. *Id.* ch. 81. Any city having more than 5,000 inhabitants or any other incorporated city as may be provided by law may adopt a home rule charter. Mo. Cons. art. VI § 19.

¹²Mo. Const. art. VI, § 26(f).

¹³*See generally* Mo. Stat. Ann. ch. 88.

¹⁴*See generally id.* ch. 89.

¹⁵*Id.* §§ 79.010 (fourth class cities), 77.010 (third class cities). The statutory language is slightly different with regard to towns and villages, which may “grant, purchase, hold and receive property, real and personal . . . and may lease, sell and dispose of the same.” *Id.* § 80.020. Constitutional charter cities have all the powers the legislature can confer to other cities that are not

Subject to restrictions, municipalities may enter into lease-purchase agreements for energy cost savings measures designed to reduce energy consumption or operating costs in public facilities.¹⁶

School Districts

School districts¹⁷ qualify as tax-exempt issuers for federal tax purposes due to their tax¹⁸ and eminent domain powers.¹⁹ School boards may "purchase apparatus, equipment and furnishings for . . . schools by entering into lease purchase agreements with vendors."²⁰ Any agreement that may result in school district ownership of leased property must contain a provision allowing the district an option to terminate the agreement on at least an annual basis without penalty.²¹ In most cases, lease-purchase obligations of school districts must be paid from the capital projects fund. With a few specific exceptions, funds cannot be transferred from the incidental (general) fund to the capital projects fund to make payments on lease-purchase obligations.²²

School districts may enter into agreements, including leases, to provide for the acquisition . . . and financing of sites, buildings, facilities, furnishings and equipment for the use of the educational institution for educational purposes."²³ The lease must be for a period of "not more than one year but with not more than twenty-five successive options by the educational institution to renew the lease."²⁴ School districts are also authorized to sell or lease at fair market value existing sites and improvements thereon to be improved and then leased back.²⁵ School districts may enter into lease-purchase agreements and joint ventures with other political subdivisions "for the acquisition, construction, improvement, extension, repair, remodeling, renovation, and financing of sites, buildings, facilities, furnishings, and equipment for the use of the school district for educational purposes."²⁶

Urban, metropolitan and certain limited other school districts may "authorize the purchase sites for and . . . the construction" of schools and certain other buildings, "authorize . . . the purchase of additional ground needed for school purposes . . . [and] the sale . . . or lease of . . . real or personal property . . . not required for the operation of the school program"²⁷

inconsistent with the constitution, statutes and the provisions of their charters. Mo. Const. art. VI, § 19(a). Each city of the second, third, or fourth class of this state, and each city having less than ten thousand inhabitants which has a special charter may "acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities, incinerators for the destruction of garbage, trash, cinders, refuse matter and municipal waste; acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste; and acquire by any of such means purification plants or sewage disposal plants for the purification of all sewage accumulating in such cities," and such contracts can be payable from general revenues of the city (maximum of ten years and probably the need of a nonappropriation clause) or revenues of the garbage operation. Mo. Stat. Ann. § 71.680.

¹⁶*Id.* § 8.231.

¹⁷School districts are of three classes; seven-director, urban, and metropolitan. *Id.* § 160.021.

¹⁸Mo. Const. art. VI, § 26(f).

¹⁹Mo. Stat. Ann. § 177.041.

²⁰*Id.* § 177.082.

²¹*Id.*

²²*Id.* § 165.011 and 177.082.

²³*Id.* § 177.088.3(2). Notice must be published of the district's intent to proceed with a financing under this statute. *Id.* § 177.088.9. This section also applies to state colleges and universities organized under Ch. 174. *See, infra*, note 68 and accompanying text.

²⁴*Id.* § 177.088.3(2).

²⁵*Id.*

²⁶*Id.* § 177.088.11.

²⁷*Id.* § 177.073. The sale pursuant to subsection 177.073.1(3) is subject to numerous restrictions.

“The school board in each seven-director district . . . may acquire additional grounds when needed for school purposes.”²⁸

School districts can lease-purchase from the School Building Revolving Fund, subject to numerous provisions and restrictions.²⁹

School districts may lease facilities or take loans from the Health and Educational Facilities Authority.³⁰

Energy Performance Contracting

Subject to restrictions, school districts may enter into lease-purchase agreements for energy cost savings measures designed to reduce energy consumption or operating costs in public facilities.³¹

Fire Districts

Fire districts³² qualify as tax-exempt issuers for federal tax purposes due to their tax³³ and eminent domain powers.³⁴ Fire districts may “acquire, construct, purchase, maintain, dispose of and encumber real and personal property, fire stations, fire protection and fire-fighting apparatus and auxiliary equipment therefor, and any interest therein”³⁵ Fire districts may

. . . enter into contracts, franchises and agreements with any person, partnership, association or corporation, public or private, affecting the affairs of the district, . . . for the . . . construction, acquisition or operation of any public improvement or facility, or for a common service relating to the control or prevention of fires, including the installation, operation and maintenance of water supply distribution, fire hydrant and fire alarm systems; provided, that a notice shall be published for bids on all construction or purchase contracts for work or material or both, outside the authority contained in subdivision (9) of this section [relating to hiring agents and others], involving an expense of ten thousand dollars or more.³⁶

Energy Performance Contracting

Subject to restrictions, fire districts may enter into lease-purchase agreements for energy cost savings measures designed to reduce energy consumption or operating costs in public facilities.³⁷

Hospital Districts

Hospital Districts³⁸ qualify as tax-exempt issuers for federal tax purposes due to their tax³⁹ and eminent domain powers.⁴⁰ Hospital districts may

²⁸*Id.* § 177.091.

²⁹*Id.* § 166.300.

³⁰*Id.* § 360.045. This section also applies to institutions of higher education. *See, infra*, note 69 and accompanying text.

³¹*Id.* § 8.231.

³²“Fire protection districts” are political subdivisions of the state. *Id.* §§ 321.010, 321.100.

³³*Id.* § 321.230.

³⁴*Id.* § 321.220(10). *See also, id.* § 321.600(10).

³⁵*Id.* § 321.220(6). *See also, id.* § 321.600(6), which provides the power “to acquire, construct, purchase, maintain, dispose of and encumber real and personal property, fire stations, fire protection and fire-fighting apparatus and auxiliary equipment therefor, and any interest therein, including leases and easements.”

³⁶*Id.* § 321.220(4).

³⁷*Id.* § 8.231.

³⁸Hospital districts are political subdivisions of the state. *Id.* § 206.010.

³⁹*Id.* § 206.060.

⁴⁰*Id.* § 206.110.1(2).

. . . acquire land . . . and tangible and intangible personal property used or useful for the location, establishment, maintenance, development, expansion, extension or improvement of any hospital or hospital facility. The acquisition may be by dedication, purchase, gift, agreement, lease, use or adverse possession or by condemnation.⁴¹

Hospital districts may dispose of real property.⁴² They may

. . . make and enter into contracts, for the use, operation or management of a hospital or hospital facilities; to engage in health care activities; and to make and enter into leases of equipment and real property, a hospital or hospital facilities, as lessor or lessee, regardless of the duration of such lease. . . . Any agreement entered into pursuant to this subsection pertaining to the lease of the hospital shall have a definite termination date as negotiated by the parties, but this shall not preclude the trustees from entering into a renewal of the agreement with the same or other parties pertaining to the same or other subjects upon such terms and conditions as the parties may agree.⁴³

Energy Performance Contracting

Subject to restrictions, hospital districts may enter into lease-purchase agreements for energy cost savings measures designed to reduce energy consumption or operating costs in public facilities.⁴⁴

State Entities

Generally, the Department of Administration, through its commissioner, makes all purchases⁴⁵ for all departments⁴⁶ of the state and negotiates all leases⁴⁷ and purchases of lands, except where a department derives power to acquire land from the constitution.⁴⁸ However, property in the seat of government is managed by the board of public buildings,⁴⁹ which may acquire real property for the seat of government by purchase or eminent domain.⁵⁰ The board of public buildings may acquire by purchase or lease real and personal property for use of agencies and instrumentalities of the state.⁵¹ The board may lease such property to state agencies, instrumentalities of the state and political subdivisions.⁵² Fee title to all real property owned by the state, with exception of lands controlled by the Highway and Transportation Commission, the Conservation Commission, the Department of Natural Resources, and the University of Missouri system, rests in the governor.⁵³ The letting of construction contracts is

⁴¹*Id.*

⁴²*Id.* § 206.157.

⁴³*Id.* § 206.110.1(3).

⁴⁴*Id.* § 8.231.

⁴⁵The term “purchase” includes “the rental or leasing of equipment, articles and things.” *Id.* § 34.010.5.

⁴⁶“Department” means “department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments.” *Id.* § 34.010.1.

⁴⁷Individual departments have no authority to obligate the state or to waive or modify provisions of the bid specifications or the terms and condition of a lease. 1 Code St. Regs 35-2.030, 35-2.040. Leases are subject to public bidding. *Id.* Leases are nonbinding “unless and until appropriations have been made by the Missouri General Assembly” annually for the fiscal year beginning July 1. *Id.* 35-2.050. Leases of facilities by the department of state government or state institution of higher education supported in whole or in part by appropriations by the Missouri General Assembly are subject to approval by the general assembly. Mo. Rev. Stat. § 21.527.

⁴⁸*Id.* § 34.030. Such departments with constitutional authority to acquire lands appear to include the departments of conservation and transportation. Mo. Const. art. IV, § 41 (conservation); art IV, §§ 29, 30(b),(c) (transportation). The state Highways and Transportation Commission “shall let all contracts for the construction or improvement of state highways.” Mo. Rev. Stat. § 226.130.(9).

⁴⁹*Id.* § 8.010. The board consists of the governor, attorney general and lieutenant governor with staff provided by the Department of Administration.

⁵⁰*Id.* § 8.240.

⁵¹*Id.* § 8.380.

⁵²*Id.*

⁵³*Id.* § 37.005 (conveyances must be approved by the general assembly).

generally subject to the approval of the director of the division of design and construction.⁵⁴ The amount expended for construction may not exceed the amount appropriated for it.⁵⁵

The commissioner of the Department of Administration is required to solicit and contract for purchases exceeding \$25,000.⁵⁶ Purchases in excess of \$3,000 must be publicly bid.⁵⁷ Individual departments may exercise procurement authority delegated to them by the commissioner and such exercise of delegated power must conform to public procurement laws.⁵⁸

Separate provisions apply specifically to information technology:

Notwithstanding any provision in section 34.040, section 34.100, or any other law to the contrary, departments shall have the authority to purchase products and services related to information technology when the estimated expenditure of such purchase shall not exceed seventy-five thousand dollars, the length of any contract or agreement does not exceed twelve months, the department complies with the informal methods of procurement established in section 34.040, and 1 CSR 40-1.050(1) [solicitation and bid method] for expenditures of less than twenty-five thousand dollars, and the department posts notice of such proposed purchase on the online bidding/vendor registration system maintained by the office of administration. For the purposes of this section, "information technology" shall mean any computer or electronic information equipment or interconnected system that is used in the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of information, including audio, graphic, and text.⁵⁹

Motor vehicles are acquired under the general provisions of Chapter 34, but certain vehicles weighing less than 10,000 pounds may require pre-approval by the State Fleet Manager.⁶⁰

Expenditures exceeding appropriations are prohibited:

No claim or account shall be preapproved by the commissioner of administration, nor shall any warrant be paid by the state treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose.⁶¹

Higher Education

There are two state systems of higher education: the University of Missouri System and state institutions of higher education governed by code sections 174.020 to 174.500.

The University of Missouri System, governed by the Curators of the University of Missouri, has the power of eminent domain and may "take, purchase and . . . sell, convey and otherwise dispose of

⁵⁴*Id.* § 8.310. An exception exists for contract by state universities.

⁵⁵*Id.* § 8.220.

⁵⁶*Id.* § 34.040. The division of the department generally responsible for procurement is the Division of Purchasing and Materials.

⁵⁷*Id.*

⁵⁸*Id.* § 34.100; *id.* § 34.150. *See generally, id.*, Ch. 34 and Code St. Regs. Tit. 1, Division 40.

⁵⁹Mo. Rev. Stat. § 34.047.

⁶⁰State Policy SP-4 (issued Jan., 2002; Revised, June 1, 2018).

⁶¹Mo. Rev. Stat. § 33.170.

lands and chattels.”⁶² The curators are authorized to enter into leases with individuals and corporations for the purpose of developing land and facilities for research parks.⁶³

The president of the university system, or a designee, has authority to acquire and sell real property, and execute rental agreements and leases covering real property.⁶⁴

Board of Curators approval shall be obtained for:

1. Property purchases with a negotiated price of more than \$1,000,000.
2. Property sales with a negotiated sale price of more than \$1,000,000.
3. Property leases for more than \$1,000,000 per year or for more than ten years.
4. Property leases with persons/entities (including all affiliates of such persons/entities), which exceed \$2,000,000 per year, in the aggregate. . . .⁶⁵

State institutions of higher education governed by code sections 174.020 to 174.500⁶⁶ appear to derive their purchasing powers through delegation from the state’s Office of Administration, Division of Purchasing and Materials Management.⁶⁷ Like school districts, they have statutory authority to lease from a non-profit corporation, “school sites, buildings, facilities, furnishing and equipment.”⁶⁸ They may lease facilities or take loans from the Health and Educational Facilities Authority.⁶⁹ Lease-purchases from either a non-profit corporation under section 177.088 or from the Health and Educational Facilities Authority require approval by the general assembly.⁷⁰

The board of curators of the University of Missouri and the several boards of regents of the state colleges may contract for construction, repair, maintenance or improvement of building projects⁷¹ under review of the director of facilities management, design and construction.⁷²

Equipment that can be considered for lease, rental, and/or lease/purchase should only be items that would be used for a short period or when obsolescence factors would make purchasing the item uneconomical or impractical. UM System Supply Chain may competitively bid or negotiate (sole source if necessary) and approve, as delegated by the Chief Procurement Officer, equipment leases, rental agreements, and lease/purchases for a total of \$100,000 for sole source or \$500,000 bid for a term of up to 5 years.

The form of contracts and agreements for leasing, maintenance, and rental of materials, supplies, equipment and services must be approved as to form by the General Counsel.⁷³

⁶²Mo. Const. art. IX, §§ 9(a), 9(b); Mo. Rev. Stat. § 172.020; § 172.380. The four individual institutions within the system are managed by a president. The University of Missouri-Columbia, Missouri University of Science & Technology, University of Missouri-Kansas City, and University of Missouri-St. Louis. The Univ. Mo. Procurement System manages the purchasing operations for all campuses within the University of Missouri System. <http://www.umsystem.edu/>.

⁶³Mo. Rev. Stat. § 172.273.1.

⁶⁴Univ. Mo. Rules and Regs. § 70.050. Construction projects are governed by § 70.060.

⁶⁵*Id.* § 70.010.C.

⁶⁶Central Missouri State University; Southeast Missouri State University; Missouri State University; Northwest Missouri State University; Missouri Western State University; Missouri Southern State University; Harris-Stowe State University.

⁶⁷Mo. Rev. Stat. § 34.030.

⁶⁸*Id.* § 177.088.3(1). Notice must be published of the district’s intent to proceed with a financing under this statute. *Id.* § 177.088.9. *See, supra*, notes 23 to 25 and accompanying text.

⁶⁹*Id.* § 360.045. This section also applies to school districts.

⁷⁰*Id.* § 21.527.

⁷¹*Id.* § 8.310.

⁷²*Id.* § 8.315.

⁷³UM Syst. Policy 24012, https://www.umsystem.edu/ums/policies/finance/equipment_leases_and_rentals (last accessed May, 2018) (Formerly Bus. Policy Man. 307). Lease purchases of information technology equipment require approval of the

Energy Performance Contracting

The Office of Administration is “authorized to contract for guaranteed energy cost savings contracts” and “other governmental units”⁷⁴ may use designated funds, bonds or master lease for any guaranteed energy cost savings contract including purchase using installment payment contracts or lease purchase agreements. . .” subject to numerous restrictions.⁷⁵

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁷⁶ The University of Missouri is limited in the amount of debt it may incur.⁷⁷ Counties, municipalities and school districts are constitutionally limited in the amount of debt which they may incur.⁷⁸ Unless approved by referendum, indebtedness is limited to “income and revenue provided for such year plus any unencumbered balances from previous years.”⁷⁹ The courts have interpreted “year” to mean calendar rather than fiscal year.⁸⁰ “Debt” has been defined as an “absolute” and “unconditional promise to pay a fixed sum at some specified time”⁸¹ and is payable “by resort to taxes” rather than from “income derived from the property purchased.”⁸² Long term leases that unconditionally obligate the political subdivision to pay rent and authorize no right of termination have been declared invalid as debt.⁸³ To determine whether or not constitutional debt limitations are exceeded, the court is not required to consider the total amount of lease payments due under the lease agreement, but rather only the amount of payments due in a particular year.⁸⁴

chief information officer. https://www.umsystem.edu/ums/policies/general_administration/it_telecommunications_purchases. UM Syst. Policy No. 12004 (Dec. 12, 2017) (last accessed May, 2018).

⁷⁴“Governmental unit” means “a state government agency, department, institution, college, university, technical school, legislative body or other establishment or official of the executive, judicial or legislative branches of this state authorized by law to enter into contracts, including all local political subdivisions such as counties, municipalities, public school districts or public service or special purpose district. Mo. Rev. Stat. § 8.231.1(2).

⁷⁵*Id.* §§ 8.231, 8.235.

⁷⁶Mo. Const. art. III, § 37.

⁷⁷Mo. Rev. Stat. §172.250.

⁷⁸Mo. Const. art. VI, § 26(a) which states: No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution. See also *id.* VI, § 26(b). An amendment to this section was proposed by 1997 H.J.R. No. 2, and approved at a special election on April 7, 1998. Section 26(b), as amended, provides that “[a]ny county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five percent of the value of the taxable tangible property therein . . . except that a school district by a vote of the qualified electors voting thereon may become indebted in an amount not to exceed fifteen percent of the value of such tangible property.” A four-sevenths vote for approval is required if the question is submitted at the general election, while a two-thirds approval is required at all other elections.

⁷⁹*Id.*

⁸⁰*First Nat’l. Bank v. Stoutland School Dist.*, 319 S.W.2d 570, 574 (Mo. 1958); *but see Mercantile Bank v. School Dist. of Osceola*, 834 S.W.2d 737, 741 (Mo. 1992) (en banc) (*see, infra*, note 84).

⁸¹*State ex rel. City of Hannibal v. Smith*, 74 S.W.2d 367, 372 (Mo. 1934) (en banc).

⁸²*State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281, 292 (Mo. 1977) (en banc); *see also Hannibal*, 74 S.W.2d 367, 371 (bonds payable from a revenue source solely from particular property do not create an indebtedness).

⁸³*New Liberty Medical & Hosp. Corp. v. E.F. Hutton & Co.*, 474 S.W.2d 1 (Mo. 1971) (en banc) (overruled on other grounds by *Kuyper v. Stone County Comm.*, 838 S.W.2d 436 (Mo. 1992); *State ex rel. Strong v. Cribb*, 273 S.W.2d 246 (Mo. 1934) (en banc); *see also* 31 Op. Att’y Gen. 88 (Mo. 1974); 25 Op. Att’y Gen. 359 (Mo. 1968); *Scroggs v. Kansas City*, 499 S.W.2d 500 (Mo. 1973).

⁸⁴*Mercantile Bank v. School Dist. of Osceola*, 834 S.W.2d 737 (Mo. 1992) (en banc). *See also, infra*, note 85 and accompanying text.

Debt limitations may be avoided by political subdivisions by lease-purchase agreements structured so that the entity is not obligated for more than one year. In *St. Charles City-County Library District v. St. Charles Library Building Corp.*,⁸⁵ the court of appeals held that a one-year lease with twenty-four successive options to renew (each for one year) and a provision that the entity might terminate the lease without legal liability was not debt.⁸⁶ The court distinguished this lease from those in previous cases which were held invalid as unconditional obligations.⁸⁷ The court held that since the entity could terminate at the end of any year by failure to renew, the agreement did not violate the constitutional debt limitations.⁸⁸

In *Burks v. City of Licking*, the City financed the purchase of real property for the construction of a penitentiary by the State, through the issuance of certificates of participation.⁸⁹ The City was obligated to pay the certificate owners \$595,000 over a 15 year period, with the amount of \$55,131 due as the first payment. The court held that the issuance of certificates did not violate art. VI, Section 26a of the constitution, which provides that any indebtedness cannot exceed in any one year the income and revenue for that year, plus any unencumbered balances from prior years. In this case, the court concluded that only the \$55,131 was a current obligation, not the entire amount of \$595,000, and that the City did not exceed the expenditure limitation of section 26(a).

The same section 26(a) of the constitution was the basis for the holding in *First Bank of Marietta v. Hogge*.⁹⁰ The county leased emergency radio equipment pursuant to a lease purchase agreement, and when the county failed to make the first lease payment, the Bank (assignee of the lease) accelerated all remaining lease payments. The court (Eighth Circuit) concluded that since the county did not have sufficient funds on the date of default to pay the accelerated total amount, the lease purchase agreement was voidable under section 26(a), which states that no county . . . “shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balance from previous years.”

Interest Rate Limitations

Interest rates on municipal bonds are limited as follows:

[B]onds, notes, or other evidences of indebtedness, including bonds, notes, or other evidences of indebtedness payable solely from revenues derived from any revenue-producing facility, hereafter issued under any law of this state by any county [municipality] . . . school district, educational institution, . . . hospital district, . . . [or] fire protection district . . . may [bear] interest at a rate not exceeding 10 percent per annum . . . Such [bonds] . . . may bear interest at a rate not exceeding 14 percent per annum if sold at a public sale.⁹¹

Interest on any contract is limited to 10 percent per year or the “market rate.” The “market rate” is defined as the current rate of U.S. government bonds plus 3 percent.⁹² Loans to a corporation, general partnership, limited partnership, or limited liability company, business loans of \$5,000 or more and real estate loans (other than residential real estate loans) are exempt.⁹³

⁸⁵627 S.W.2d 64 (Mo. Ct. App. 1981).

⁸⁶*Id.* at 66, 68.

⁸⁷*Id.* at 68-69.

⁸⁸*Id.* at 68.

⁸⁹*Burks v. City of Licking*, 980 S.W.2d 109 (1998). *See also, supra*, note 78 and accompanying text.

⁹⁰*First Bank of Marietta v. Hogge*, 161 F.3d 506 (1998).

⁹¹Mo. Stat. Ann. § 108.170.

⁹²*Id.* § 408.030.

⁹³*Id.* § 408.035.

Miscellaneous

A Missouri court of appeals ruled that the prevailing wage law is applicable to a sale leaseback transaction where improvements are to be built on the subject property for a municipality.⁹⁴

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁹⁴State v. City of Camdenton, 779 S.W.2d 312 (Mo. Ct. App. 1989).

MONTANA 2017

Current through the 2015 Session, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ A county may “purchase and hold lands within its limits”⁵ and may “make contracts and purchase and hold personal property that may be necessary to the exercise of its powers.”⁶ Counties have the “power . . . to purchase . . . or lease any real or personal property necessary for the use of the county.”⁷

“If a county . . . establishes or maintains [an] ambulance service it may . . . buy, rent, lease or otherwise contract for vehicles, equipment, [or] facilities.”⁸ “A city and a county may, by contract . . . purchase, or lease . . . a city-county building to house the offices of city government and county government.”⁹

When the amount to be paid as the purchase price for any vehicle or road machinery of any kind, for any other machinery, apparatus, appliance, or equipment, . . . exceeds \$4,000, the county . . . may provide for the payment of the purchase price in installments extending over a period of not more than 10 years, provided that at the time of entering into the agreement for the purchase, there is an unexpended balance of appropriation in the budget for the then-current fiscal year available and sufficient to meet and take care of the portion of the purchase price as is payable during the then-current fiscal year and the budget for each following year in which any portion of the purchase price is to be paid contains appropriation for the purpose of paying the purchase price.¹⁰

County commissioners are authorized to “sell, trade, or exchange any real or personal property,”¹¹ and may “lease . . . county property . . . which is not necessary to the conduct of the county's business.”¹²

Counties may enter into lease-purchase agreements for a period not to exceed twenty years for the construction, furnishing and purchasing of single jurisdiction or multijurisdictional detention centers.¹³ Section 7-32-2231 declares that it is the purpose of sections 7-32-2231 through 7-32-2234 “to allow multijurisdictional or single jurisdictional detention centers to be built by private industry and leased to the participating local government or governments for operation by the local government, collectively by

¹Counties may adopt a charter form of government. Mont. Const. art. XI, §5.

²Mont. Code Ann. § 7-1-2103(5).

³*Id.* §§7-14-2107, 7-16-2105.

⁴*Id.* § 7-1-2101.

⁵*Id.* § 7-1-2103(2).

⁶*Id.* § 7-1-2103(3).

⁷*Id.* § 7-8-2201.

⁸*Id.* § 7-34-103.

⁹*Id.* § 7-8-201.

¹⁰*Id.* § 7-5-2306. Every contract for the rental of machinery, equipment, apparatus, appliances, materials or supplies whereby the county acquires ownership after payment of the rental payments “shall be deemed and construed to be a contract for sale of such property.” *Id.* § 7-5-2307. Public bidding is required for installment contracts and lease-purchase agreements in excess of \$50,000 [currently \$80,000] under § 7-5-2301. 38 Op. Att’y Gen. 349 (Mont. 1980).

¹¹Mont. Code Ann. § 7-8-2211. Property with a value in excess of \$2,500 must be sold at public auction. *Id.* § 7-8-2212.

¹²*Id.* §§ 7-8-2231 to -2233. The lease period may not exceed ten years, and all property leased is subject to sale by the board of county commissioners. *Id.* § 7-8-2231.

¹³*Id.* § 7-32-2201.

participating local governments, or by a private entity with the concurrence of the local governments involved.”¹⁴

Energy Performance Contracting

Counties may enter into contracts for conservation measures for a duration of a minimum of 3 years and up to the useful life of the conservation measures or 20 years, subject to numerous restrictions.¹⁵

Municipalities

Municipalities¹⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁷ eminent domain¹⁸ and police powers.¹⁹ Municipalities may “buy, sell, mortgage, rent, lease, hold, manage, or dispose of any interest in real or personal property.”²⁰

Municipalities have the power to:

(1) [E]nter into or incur an obligation for any public or governmental purpose, including the purposes set forth in 7-7-4101. An obligation may be in the form of . . . a lease, a lease-purchase agreement, an installment purchase contract, or other legal form. An obligation constitutes a general obligation of the municipality but is not secured by a pledge of the taxing power of the municipality.

(2) The obligation provided for in subsection (1) may be authorized by a resolution adopted by the governing body of the municipality. The resolution must establish the terms, covenants, and conditions of the obligation. It is not necessary to submit the question of incurring the obligation to the electors of the municipality. The obligation may be incurred or sold at public or private sale, on terms and at prices that the governing body determines to be advantageous. The obligation does not constitute indebtedness for the purpose of statutory debt limitations.

(3) An obligation may be issued only if:

(a) the principal amount of the obligation does not exceed 10% of the general fund budget of the municipality in each of the 2 immediately preceding fiscal years;

(b) at the time the obligation is to be incurred, the debt services in the current or in any future fiscal year on the obligation and any other outstanding obligation issued pursuant to this section do not exceed 2% of the revenue deposited in the general fund of the municipality in each of the 2 immediately preceding fiscal years; and

(c) the term of the obligation does not exceed 20 years.

(4) The obligation must clearly state that it is not secured by a pledge of the municipality's taxing power but that it is payable solely from revenue in the general fund in any fiscal year that is pledged to the payment of the obligation.

(5) In order to secure the payment of principal of or interest on an obligation and related charges, the municipality may grant a first lien on all revenue collected and deposited in the general fund subject to or on a parity with any prior pledges. The municipality may establish other funds and accounts for obligations issued under this section that may be necessary to provide for the priority and segregation of revenue deposited in the general fund and pledged to the payment of obligations. For purposes of this section, related charges

¹⁴*Id.* § 7-32-2231. The attorney general has opined that Montana Code §§ 7-32-2231 to -2233 do not conflict with statutes regulating county contracts (title 7, ch. 5, pt. 23). 42 Op. Att’y Gen. 81 (Mont. 1988).

¹⁵*Id.* §§ 90-4-1101 to -1114.

¹⁶Municipalities for purposes of this discussion are cities and towns. Mont. Code Ann. § 7-1-4101. Municipalities may adopt a charter form of government. Mont. Const. art. XI, § 5.

¹⁷Mont. Code Ann. § 7-6-4401.

¹⁸*Id.* § 7-1-4124(14).

¹⁹*Id.* § 7-1-4123(2).

²⁰*Id.* § 7-1-4124(3).

include the fees and expenses of registrars and paying agents and the amounts, if any, that must be rebated to the federal government under 26 U.S.C. 148.²¹

The purposes set forth in section 7-7-4101 include acquiring land, erecting public buildings, purchasing or leasing fire apparatus, street and other equipment, and personal property such as vehicles, telephone systems, photocopy and office equipment, and computer hardware and software.

The state attorney general has opined that section 7-7-4104, quoted above, does not preempt a municipality's general authority to enter into a lease purchase agreement containing a nonappropriation clause.²² "If a . . . city . . . establishes or maintains [an] ambulance service it may . . . buy, rent, lease or otherwise contract for vehicles, equipment, [or] facilities."²³ "A city and a county may, by contract, . . . purchase or lease and manage a city-county building to house the offices of city government and county government."²⁴

Use of installment purchase contract. When the amount to be paid under an installment purchase contract exceeds \$4,000, the council may provide for the payment of the amount in installments extending over a period of not more than 10 years if at the time of entering into the contract, there is an unexpended balance of appropriation in the budget for the then-current fiscal year available and sufficient to pay for the portion of the contract price payable during the then-current fiscal year. The budget for each following year in which any portion of the purchase price is to be paid must contain an appropriation for the purpose of paying that portion. The limitations contained in this section do not apply to installment purchase contracts entered into pursuant to 7-7-4104.²⁵

Municipalities "may acquire property in fee simple or lesser interest or estate by purchase, . . . lease, or lease with the privilege to purchase."²⁶

Municipalities may "sell, dispose of, donate, or lease any property belonging to the city or town."²⁷

Energy Performance Contracting

Municipalities may enter into contracts for conservation measures for a duration of a minimum of 3 years and up to the useful life of the conservation measures or 20 years, subject to numerous restrictions.²⁸

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁹ and eminent domain powers.³⁰ School trustees may "acquire . . . the real and personal property of the district."³¹

The trustees of a district may acquire real and personal property by an agreement to lease for up to 7 years for personal property and for up to 15 years for real property with an option to purchase. The terms of the lease must comply with 20-6-625. If real property is acquired, the trustees shall comply with 20-6-603.³²

²¹*Id.* § 7-7-4104. This statute does not require a nonappropriation clause.

²²49 Op. Att'y Gen. No. 3 (Mont. 2001), 2001 WL 883392.

²³*Id.* § 7-34-103.

²⁴*Id.* § 7-8-201.

²⁵*Id.* § 7-5-4306.

²⁶*Id.* § 7-3-4313(1) (applies to municipalities with commission-manager form of government).

²⁷*Id.* § 7-8-4201. If the property is held in trust then a majority vote of the electors is required. *Id.*

²⁸*Id.* §§ 90-4-1101 to -1114.

²⁹*Id.* § 20-9-141.

³⁰*Id.* § 70-30-102(3). This assumes that the school district itself may proceed with condemnation under this statute.

³¹*Id.* § 20-3-324(15).

³²*Id.* § 20-6-609.

The trustees of any district may lease buildings or land suitable for school purposes when it is within the best interests of the district to lease the buildings or land from the county, municipality, another district, or any person. The term of the lease may not exceed 15 years unless prior approval of the qualified electors of the district is obtained in the manner prescribed by law for school elections, in which case the lease may be for a term approved by the qualified electors, but not exceeding 99 years. Whenever the lease is for a period of time that is longer than the current school fiscal year, the lease requirements for the succeeding school fiscal years shall be an obligation of the final budgets for such years.³³

* * * *

The trustees of a district may purchase, build, exchange, or otherwise acquire, sell, or dispose of sites and buildings of the district. Action may not be taken by the trustees without the approval of the qualified electors of the district at an election called for the purpose of approval unless:

- (a) a bond issue has been authorized for the purpose of constructing, purchasing, or acquiring the site or building;
- (b) an additional levy under the provisions of 20-9-353 has been approved for the purpose of constructing, purchasing, or acquiring the site or building;
- (c) the cost of constructing, purchasing, or acquiring the site or building is financed without exceeding the maximum general fund budget amount for the district, and in the case of a site purchase, the site has been approved under the provisions of 20-6-621; or
- (d) money is otherwise available under the provisions of this title and the ballot for the site approval for the building incorporated a description of the building to be located on the site.³⁴

“When a district purchases a school bus, the trustees may purchase such school bus under an installment contract which will be completely executed within three years from the date of the purchase. The trustees may also purchase a school bus without advertising for bids under the provisions of 20-9-204.”³⁵

School districts may create a fund for the purchase and rental of computers and computer network access.³⁶ This fund can be comprised of money from the state, other local, state, federal or private funds or a voter approved taxing levy, but expenditures from the fund are subject to restrictions.³⁷

Trustees “may sell or otherwise dispose of real or personal property,”³⁸ and may “rent, lease, or let any buildings, land, or facilities of the district.”³⁹

Energy Performance Contracting

School districts may enter into contracts for conservation measures for a duration of a minimum of 3 years and up to the useful life of the conservation measures or 20 years, subject to numerous restrictions.⁴⁰

³³*Id.* § 20-6-625.

³⁴*Id.* § 20-6-603(1).

³⁵*Id.* § 20-10-110.

³⁶*Id.* § 20-9-533.

³⁷*Id.*

³⁸*Id.* § 20-6-604. Property must be or about to be abandoned, obsolete, undesirable or unsuitable for school purposes. Section 20-6-603 is not applicable, but notice must be given. *Id.*

³⁹*Id.* § 20-6-607.

⁴⁰*Id.* §§ 90-4-1101 to -1114.

Fire Districts

Fire districts⁴¹ do not qualify as tax-exempt issuers for purposes of federal income tax law for lack of sufficient powers.⁴² Fire districts “have the authority to provide adequate and standard firefighting and emergency response apparatus, equipment, . . . housing, and facilities, including real property and emergency medical services and equipment, for the protection of the district.”⁴³

Hospital Districts

Hospital districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax powers.⁴⁴ A hospital district “has all powers necessary and convenient to the acquisition . . . of hospital facilities that its board of trustees considers necessary and expedient.”⁴⁵ Hospital districts may “lease, purchase, and contract for the purchase of real and personal property by option . . . or otherwise.”⁴⁶ They may “lease or construct, equip, furnish, and maintain necessary buildings and grounds.”⁴⁷

Energy Performance Contracting

Hospital districts may enter into contracts for conservation measures for a duration of a minimum of 3 years and up to the useful life of the conservation measures or 20 years, subject to numerous restrictions.⁴⁸

State Entities

The department of administration is generally responsible for acquisition of real and personal property for the State. Regarding leases with options to purchase real property the code provides:

When authorized by a vote of two-thirds of the members of each house of the legislature, the department of administration may, as part of the long-range building program, enter into a lease contract that provides an option to purchase a building to be used by the state or any department of state government.⁴⁹

A building authorized pursuant to 18-3-101 [this provision is set out immediately above] must be located as determined by the terms of the request for proposals. If a contract entered into pursuant to this chapter requires the sale or lease of any interest in state lands, the contract must have prior approval of the board of land commissioners.⁵⁰

To insure an adequate security provision for the lessor, the full faith and credit and taxing powers of the state of Montana are pledged in the amount necessary for the payment of rent incurred pursuant to a contract authorized by this part.⁵¹

A contract under the above provisions is generally exempt from provisions of Title 18, chapter 2, relating to public construction contracts.⁵² Under Title 18, chapter 2, the department of administration is authorized

⁴¹Fire districts are “rural fire districts” governed by a board of trustees for purposes of this discussion. *Id.* § 7-33-2104.

⁴²*Id.* § 7-33-2109. The power to tax for the benefit of the district resides in the board of county commissioners.

⁴³*Id.* § 7-33-2105(b).

⁴⁴*Id.* § 7-34-2133.

⁴⁵*Id.* § 7-34-2122.

⁴⁶*Id.* § 7-34-2122(3).

⁴⁷*Id.* § 7-34-2122(4).

⁴⁸*Id.* §§ 90-4-1101 to -1114.

⁴⁹*Id.* § 18-3-101.

⁵⁰*Id.* § 18-3-105.

⁵¹*Id.* § 18-3-106.

⁵²*Id.* § 18-3-111.

to purchase and lease land and buildings in Lewis and Clark County (the seat of state government), and equipment, and furnishings for the buildings.⁵³

The department of transportation “may acquire by purchase or other lawful manner lands or other real property, excluding oil, gas, and mineral rights, that it considers reasonably necessary for present or future highway purposes. . . .”⁵⁴

The Montana Procurement Act,⁵⁵ applicable to personal property, applies to “the expenditure of public funds . . . by this state acting through a governmental body⁵⁶ under any contract”⁵⁷ unless exempted by statute. The department of administration is responsible for procuring or supervising the procurement of supplies needed by the state.⁵⁸

(1) Except as provided in subsection (2) or unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than 7 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.

(2) The contract term limit specified in subsection (1) does not apply to:

(a) a contract for hardware, software, or other information technology resources, which may be made for a period not to exceed 10 years

(3) Prior to the issuance, extension, or renewal of a contract, it must be determined that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(4) If funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.⁵⁹

Regulations provide for review and approval of certain procurements:

(5) The department [of administration] is responsible for the review and approval of the following equipment or service procurements regardless of delegated authority:

⁵³*Id.* § 18-2-105. Historic properties must comply with the requirements of section 2-17-135.

⁵⁴*Id.* § 60-4-102.

⁵⁵*Id.* Title 18, ch. 4. “Procurement” “means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services.” *Id.* § 18-4-123(15). Montana Administrative Rules define “lease-purchase agreement” as “a lease contract containing a purchase option in which the lessee’s periodic payments or parts thereof may be applied to serve both as the rental obligation and as installments for acquiring ownership of the property upon lessee exercising the purchasing option; a conditional sales contract.” Mont. Admin. Code § 2.5.201(20). Supplies “means all property except as otherwise provided by law, including but not limited to equipment, materials, printing, and commodities, and excluding land or any interest in land.” Mont. Code Ann. § 18-4-123(19).

⁵⁶Governmental body “means a department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or judicial branch of this state, including the board of regents and the Montana university system.” *Id.* § 18-4-123(11).

⁵⁷Contract “means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.” *Id.* § 18-4-123(3).

⁵⁸*Id.* § 18-4-221.

⁵⁹*Id.* § 18-4-313.

(a) all printing-related equipment involving duplicating, printing, bindery, and graphic arts for state agencies within a ten-mile radius of the capitol area—approval by Print and Mail Services is required;

(b) information technology resources, including hardware, software, and associated services and infrastructure used to store or transmit information in any form, including voice, video, and electronic data—approval by the Information Technology Services Division is required, except as provided in 2-17-516, MCA [Montana Code Annotated];⁶⁰

(c) communications equipment and systems—approval by Information Technology Services Division is required; and

(d) mail equipment to be used within a ten-mile radius of the capitol area—approval by Print and Mail Services is required.⁶¹

Procurement authority is delegated to all agencies for supplies and services of \$5,000 or less.⁶²

Contracts with state agencies and political subdivisions must include particular terms or covenants in compliance with the following provision:

Money may not be spent by a state agency under a contract with a nonstate entity unless the contract contains a provision that allows the legislative auditor sufficient access to the records of the nonstate entity to determine whether the parties have complied with the terms of the contract. The access to records is necessary to carry out the functions provided for in Title 5, chapter 13. A state agency may terminate a contract, without incurring liability, for the refusal of a nonstate entity to allow access to records as required by this section.⁶³

Expenditures in excess of appropriations are unlawful:

(1) It shall be unlawful for the board of trustees, executive board, managerial staff, president, deans and faculty, or any other authority of any state institution maintained in whole or in part by the state or any officer, department, board, commission, or bureau, having charge of the disbursement or expenditure of the income provided by legislative appropriation or otherwise, to expend, contract for the expenditure, or to incur or permit the incurring of any obligation whatsoever, in any one year, in excess of the legislative appropriation, including any approved, authorized, and valid budget amendment, provided for such year or for any supervisory board or authority either directly or indirectly to authorize, direct, or order any such institution, officer, department, board, commission, or bureau to increase any expenditures, except as specifically provided by law. It shall be and is hereby made the duty of any and all of such institutions, officers, departments, boards, commissions, and bureaus to keep such expenditures, obligations, and liabilities within the amount of such legislative appropriation, which includes an approved, authorized, and valid budget amendment.

(2) A condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until such condition or limitation is changed by a subsequent appropriation act. In no event does a condition or limitation contained in an appropriation act amend any other statute.⁶⁴

Information Technology

⁶⁰Section 2-17-516 provides for exemptions for the university system and office of public instruction.

⁶¹Mont. Admin. R. 2.5.202. (AMD, 2007 MAR p. 1657, Eff. 10/26/07).

⁶²*Id.*

⁶³Mont. Code Ann. § 18-1-118.

⁶⁴*Id.* § 17-8-103.

The department of administration is responsible for overseeing the management and procurement of information technology for state government except the National Guard,⁶⁵ and regarding certain exempt situations. The department

(k) shall review and approve state agency⁶⁶ specifications and procurement methods for the acquisition of information technology resources;

(l) shall review, approve, and sign all state agency contracts and shall review and approve other formal agreements for information technology resources provided by the private sector. . . .⁶⁷

* * * *

(1) If the department determines that an agency is not in compliance with the state strategic information technology plan provided for in 2-17-521, the agency information technology plan provided for in 2-17-523, or the statewide information technology policies and standards provided for in 2-17-512, the department may cancel or modify any contract, project, or activity that is not in compliance.

(2) Prior to taking action provided for in subsection (1), the department shall review with the board any activities that are not in compliance.

(3) Any contract entered into by an agency that includes information technology resources must include language developed by the department that references the department's enforcement responsibilities provided for in subsection (1). A contract that does not contain the required language is considered to be in violation of state law and is voidable pursuant to subsection (1). The language developed by the department may not be varied pursuant to 18-4-224.⁶⁸

Approval of the acquisition of information technology by state agencies is also required under the following provision:

Amounts appropriated by the legislature to executive branch agencies, other than the university system, for long-range information technology capital projects may not be encumbered until project and security plans are approved by the chief information officer and the budget director if the legislature directs these approvals as a condition on the appropriations in the bill making the appropriations.⁶⁹

Department of administration rules provide:

REVIEW AND APPROVAL PROCESS FOR PROCUREMENT, DEVELOPMENT, AND OVERSIGHT OF INFORMATION TECHNOLOGY RESOURCES AND SOFTWARE AND MANAGEMENT SYSTEMS

(1) State agencies shall submit on forms as required by the department a request for all information technology procurements or state agency development efforts in accordance with policies, standards, procedures, and guidelines.

(2) Agencies may request a preliminary project planning meeting with the department to identify important project issues, including project schedule, timeframes for review and approval, project management requirements, reporting and approval requirements, and any other issues identified by the agency or the department.

⁶⁵*Id.* § 2-17-512. Information technology “means hardware, software, and associated services and infrastructure used to store or transmit information in any form, including voice, video, and electronic data.” *Id.* § 2-17-506(7).

⁶⁶State agency “means any entity of the executive branch, including the university system.” *Id.* § 2-17-506.

⁶⁷*Id.* § 2-17-512(l). The office of public instruction is exempt from provisions k and l of section 2-17-512(1). *Id.* § 2-17-516. The university system is also exempt from these approval provisions and is exempt from other provisions of the procurement code, including the enforcement provision of section 2-17-514 “unless the proposed activities would detrimentally affect the operation of the central computer center or the statewide telecommunications network.” *Id.*

⁶⁸*Id.* § 2-17-514.

⁶⁹*Id.* § 2-17-561.

(3) In accordance with the policies and principles established in 2-17-505, MCA, the department shall use the following process in reviewing the request:

- (a) determine if the request is subject to approval as defined in 2-17-527 , MCA;
- (b) determine if the request meets all applicable policies, standards, procedures, and guidelines;
- (c) verify if the request complies with the state strategic plan for information technology;
- (d) determine if the request is based upon state agency defined business requirements;
- (e) verify the request supports the state agency's current information technology strategic plan;
- (f) refer the request to subject matter experts as necessary;
- (g) follow procedures for signature requirements;
- (h) approve or deny the request and notify the state agency of the decision.

(4) For all formal agreements, a statement of work that complies with the format established by the department should accompany the request.

(a) Contracts shall use the standardized state information technology contract or note why it could not be used.

(b) The CIO or their designee shall review and approve all formal agreements.

(5) In the case of state agency procurement or development of software and management systems, the department will look at completeness, compliance with strategic direction of the state, policies, standards, procedures, guidelines, appropriateness, and duplication of functionality as general guidelines in the approval decision.

(a) Agencies shall report progress of software and management system procurement or development in accordance with policies, standards, procedures and guidelines.

(6) The department may delegate to agencies duties associated with the procurement and oversight of information technology so long as the duties are carried out in conformity with the requirements established in an information technology procurement delegation between the department and state agencies.⁷⁰

Telecommunications networks⁷¹ are also operated and maintained by the department of administration,⁷² which must approve installations, modifications and removal of systems.⁷³

Motor Vehicles and Related Information Technology

⁷⁰Mont. Admin. R. 2.12.204 (Eff. 10/31/03).

⁷¹Statewide telecommunications network means “any telecommunications facilities, circuits, equipment, software, and associated contracted services administered by the department for the transmission of voice, video, or electronic data from one device to another.” Mont. Code Ann. § 2-17-506.

⁷²*Id.* § 2-17-512(n).

⁷³Mont. Admin. R. 2.13.101. The university system is generally exempt from requirements concerning telecommunications and information technology. Mont. Code Ann. § 2-17-516.

(1) An agency responsible for the procurement and provision of vehicles, automated systems, and equipment using an enterprise fund or an internal service fund, as described in 17-2-102, is authorized to enter into contracts, loan agreements, or other forms of indebtedness payable over a term not to exceed 7 years for the purpose of financing the cost of the vehicles and equipment and to pledge to the repayment of the indebtedness the revenue of the enterprise fund or internal service fund if:

(a) the term of the indebtedness does not exceed the useful life of the items being financed; and

(b) at the time that the indebtedness is incurred, the projected revenue of the fund, based on the fees and charges approved by the legislature and other available fund revenue, will be sufficient to repay the indebtedness over the proposed term and to maintain the operation of the enterprise.

(2) (a) The department of justice is authorized to enter into contracts, loan agreements, or other forms of indebtedness with the board of investments for an amount not to exceed \$28.5 million, payable over a term not to exceed 15 years, for financing the cost of an information technology system for the production and maintenance of motor vehicle title and registration records and driver's license records.

(b) For purposes of the financing of the motor vehicle information technology system, loans are payable from the money in the motor vehicle information technology system account as provided in 61-3-550. The term of the indebtedness may not exceed the useful life of the items being financed. At the time that the loan is made, the projected revenue of the motor vehicle information technology system account, based upon the fees approved by the legislature, must be sufficient to repay the indebtedness over the proposed term.⁷⁴

Higher Education

Two university subsystems (the University of Montana and Montana State University) are under the supervision of the Montana university system, governed by a board of regents.⁷⁵

Pursuant to the terms of appropriations of the legislature or of congress or of gifts of donors, the regents shall determine the need for all expenditures and control the purposes for which all funds shall be spent, subject to the provisions of the law dealing with state purchases.⁷⁶

The board of regents may

[p]urchase, construct, equip, or improve, at any unit of the Montana university system, any of the following types of revenue-producing facilities:

(a) land;

(b) residence halls, dormitories, houses, apartments, and other housing facilities;

(c) dining rooms and halls, restaurants, cafeterias, and other food service facilities;

(d) student union buildings and facilities; and

(e) those other facilities specifically authorized by joint resolution of the legislature.⁷⁷

The board of regents may

⁷⁴*Id.* § 17-5-2001.

⁷⁵The university system is governed by a board of regents, and the commissioner of higher education is its chief executive officer. Mont. Const. art. X, § 9. Section 20-15-103 places supervision of community college districts under the board of regents, but they have their own governing powers regarding the levying of taxes and certain fiscal matters. *Id.* § 20-15-102. Mont. Bd. of Regents Policy 209.1. (Issued May 15, 1980).

⁷⁶Mont. Code. Ann. § 20-25-425.

⁷⁷*Id.* § 20-25-302(1).

(a) borrow money for any purpose or purposes stated in parts 3 and 4 of this chapter,⁷⁸ including, if considered desirable by the regents, the payment of interest on the money borrowed for a facility during the construction of the facility and for 1 year after construction and the creation of a reserve for the payment of bond principal and interest;

(b) make purchases on a time or installment basis.⁷⁹

Proposals for new construction or renovation of and existing building with costs in excess of \$350,000 must be submitted to the Board of Regents for approval.⁸⁰ Such construction is generally subject to legislative approval.⁸¹

Board of regents policies provide:

Lease of Property for University System use. From time to time it becomes necessary for campuses to rent property from private and public entities to house employees and programs that cannot be housed on campus. Leases of real property for university system use must be approved by the Board of Regents if:

1. The lease exceeds five years in duration, or
2. The total lease payments exceed \$25,000 per year.

The president or chancellor or designee shall approve all other leases entered into by a campus to lease space for campus use.⁸²

The Commissioner of higher education, chief executive officer of the Montana university system, has the duty to “[s]ign, on behalf of the board, contracts and documents which have been authorized by the board except when otherwise delegated by the board.”⁸³

In regard to the acquisition of information technology and telecommunications the university system is exempt from review, approval, enforcement and other provisions under the procurement laws unless the central computer center would be detrimentally affected.⁸⁴ University system policies provide:

1. Unless sections 2 or 3 apply, the acquisition of information technology or telecommunications equipment, software and vendor services with an estimated cost of \$50,000 or more shall be approved by the Commissioner or designee. Requests for proposals, bid specifications and similar documents delineating the requirements of the acquisition shall be reviewed with the commissioner or designee prior to submission to any vendor or to the Purchasing Bureau of the State Department of Administration for final action.
2. When an acquisition otherwise covered above has no system wide impact the campus may proceed without review or approval by the commissioner.
3. Acquisitions made with funding that contains specific reporting and approval processes (e.g., student computing fee funds) should be approved and reported according to the processes specific to those funds and not required to follow the requirements of section 1.⁸⁵

Energy Performance Contracting

⁷⁸Title 20, Chapter 25 (university system).

⁷⁹*Id.* § 20-25-402.

⁸⁰Mont. Bd of Regents Policy 1003.7. (Issued Oct. 9, 2001, rev.: Nov. 22, 2013).

⁸¹Mont. Code Ann. § 18-2-102.

⁸²Mont. Bd of Regents Policy 1003.6.III.B (ad.: Jan. 23, 1997; rev.: Sept. 22, 2011).

⁸³Mont. Bd of Regents Policy 204.3 (Issued: Feb. 7, 2003).

⁸⁴Mont. Code Ann. § 2-17-516.

⁸⁵Mont. Bd of Regents Policy 920.1 (rev. Sept. 17, 2015).

State agencies⁸⁶ may enter into contracts for conservation measures for a duration of a minimum of 3 years and up to the useful life of the conservation measures or 20 years, subject to numerous restrictions.⁸⁷

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.⁸⁸ Counties, municipalities and school districts are statutorily limited in the amount of “indebtedness” they can incur “for any purpose.”⁸⁹ *State ex rel. Simmons v. City of Missoula*⁹⁰ involved a transaction in which the city would sell real property to an individual who would then lease the property as developed back to the city for a term of three years.⁹¹ The Montana Supreme Court stated that

[a] debt payable in the future is obviously no less a debt than if payable presently If a contract . . . contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute, the debt exists, --and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred.⁹²

The constitutional provision construed in this decision has since been repealed.

In *Pollard v. City of Bozeman*,⁹³ the Montana Supreme Court reviewed a transaction in which the lessor agreed to construct and lease a vehicle storage building on land owned by the City of Bozeman. The lease was for five years, with three five year renewal terms. If the city failed to renew the lease at the end of the five year initial term or the any of the renewal terms, the city was obligated to pay liquidated damages in the amount of \$175,000, and provide a quitclaim deed to the lessor to allow use of the land around the building, including access to the building.⁹⁴ At the end of the 20-year combined lease and renewals, the city had the option to purchase the building for \$10, and a deed for the building was placed in escrow for such occasion. The city asserted that the lessor was the owner and was obligated to pay property taxes. The Court had previously held that for Montana’s prevailing wage laws, the lease was a sale of the property to the City making it a public works project.⁹⁵ The Court determined that for property tax purposes, lessor

⁸⁶State agency “means : (a) each executive, legislative, or judicial branch department, office, or agency; (b) the university system; and (c) a community college district.” Mont. Code Ann. § 90-4-1102 (citing *id.* § 90-4-602).

⁸⁷*Id.* §§ 90-4-1101 to -1114.

⁸⁸Mont. Const. art.VIII, § 8 requiring “a two-thirds vote of the members of each house of the legislature or a majority of the electors voting thereon.”

⁸⁹Mont. Stat. Ann. §§ 7-7-2203 (counties), 7-7-4201(1) (municipalities). The incurrence by a county of “indebtedness or liability for any single purpose to an amount exceeding \$500,000” requires “approval of a majority of the electors of the county voting at an election.” *Id.* § 7-7-2101(2). In construing § 7-7-2101(2) the attorney general once took the position that a lease providing for a total liability in excess of \$40,000 (this was amended to \$500,000 in 1981) must be approved by voters even though it provides for (i) annual payments of less than \$40,000, (ii) an option to purchase at the end for less than \$40,000 and (iii) an option to cancel at any time. 38 Op. Att’y Gen. 56 (Mont. 1979), however, this opinion has been overruled in its entirety by 52 Op. Att’y Gen. 3 (Mont. 2007). See also *Deiderichs v. Board of Trustees*, 7 P.2d 543 (Mont. 1932) (debt limitation did not apply to bar the expenditure in excess of \$40,000 financed by cash specifically appropriated from then available funds). Except for the purpose of refunding outstanding bonds, the county may not borrow money for any authorized single purpose exceeding the limits based on the county’s taxable value, as set forth in subsection (2) of § 7-7-2402. An installment purchase contract may create indebtedness, but it is not borrowing under § 7-7-2402. 42 Op. Att’y Gen. 13 (Mont. 1987).

⁹⁰395 P.2d 249, 251 (Mont. 1964) (citing *State ex rel. Helena Water Works v. City of Helena*, 63 P. 99 (Mont. 1900)).

⁹¹395 P.2d at 250.

⁹²*Id.* at 251 (quoting *State ex rel. Helena Water Works v. City of Helena*, 63 P. 99 (Mont. 1900)). The court remanded the case for a determination of whether the city was indebted beyond the constitutional debt limit at the time the resolution authorizing the transaction was passed. 395 P.2d at 251.

⁹³741 P.2d 776 (Mont. 1987).

⁹⁴It appears there is no nonappropriation clause in the lease. See, *supra*, note 21 and accompanying text for legislation allowing for binding full faith leases by municipalities in Montana.

⁹⁵700 P.2d 184 (Mont. 1985).

remained the owner of the building, since title goes over to the city only at the end of the 20 year term.⁹⁶ The property was therefore subject to property taxes.

The Montana attorney general has opined that a lease-purchase agreement entered into by the City of Great Falls, as lessee, which included a nonappropriation clause, would not be subject to the debt limitations set forth in Mont. Code Ann. § 7-7-4201, would not be included in the computation of binding obligations under § 7-7-4104, and would not require voter approval under § 7-7-4221(1).⁹⁷ The Montana attorney general has opined that a lease-purchase agreement entered into by Valley County, as lessee, which included a nonappropriation clause and which allows for termination without penalty to the County, would not be subject to the debt limitations set forth in Mont. Code Ann. § 7-7-2101(1) or (2) and therefore does not require voter approval.⁹⁸

Interest Rate Limitations

“Bonds of a political subdivision shall bear interest at such rate or rates as its governing body shall determine.”⁹⁹ “[These] provisions . . . expressly supersede any other statutory limitation on the rate of interest to be borne by bonds of political subdivisions.”¹⁰⁰

(1) Parties may agree in writing to the payment of any rate of interest that does not exceed the greater of 15% or an amount that is 6 percentage points per year above the prime rate published by the federal reserve system in its statistical release H.15 Selected Interest Rates for bank prime loans dated 3 business days prior to the execution of the agreement. Interest must be allowed according to the terms of the agreement.

(2) A loan that is not usurious when made is lawful for the duration of the loan, provided the loan agreement is not substantially changed. This subsection does not apply to loan renewals.

(3) The provisions of this section do not apply to regulated lenders as defined in 31-1-111.¹⁰¹

* * * *

(1) Except as otherwise provided by the Uniform Commercial Code, 31-1-111 and 31-1-112, or 31-1-817, unless there is an express contract in writing fixing a different rate or a law or ordinance or resolution of a public body fixing a different rate on its obligations, interest is payable on all money at the rate of 10% a year after it becomes due on:

- (a) any instrument of writing, except a judgment;
- (b) an account stated;
- (c) money lent or due on any settlement of accounts from the date on which the balance is ascertained; and

⁹⁶The city argued that the transaction was a lease with option to purchase, not a contract for sale. The court basically followed the analysis of a retail installment contract in holding it a contract of sale, but noted that, while the city will become the owner, it is not currently the owner. 741 P.2 at 780.

⁹⁷2001 WL 883392 (Mont.A.G.). See, *supra*, note 21 and accompanying text for analysis of § 7-7-4104.

⁹⁸52 Op. Att’y Gen. 3 (Mont. 2007), 2007 WL 1690883.

⁹⁹Mont. Code Ann. § 17-5-102(1). Bonds include “bonds, notes, warrants, debentures, certificates of indebtedness . . . and all instruments or obligations evidencing or representing indebtedness . . .” *Id.* 17-5-101(1). Political subdivision “includes a county, city, town school district [or] another political subdivision of the state. . .” *Id.* § 17-5-101(3)(a).

¹⁰⁰*Id.* § 17-5-102(2).

¹⁰¹*Id.* § 31-1-107.

(d) money received for the use of another person and detained from that person.

(2) In the computation of interest for a period of less than 1 year, 365 days constitute a year.¹⁰²

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰²*Id.* § 31-1-106.

NEBRASKA 2018 REVISION

Current through legislation effective April 24, 2018, of the 2nd Regular Session of the 105th Legislature (2018), Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ “Each county shall have power: To purchase and hold the real and personal estate necessary for the use of the county.”⁴ Counties are authorized “to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers, except, that no lease agreement for the rental of equipment shall be entered into if the consideration for all lease agreements for the fiscal year exceeds one-tenth of one percent of the total taxable value of the taxable property of the county.”⁵ “The county board . . . may enter into contracts for lease of real or personal property for authorized purposes. Such leases shall not be restricted to a single year, and may provide for the purchase of the property in installment payments.”⁶ Counties may “sell, convey, exchange, or lease any real or personal estate owned by the county.”⁷ Counties “shall acquire, purchase, construct, renovate, remodel, furnish, equip, add to, improve, or provide a suitable courthouse, jail, and other county buildings and a site or sites therefor and for such purposes borrow money and issue the bonds of the county to pay for the same.”⁸ The governing board of a county may levy taxes to acquire voting systems by lease-purchase agreement and “provide for installment payments which extend over a period of more than one year.”⁹ Counties may “lease, purchase” public transportation.¹⁰

“Notwithstanding any other provision of law, no political subdivision shall purchase, lease-purchase, or acquire for consideration real property having an estimated value of one hundred thousand dollars or more unless an appraisal of such property has been performed by a certified real property appraiser.”¹¹

Energy Performance Contracting

Counties have restricted authority to enter into lease-purchase agreements for energy conservation measures in existing public facilities for a period not to exceed thirty years.¹²

Municipalities

Municipalities¹³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁴ eminent domain¹⁵ and police powers.¹⁶ Metropolitan class municipalities have the power “to

¹Neb. Const. art. VIII, § 5.

²Neb. Rev. Stat. § 23-325.

³*Id.* § 23-114.

⁴*Id.* § 23-104.

⁵*Id.*

⁶*Id.* § 23-3114. These contracts are not subject to the restrictions in *id.* § 23-916 that officers, departments or other expending agencies of the county not expend or contract to expend money not provided in the budget or in excess of the money provided in the budget for the fiscal year. *Id.* These contracts are subject to public bidding and “all contracts and leases shall be approved as to form by the county attorney, and a copy of each long-term contract or lease shall be filed with the county clerk.” *Id.* § 23-3108.

⁷*Id.* § 23-104 (4).

⁸*Id.* § 23-120. Restrictions apply.

⁹*Id.* § 32-1042.

¹⁰*Id.* § 13-1208.

¹¹*Id.* § 13-403.

¹²*Id.* §§ 66-1062 to 1066.

purchase, lease, [and] lease with option to buy . . . real and personal property.”¹⁷ Metropolitan municipalities may sell, exchange, lease and convey any real or personal estate.¹⁸

Primary class municipalities are authorized as follows:

“(2) to purchase, lease, or otherwise acquire as authorized by their home rule charters or state statutes real estate or personal property . . . ,¹⁹ (4) to sell, convey, exchange, or lease real or personal property owned by the city in such manner and upon such terms and conditions as shall be deemed in the best interests of the city as authorized by its home rule charter . . . ,²⁰ (5) to make contracts and do all acts relative to the property and concerns of the city necessary or incident or appropriate to the exercise of its corporate powers . . . ,²¹ (6) to purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities”²²

Primary class municipalities are also authorized to “enter into installment contracts for the purchase of real or personal property. Such contracts need not be restricted to a single year and may provide for the purchase of the property in installment payments to be paid over more than one fiscal year.”²³

First class municipalities have the power “to purchase, lease, [and] lease with option to buy . . . real and personal property”²⁴ and “to sell and convey, exchange, or lease any real or personal property owned by the city, including any park land, in such manner and upon such terms and conditions as may be deemed in the best interests of the city”²⁵ The first class city’s power to sell and convey real estate is subject to numerous restrictions.²⁶

Second class cities may “convey property, real or personal.”²⁷ Second class cities have the power “to contract or be contracted with”²⁸ and “to acquire and hold real and personal property . . . and lease, [and] lease with option to buy . . . real or personal property.”²⁹ The power of a second class city to convey property is subject to numerous restrictions.³⁰

“[Any] city of the first or second class . . . may enter into contracts for lease of real or personal property for any purpose for which the city . . . is authorized by law to purchase property.”³¹ “Such leases

¹³Municipalities for purposes of this discussion consist of four classes of cities: metropolitan class, primary class, first class and second class. Cities of over 5,000 inhabitants may frame a charter. Neb. Const. art. XI, § 2. Cities of over 100,000 inhabitants may have home rule powers. *Id.* art. XI, § 5.

¹⁴Neb. Rev. Stat. §§ 14-102(1) (cities of the metropolitan class); 15-202 (cities of the primary class); 16-203 (cities of the first class); 17-506 (cities of the second class).

¹⁵*Id.* § 14-366(cities of the metropolitan class), § 15-229 (cities of the primary class); § 19-709 (cities of the first and second class).

¹⁶*Id.* § 14-102 (cities of the metropolitan class); § 15-255 (cities of the primary class); § 16-225 (cities of the first class); § 17-505 (cities of the second class).

¹⁷*Id.* § 14-101(2).

¹⁸*Id.* § 14-101(3).

¹⁹*Id.* § 15-201(2).

²⁰*Id.* § 15-201(4).

²¹*Id.* § 15-201(5).

²²*Id.* § 15-201(6).

²³*Id.* § 15-201.02.

²⁴*Id.* § 16-201(2).

²⁵*Id.* § 16-201(3).

²⁶*Id.* § 16-202.

²⁷*Id.* § 17-501(3).

²⁸*Id.* § 17-501(2).

²⁹*Id.* § 17-501(3).

³⁰*Id.* § 17-503.

³¹*Id.* § 19-2421.

shall not be restricted by a single year, and may provide for the purchase of the property in installment payments.”³² Cities of the first and second class may "lease, purchase" public transportation systems, including special transportation for the elderly or handicapped.³³

Incorporated municipalities are authorized to enter into lease-purchase agreements for any municipal purpose and pledge voter approved sales tax revenues for the payment thereof.³⁴

Municipalities may "lease, purchase" public transportation.³⁵

Energy Performance Contracting

Municipalities have restricted authority to enter into lease-purchase agreements for energy conservation measures in existing public facilities for a period not to exceed thirty years.³⁶

School Districts

School districts³⁷ may qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁸ and eminent domain powers.³⁹

[A]ny public school district may enter into a lease or lease-purchase agreement . . . for such buildings or equipment as the board determines necessary. Such lease or lease-purchase agreements may not exceed a period of seven years, except that lease-purchase agreements entered into as part of an energy financing contract pursuant to Section 66-1065 may not exceed a period of thirty years. All payments pursuant to such leases shall be made from current building funds or general funds. No school district shall directly or indirectly issue bonds to fund any such lease-purchase plan for a capital construction project exceeding twenty-five thousand dollars in costs unless it first obtains a favorable vote of the legal voters”⁴⁰

* * * *

[A]ny school district may lease, purchase, [and] acquire . . . real property which is located outside of its school district for laboratory, recreation, camping or educational facilities, except that any purchase costing (a) more than one thousand dollars by any Class I or II school district or (b) more than five thousand dollars by any Class III, IV, V or VI school district shall be submitted to a vote of the legal voters in that school district seeking to acquire the property.⁴¹

There are numerous special provisions allowing the selling of property by school districts.

Energy Performance Contracting

³²*Id.*

³³*Id.* §§ 13-1208; 16-6,110; 17-174.

³⁴*Id.* § 77-27,142.

³⁵*Id.* §13-1208.

³⁶*Id.* §§ 66-1062 to 1066.

³⁷School districts are of six classes. *Id.* § 79-102.

³⁸*See generally* Neb. Rev. Stat. Chapter 79, article 10.

³⁹*Id.* § 79-1095.

⁴⁰*Id.* § 79-10,105. The financing of building construction through lease-purchase was upheld in *George v. Board of Educ.*, 313 N.W.2d 259 (Neb. 1981). The lease-purchase of modular homes for use as classrooms was upheld in *Foree v. School Dist. No. 7*, 493 N.W.2d 625 (Neb. 1993). In *Nebuda v. Dodge County School Dist.* 861 N.W.2d 742 (Neb. 2015), the Court seems to take the position that if the financing had gone through a public building authority with sale of certificates of participation, then voter approval would have been required, since it would have been an indirect issuance of bonds, but voter approval was not required with a direct lease leaseback with the bank. Note that the transaction in *Nebuda* did include a nonappropriation clause and there was no pledge or levy of taxes.

⁴¹Neb. Rev. Stat. § 79-10,103(1)). The election provisions of this section do not apply to purchases of land contiguous to that already owned by the acquiring school district. *Id.* § 79-10,103(2).

School districts have restricted authority to enter into lease-purchase agreements for energy conservation measures in existing public facilities for a period not to exceed thirty years.⁴²

Fire Districts

Fire districts⁴³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax powers.⁴⁴ Fire districts may “purchase or lease such firefighting and rescue equipment...and other real or personal property as necessary and proper to carry out the general fire protection and rescue program of the district.”⁴⁵

Hospital Districts

Hospital districts may qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴⁶ and eminent domain powers.⁴⁷ Hospital districts may “purchase, . . . [and] lease, . . . property of every kind and description within and outside the district and to control, dispose of, convey, and encumber the same and create a leasehold interest in such property for the benefit of the district.”⁴⁸ They may “establish, maintain, lease, or operate one or more hospitals within or outside the district, or both,”⁴⁹ and may “acquire, maintain, and operate ambulances.”⁵⁰

(1) The board of directors may purchase all necessary surgical instruments and hospital equipment and equipment for nurses' homes and all other property necessary for equipping a hospital and nurses' home.

(2) The board of directors may purchase such real property, and erect or rent and equip such buildings or building, room or rooms as may be necessary for the hospital.⁵¹

Hospital Authorities also exist, but do not appear to have sufficient sovereign powers to be tax-exempt for purposes of federal income tax law.⁵²

State Entities

“No department commission, board or agency of state government may spend any money beyond its budget allowance without specified authority from the Legislature.”⁵³

The director of the Department of Administrative Services is responsible for review and approval of lease-purchase agreements for real and personal property:

The Director of Administrative Services is hereby vested with the duties, powers and responsibilities involved in: . . . The review and approval of financing agreements⁵⁴ for the purposes of protecting the credit

⁴²*Id.* §§ 66-1062 to 1066.

⁴³Fire districts are “rural and suburban fire protection districts” organized under Neb. Rev. Stat. chapter 35.

⁴⁴Neb. Rev. Stat. § 77-3442.

⁴⁵*Id.* § 35-508.

⁴⁶*Id.* § 23-3552.

⁴⁷*Id.* § 23-3547(4).

⁴⁸*Id.* § 23-3547(3).

⁴⁹*Id.* § 23-3547(10).

⁵⁰*Id.* § 23-3547(12).

⁵¹*Id.* § 23-3548.

⁵²*Id.* § 23-3579 to 23-35,120.

⁵³*Id.* § 81-1116.01.

⁵⁴“Financing agreement” “shall mean any bond, lease-purchase obligation, installment sales contract, or similar financial arrangement, for a period greater than one year, which is entered into by the state or any agency, board, or commission thereof, not including the University of Nebraska or state colleges, in accordance with the Constitution of Nebraska and statutes of this state, relating to capital construction, real property acquisition, and personal property acquisition.” *Id.* § 81-1102(13).

of the state, insuring the most advantageous terms, providing for proper accounting of financial transactions, complying with the approved budget, and promoting sound financial management.

Financing agreements related to real property acquisitions and capital construction projects within the Nebraska State Capitol Environs District, other than the State Capitol and capitol grounds, may be financed, if determined appropriate by the director, **subject to legislative appropriation**. Real property acquisitions or capital construction projects within the Nebraska State Capitol Environs District, other than the State Capitol and capitol grounds, shall not proceed without legislative appropriation and shall require the approval of both the Governor and the Executive Board of the Legislative Council.

Financing agreements related to real property acquisition and capital construction (a) for the State Capitol and capitol grounds or (b) outside the Nebraska State Capitol Environs District, shall not be financed without the express approval of the Legislature, and such legislative authorization shall include the maximum financing period for any project to be financed. The approval of such projects shall be through the capital construction budget process and shall be subject to legislative appropriation.⁵⁵ [Emphasis added.]

Administrative policy provides that State Accounting must review financing terms where the financed amount exceeds \$50,000 with payment over a term exceeding one year.⁵⁶ The Administrative Services Accounting Division has developed a Master Lease Purchase Program (MLPP).⁵⁷ The State Accounting MLPP manual provides the following information:

Amounts to be Financed:

Normally, equipment costing not less than \$50,000 and not more than \$5,000,000.00. (Amounts less than \$50,000.00 may be considered on a case by case basis. Amounts less than \$600,000.00 will only be considered if they are to be included with a larger issue).

Repayment Provisions:

Agencies will pay for the financing through level monthly payments to State Accounting over life of the lease.

Repayment Terms:

Will be negotiated for each equipment group with a term not to exceed the expected life of the equipment being leased. For most equipment this will normally be three (3) to five (5) years.

Parties to the Master Lease:

To finalize a Master Lease there are four parties to the transaction:

1. AS State Accounting represents the State and its agencies.
2. Bond Counsel prepares all legal documents.
3. The Underwriter markets and sells the instruments (Certificates of Participation) to the public from which the funds are obtained to provide to the agencies. The underwriter also acts as the lessor.
4. The Trustee (a bank) receives the proceeds from the sale of the certificates of participation and pays for the equipment purchased from such proceeds. The Trustee holds onto the funds until all equipment is purchased.

Interest Rate:

The rate will be set at the time the lease for the equipment is finalized, at which time the rate will not exceed 101% of the market rate of comparable "Aa3" rated, annual appropriation lease financings.

⁵⁵*Id.* § 81-1107(3). The Department of Administrative Services is generally responsible for state fiscal control and centralization of procedures. *Id.* § 81-1108.

⁵⁶Neb. St. Acct. Man. § AM-005, Gen. Pol. 17 (updated 02-03-14).

⁵⁷*Id.*; Neb. Rev. Stat. § 81-1107(3); *id.* § 81-1108.03. State Accounting, Master Lease Purchase Program, Policy Manual (Feb. 12, 2013)(available online on the state accounting website: http://das.nebraska.gov/accounting/master_lease/MLPP_Details_Web.pdf).

Fees and Expenses:

The underwriter will be paid a one-time fee (discount) of .675% for issues \$3,000,000.00 and under, and .725% for issues that exceed \$3,000,000.00. Other fees include legal fees (.15%), trustee fees (\$1,500 at closing, and \$1,500 annually), and printing fees (amounts vary). These fees will normally be part of the amount financed and paid over the term of the repayment period. A schedule of the total payments including principal, interest and fees will be provided to the borrowing agency at the inception of the lease.

Title to the Equipment:

Title will be held by the State of Nebraska, with the lessor being given a security interest in the equipment until the Master Lease commitment is paid in full.

Modification of Equipment:

The State shall, at its own expense, have the right to make repairs, replacements, improvements, substitutions and modifications to the equipment. Such work shall then comprise part of the equipment and be subject to the provisions of the lease. Upon the completion of any such work, the value of the equipment shall not be less than that immediately prior to the commencement of such work.

Agency(s) Payments:

The State represents that it intends to continue a lease for its entire lease term and to pay all rental payments relating thereto. The person or entity in charge of preparing each agency(s)'s budget will include in the budget request for each fiscal period the rental payments to become due in such fiscal period and use all reasonable and lawful means available to secure the appropriation of funds. Nonappropriation is defined as an act that specifically prohibits the State from performing its obligations under the MLPP.

Where agencies enter into lease-purchase agreements for personal property, state purchase procedures must be followed:

(5) The state purchasing bureau shall be responsible for all purchases by all state agencies⁵⁸ other than the University of Nebraska. The materiel division shall administer the public notice and bidding procedures and any other areas designated by the Director of Administrative Services to carry out the lease or purchase of personal property. All purchases of and contracts for materials, supplies, or equipment and all leases of personal property shall be made in the following manner except in emergencies approved by the Governor:

(a) By a competitive formal sealed bidding process through the materiel division in all cases in which the purchases are of estimated value exceeding fifty thousand dollars;

(b) By a competitive informal bidding process through the materiel division in all cases in which the purchases are of estimated value equal to or exceeding twenty-five thousand dollars but less than fifty thousand dollars;

(c) By unrestricted open market purchases through the materiel division in all cases in which purchases are of estimated value of less than twenty-five thousand dollars;

(d) All requisitions for whatever purpose coming to the state purchasing bureau shall be in conformance with the approved budget of the requisitioning department or agency; and

(e) All contracts for purchases and leases shall be bid as a single whole item. In no case shall contracts be divided or fractionated in order to produce several contracts which are of an estimated value below that required for competitive bidding;

⁵⁸Under the State Contract Claims Act "[s]tate agency shall mean all departments, agencies, boards, bureaus, and commissions of the State of Nebraska and corporations the primary function of which is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska but shall not include corporations that are essentially private corporations or entities created pursuant to the Interlocal Cooperation Act or the Joint Public Agency Act. State agency shall not be construed to include any contractor with the State of Nebraska." *Id.* § 81-8,303.

(f) No contract for purchase or lease shall be amended to extend the duration of the contract for a period of more than fifty percent of the initial contract term. Following the adoption of any amendment to extend the contract for a period of fifty percent or less of the initial contract term, no further extensions of the original contract shall be permitted. This subdivision (f) does not prohibit the exercise of any renewal option expressly provided in the original contract.⁵⁹

* * * *

Notwithstanding any other provision of law, all contracts for or leases of personal property shall be subject to the following conditions:

(1) No purchase or lease of property shall be approved until a solicitation for purchase or lease has been made by the Department of Administrative Services. Such solicitation shall be in the form of a public notice of the proposed purchase or lease and a general description of the personal property needed in a paper of general circulation in the area where the agency will be operating or by any other method approved by the materiel administrator;

(2) The Department of Administrative Services shall be the sole and final authority on purchases and leases of personal property by a using agency. In any case when the approval of the Governor is required, the Governor may, in his or her discretion, confer complete authority upon the Department of Administrative Services in the review and approval of purchase and lease proposals;

(3) The Department of Administrative Services shall adopt and promulgate rules and regulations to (a) develop and implement purchasing and leasing policies and procedures which shall insure economical and efficient operations of state agencies and (b) carry out the provisions of sections 81-145 to 81-162; and

(4) The Director of Administrative Services shall refuse to issue warrants for the disbursement of any funds in payment of contracts or leases which have not been approved according to law.⁶⁰

Agencies involved in capital construction of new buildings are subject to the powers of the state building division of the Department of Administrative Services and numerous code requirements.⁶¹ The costs of erecting or repairing public buildings may not exceed appropriations for such buildings.⁶²

A municipality may acquire or construct buildings or facilities and lease them to the state with an option to purchase, subject to numerous restrictions.⁶³

The state building division of the Department of Administrative Services oversees and approves all leases by state agencies, pursuant to numerous statutory and regulatory requirements.⁶⁴

The Department of Administrative Services may purchase real property which costs an amount equal to or less than ten percent of the amount set forth in subdivision (1)(a) of section 81-1108.43 as adjusted by subsection (2) of section 81-1108.43 without legislative approval or a specific appropriation.⁶⁵

All purchases of state-owned motor vehicles must be made by the Transportation Services Bureau.⁶⁶

⁵⁹*Id.* § 81-1118(5). *See also*, the “Public letting” requirement: *id.* § 73-101.

⁶⁰*Id.* § 81-1118.03.

⁶¹*Id.* § 72-803. *See* Capital Construction Procedural Manual (procedures applying to all capital construction projects whose total project cost exceeds \$450,000) available at the State Building Division website. <http://das.nebraska.gov/building/>. Projects, other than those instituted by the Board of Regents, must comply with a comprehensive capital facilities plan. Neb. Rev. Stat. § 81-1108.41; *Bd. Of Regents vs. Exon*, 256 N.W. 2d 330 (Neb. 1977).

⁶²Neb. Rev. Stat. §§ 72-801, 72-802.

⁶³*Id.* §§ 72-1401 to 72-1412. Other public bodies may enter into such a lease as lessee.

⁶⁴*Id.* § 73-101; § 81-1108.15; § 81-1108.16; § 81-1108.22; §§ 1108.55 through 1108.57; § 1118.03; Neb. Admin. Code tit. 7, ch. 2; External Leasing Manual (available on the State Building Division website: [http://das.nebraska.gov/building/Leasing/ External_Leasing_Manual_2011-07-01_FINAL.pdf](http://das.nebraska.gov/building/Leasing/External_Leasing_Manual_2011-07-01_FINAL.pdf)).

⁶⁵Neb. Rev. Stat. § 81-1119 (\$400,000 plus inflationary changes).

⁶⁶*Id.* § 81-1015.

The Department of Roads is authorized to acquire real and personal property by eminent domain.⁶⁷ The Department (of Highways and Bridges) may “lease, purchase” equipment and buildings for a cost less than one hundred thousand dollars without the consent of the legislature.⁶⁸

Information Technology and Communications

The information management services division manages acquisition of information technology, subject to review and approval of the office of the Chief Information Officer within the Department of Administrative Services.⁶⁹ The division “may contract . . . with private vendors in carrying out the duties relating to the governmental data services program.”⁷⁰ “No state agency⁷¹ shall hire, purchase, lease, or rent any information management item⁷² . . . without the written approval of the information management services administrator.”⁷³

Information technology purchases made with state funds or local tax receipts by education-related political subdivisions shall meet or exceed any applicable technical standards established by the commission.⁷⁴ The Chief Information Officer may bid for such equipment and allow education-related political subdivisions to participate in leasing or purchasing contracts.⁷⁵

The division of communications⁷⁶ in the office of the chief information officer oversees telecommunications facilities and equipment leased by all departments, agencies and subdivisions of state government.⁷⁷

There is an Information Technology Infrastructure Fund used to attain goals identified in the statewide technology plan.⁷⁸

Higher Education

There are two systems of public higher education: the University of Nebraska,⁷⁹ and the Nebraska State College System.⁸⁰ The Board of Regents of the University of Nebraska has the power “to enact laws for the government of the university.”⁸¹ It may exercise the power of eminent domain⁸² and may

⁶⁷*Id.* § 39-1320.

⁶⁸*Id.* § 39-1355.

⁶⁹*Id.* § 81-1116.02. *id.* § 86-519.

⁷⁰*Id.* § 86-563.

⁷¹This section is not applicable to the Board of Regents. *Board of Regents v. Exon*, 256 N.W. 2d 330 (Neb. 1977).

⁷²Such items include: “(1)(a) Mainframe computers, minicomputers, microprocessors, word processors, and desktop computers; (b) Any peripheral device to be used with the equipment listed in subdivision (1)(a) of this section for such purposes as data input and output, data storage, or data communications; (c) Any code or program to control the operation of the equipment or devices listed in subdivision (1)(a) or (1)(b) of this section; and (d) Employment of professional expertise for computer system design, operations, or program development.” Neb. Rev. Stat. § 81-1117.

⁷³*Id.* § 81-1117(2)(e).

⁷⁴“Commission” means the Nebraska Information Technology Commission. *Id.* § 86-515.

⁷⁵*Id.* § 86-520.01.

⁷⁶“Communications” means any transmission, emission, or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, radio, optical, or other electromagnetic systems. *Id.* § 81-1120.02). “Communications system” means the total communications facilities and equipment owned, leased, or used by all departments, agencies, and subdivisions of state government. *Id.*

⁷⁷*Id.* § 81-1120.03; *id.* § 81-1120.02; *id.* § 81-1120.17.

⁷⁸*Id.* § 86-527.

⁷⁹Neb. Const. art. VII, § 10 (general government vested in a Board of Regents). Institutions governed by the board include: The University of Nebraska-Lincoln, the University of Nebraska at Omaha, the University of Nebraska at Kearney, and the University of Nebraska Medical Center. *Id.* § 85-106.06.

⁸⁰Neb. Const. art. VII, § 13. The state college system is governed by the Board of Trustees of the Nebraska State Colleges. Neb. Rev. Stat. § 85-301. Institutions are Chadron State College, Peru State College, and Wayne State College. *Id.*

⁸¹*Id.* § 85-106; Bylaws of the Regents of the Univ. Neb. (am. through Jan. 25, 2018) available online <https://nebraska.edu/regents/bylaws-policies-and-rules> (last accessed May, 2018). Board policies provide guidelines for the procurement of equipment. Univ. Neb. Bd. of Regents Pol. RP 6.2.1 (am. through Jan. 25, 2018); the acquisition of real

acquire real and personal property.⁸³ The Board of Trustees of the Nebraska State Colleges has the power “to acquire real and personal property and dispose of the same”⁸⁴ and also has the power of eminent domain.⁸⁵ Both systems are authorized to enter into lease-purchase agreements as follows:

Subject to subsection (10) of section 85-1414,⁸⁶ the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges are authorized to lease to any person, firm, or corporation such portions of the campus of the respective institutions under their control as may be necessary to be used as sites for the construction of fireproof buildings for dormitories and for boarding, housing, and student activity purposes, for athletic structures, and for parking or as sites for the establishment of parking facilities, and they may acquire lands adjacent to the campus of any such institution by donation or purchase with any funds they may have available for that purpose to be leased as sites for such buildings and facilities. Subject to subsection (10) of section 85-1414, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges may also lease from any person, firm, or corporation an athletic structure or structures constructed on a site or sites owned by the State of Nebraska when the person, firm, or corporation has the permission of the Legislature to construct on such site or sites.

The State of Nebraska shall incur no liability by reason of the exercise of the authority granted in this section to the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges other than is hereinafter specifically set forth. The buildings and facilities so erected or established shall be used solely for dormitories and for boarding, housing, and student activity purposes, for athletic structures, and for parking, as the case may be.

Subject to subsection (10) of section 85-1414, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges are hereby authorized to contract with the owners of the buildings and facilities so erected or established on the leased grounds or state sites to pay as rental or otherwise for the use of the buildings and facilities a sum sufficient to pay, on the amortization plan, the principal and interest thereon of the cost of construction or establishment of the buildings and facilities, such contracts to run not over forty years.

The rate of interest allowed on the cost of construction or establishment shall be fixed by the Board of Regents of the University of Nebraska or Board of Trustees of the Nebraska State Colleges, payable annually or semiannually as may be determined by the Board of Regents of the University of Nebraska or the Board of Trustees of the Nebraska State Colleges. The contract shall provide that when the cost of construction or establishment has been paid, together with interest thereon, the buildings and facilities so constructed or established shall become the property of the State of Nebraska.⁸⁷

property costing more than \$250,000 requires board approval and approval by the office of general counsel. Real property costing under \$250,000 must be approved by the president and general counsel. Univ. Neb. Bd. of Regents Pol. RP-6.2.3 (am. Through Jan. 25, 2018). The president of the university is empowered to execute contracts, with numerous restrictions. *Id.* RP-6.3.1 .4.

⁸²Neb. Rev. Stat. § 85-133.

⁸³*Id.* § 85-105.

⁸⁴*Id.* § 85-304(5).

⁸⁵*Id.* § 85-319.

⁸⁶Neb. Rev. Stat. § 85-1414 requires the Coordinating Commission for Postsecondary Education to approve or disapprove proposed capital construction projects which utilize tax funds designated by the Legislature. “Capital construction project” means” any proposed acquisition of a capital structure by gift, purchase, lease-purchase, or other means of construction or acquisition that (i) will be directly financed in whole or in part with tax funds designated by the Legislature totaling at least the minimum capital expenditure for purposes of this subdivision or (ii) is likely, as determined by the institution, to result in an incremental increase in appropriation or expenditure of tax funds designated by the Legislature of at least the minimum capital expenditure for the facility’s operations and maintenance costs in any one fiscal year within a period of ten years from the date of substantial completion or acquisition of the project. No tax funds designated by the Legislature shall be appropriated or expended for any incremental increase of more than the minimum capital expenditure for the costs of the operations and utilities of any facility which is not included in the definition of capital construction project and thus is not subject to commission approval pursuant to the Coordinating Commission for Postsecondary Education Act. No institution shall include a request for funding such an increase in its budget request for tax funds designated by the Legislature nor shall any institution utilize any such funds for such an increase. The Governor shall not include in his or her budget recommendations, and the Legislature shall not appropriate, such funds for such increase.” *Id.* § 85-1402.

⁸⁷*Id.* § 85-401. See also, Neb. Admin. Code tit. 281, Ch. 9 (rules and regulations concerning capital construction).

There are funds established by the legislature for deferred maintenance, repair, renovation and construction of facilities at specific campus locations and associated legislation enabling the Board of Regents of University of Nebraska and The Board of Trustees of the Nebraska State Colleges to enter into lease, lease back financings.⁸⁸

Board of Trustees of the Nebraska State Colleges policy regarding lease-purchase agreements exceeding \$50,000 provides:

Periodically it may be necessary or advantageous for the State Colleges or System Office to enter into Lease-Purchase contracts for the procurement of equipment, energy management projects, facilities management systems, vehicles, furnishings, fixtures, facilities, land and other essential types of purchases. When it has been determined that a lease-purchase agreement will be used, the following process shall be followed for all such contracts whereby the financing amount exceeds \$50,000:

1. Discuss proposed purchase with DAS representative for the State of Nebraska's Master Lease Program and obtain financial data for using that program

2. Solicit information on other available Lease-Purchase programs and analyze the advantages/ disadvantages of each program that is appropriate for use by the institution

3. Submit material to System Office staff with recommendation on designated program, including draft of proposed agreement which recognizes the following:

- a) Since the State Colleges are not permitted, by law, to mortgage or grant a security interest in real or personal property to which it has title, the title to the property must be vested in the lessor until such time as all of the rental payments are made.

- b) The State Colleges may not permit title to any equipment, fixture, etc. to remain in another party if its removal would impair the integrity of the building to which it is attached or in which it is housed.

- c) The lease-purchase agreement for qualifying projects would be subject to an annual appropriation and be annually renewable.

- d) Unless there are other restrictions imposed by other documents, there are no restrictions on the source of funds that may be used for payment of the colleges' obligation under the contract. However, the Board of Trustees must specifically approve the source of funds intended to be used.

- e) The State Colleges may combine various sources of funds for lease purchase financing, but it must be recognized that failure of any one of the sources might cause a default for the entire contract.

4. Prepare recommendation to be submitted to the Board of Trustees for approval.

5. The Agreement, once approved by the Board, shall be signed by the President or Vice President for Administration and Finance and then by the Chancellor or Vice Chancellor for Finance and Administration, or General Counsel.

Lease-Purchase Agreements, in which the financing amount ranges from \$25,000 to \$50,000, shall be reviewed first with System Office staff. Upon approval by the Chancellor, the Agreement shall be signed by the President or Vice President for Administration and Finance, and then by the Chancellor or Vice Chancellor for Finance and Administration or General Counsel.

Lease-Purchase Agreements of less than \$25,000 may be approved by the College President and signed by the President or Vice President for Administration and Finance. All System Office Lease-Purchase Agreements shall be signed by the Chancellor or Vice Chancellor for Finance and Administration or General Counsel.

⁸⁸See, Neb. Rev. Stat. §§ 85-421, 85-422 (University of Nebraska Facilities Program of 2006, exp. June 30, 2030); *id.* §§ 85-424, 85-425 (State College Facilities Program of 2006, exp. June 30, 2030).

All System Office Lease-Purchase Agreements shall be signed by the Chancellor or Vice Chancellor for Finance and Administration or General Counsel.

All College Lease-Purchase Agreements shall be reported to the Board by the College. Any System Office Lease Purchase Agreements shall be reported to the Board by the System Office.⁸⁹

Lease-purchases by the University of Nebraska and the state colleges are not covered by provisions requiring acquisition of property to be made by the Department of Administrative services.⁹⁰

Energy Performance Contracting

Departments and agencies of the State have restricted authority to enter into lease-purchase agreements for energy conservation measures in existing public facilities for a period not to exceed thirty years.⁹¹

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁹² Counties, municipalities and school districts are statutorily limited in the incurring of indebtedness.⁹³ In *Ruge v. State*,⁹⁴ the court held that since the liability of the state as lessee extended for only one year at a time, there was no binding obligation beyond the rental period for which an appropriation had been made.⁹⁵ However, the court held that a provision in the lease which required the state upon termination of the lease to pay costs of reletting the property, including costs of alterations incurred by lessor in placing property in condition for reletting, violated constitutional debt limitations.⁹⁶

Interest Rate Limitations

“Notwithstanding the provisions of other law, the time-price differential for any goods or services sold under an installment contract shall be stated as a fixed or variable annual percentage rate and shall be at a rate agreed to in writing, not to exceed eighteen percent per annum”⁹⁷

“[A]ny rate of interest which may be agreed upon, not exceeding 16 percent per annum on the unpaid principal balance, shall be valid upon any loan or forbearance of money, goods, or things in action.”⁹⁸

“All warrants or orders issued by . . . any county, city, township, school district . . . shall draw interest . . . at such rate as is fixed by the issuing authority.”⁹⁹

Miscellaneous

The following tax exemptions apply to lease-purchases:

⁸⁹Board of Trustees of the Nebraska State Colleges Policy 7012 (adopted 6/19/98, last rev. 03/15/13).

⁹⁰Neb. Rev. Stat. § 81-1102 (13).

⁹¹*Id.* §§ 66-1062 to 1066.

⁹²Neb. Const. art. VIII, §1.

⁹³Neb. Rev. Stat. § 23-120 (counties); *id.* § 79-1070 (school districts); *id.* §§ 14-525 (metropolitan class cities), 15-244 (primary class cities), 16-213 (first class cities), 17-560 (second class cities).

⁹⁴267 N.W.2d 748 (Neb. 1978).

⁹⁵*Id.* at 751.

⁹⁶*Id.* at 752.

⁹⁷Neb. Rev. Stat. § 45-338.

⁹⁸*Id.* § 45-101.03(1).

⁹⁹*Id.* § 45-106.

77-202.

(1) The following property shall be exempt from property taxes:

(a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision:

(i) Property of the state and its governmental subdivisions means. . .

(B) property beneficially owned by the state or a governmental subdivision in that it is used for a public purpose and is being acquired under a lease-purchase agreement, financing lease, or other instrument which provides for transfer of legal title to the property to the state or a governmental subdivision upon payment of all amounts due thereunder. If the property to be beneficially owned by a governmental subdivision has a total acquisition cost that exceeds the threshold amount or will be used as the site of a public building with a total estimated construction cost that exceeds the threshold amount, then such property shall qualify for an exemption under this section only if the question of acquiring such property or constructing such public building has been submitted at a primary, general, or special election held within the governmental subdivision and has been approved by the voters of the governmental subdivision. For purposes of this subdivision, threshold amount means the greater of fifty thousand dollars or six-tenths of one percent of the total actual value of real and personal property of the governmental subdivision that will beneficially own the property as of the end of the governmental subdivision's prior fiscal year; and

(ii) Public purpose means use of the property (A) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (B) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose.¹⁰⁰

* * * *

77-2704.15

(1)(a) Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of purchases by the state, including public educational institutions recognized or established under the provisions of Chapter 85, or by any county, township, city, village, rural or suburban fire protection district, city airport authority, county airport authority, joint airport authority, drainage district organized under sections 31-401 to 31-450, natural resources district, elected county fair board, housing agency as defined in section 71-1575 except for purchases for any commercial operation that does not exclusively benefit the residents of an affordable housing project, cemetery created under section 12-101, or joint entity or agency formed by any combination of two or more counties, townships, cities, villages, or other exempt governmental units pursuant to the Interlocal Cooperation Act, the Integrated Solid Waste Management Act, or the Joint Public Agency Act, except for purchases for use in the business of furnishing gas, water, electricity, or heat, or by any irrigation or reclamation district, the irrigation division of any public power and irrigation district, or public schools or learning communities established under Chapter 79.

(b) For purposes of this subsection, purchases by the state or by a governmental unit listed in subdivision (a) of this subsection include purchases by a nonprofit corporation under a lease-purchase agreement, financing lease, or other instrument which provides for transfer of title to the property to the state or governmental unit upon payment of all amounts due thereunder. If a nonprofit corporation will be making purchases under a lease-purchase agreement, financing lease, or other instrument as part of a project with a total estimated cost that exceeds the threshold amount, then such purchases shall qualify for an exemption under this section only if the question of proceeding with such project has been submitted at a primary, general, or special election held within the governmental unit that will be a party to the lease-purchase agreement, financing lease, or other instrument and has been approved by the voters of such governmental unit. For purposes of this

¹⁰⁰*Id.* § 77-202(1)(a).

subdivision, (i) project means the acquisition of real property or the construction of a public building and (ii) threshold amount means the greater of fifty thousand dollars or six-tenths of one percent of the total actual value of real and personal property of the governmental unit that will be a party to the lease-purchase agreement, financing lease, or other instrument as of the end of the governmental unit's prior fiscal year.¹⁰¹

Political subdivision are required to get appraisals of real property with an estimated value in excess of \$100,000 before lease-purchasing such real property.”¹⁰²

The Nebraska Governmental Unit Security Interest Act governs the perfection, priority, and enforcement of all security interests created by governmental units, including the State, and is applicable to lease-purchase agreements.”¹⁰³

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰¹*Id.* § 77-2704.15(1).

¹⁰²*Id.* § 13-403.

¹⁰³*Id.* § 10-1101 to 1106.

NEVADA 2018 REVISION

Current through the end of the 79th Regular Session (2017) of the Nevada Legislature subject to change from the Reviser of the Legislative Counsel Bureau, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties may “purchase any real or personal property necessary for the use of the county”⁴ and may “lease any real or personal property necessary for the use of the county.”⁵

“[Any] county may enter into an agreement with a person whereby the person agrees to construct or remodel a building or facility . . . and thereupon enter into a lease or lease-purchase agreement with the . . . county . . . for that building or facility.”⁶

Pursuant to section 244.281, counties may sell or lease real property owned by the county when in the best interest of the county.⁷ Counties may also lease real property belonging to the county when “necessary or desirable.”⁸

“A [county] may . . . lease property or facilities from a nonprofit corporation or trustee in conjunction with one or more other local governments, and in connection therewith may sell or lease property or facilities to the nonprofit corporation or trustee.”⁹

Counties and other local governments may enter into installment-purchase agreements:

1. If the public interest requires a[n] . . . installment-purchase agreement, the governing body of any local government, by a resolution adopted by two-thirds of its members, may authorize a[n] . . . installment-purchase agreement.

2. The resolution must contain:

(a) A finding by the governing body that the public interest requires the . . . installment-purchase agreement;

¹Nev. Rev. Stat. § 244.150.

²*Id.* § 37.010(1)(c).

³*Id.* § 244.357.

⁴*Id.* § 244.275(1)(a).

⁵*Id.* § 244.275(1)(b). “[E]xcept as otherwise provided by law, . . . [a lease entered into by a board of county commissioners] is binding beyond [their] terms of office only to the extent that money is appropriated therefor, or for like item of service.” *Id.* § 244.320(1).

⁶*Id.* § 244.286(1).

⁷*Id.* § 244.281(1). In addition to other restrictions, counties must publish notice of a proposal to sell for three weeks prior to sale. *Id.* § 244.281.1(b)(2).

⁸*Id.* § 244.283(1). Counties must publish notice for two successive weeks prior to the acceptance of any bids to lease. *Id.* § 244.283(3)(b).

⁹*Id.* § 354.750. This is a statute too detailed to set forth herein. The term “local government” has the meaning ascribed to it in section 354.474. *Id.* § 350.0065. Section 354.474 provides: “‘Local government’ means every political subdivision or other entity which has the right to levy or receive money from ad valorem or other taxes or any mandatory assessments, and includes, without limitation, counties, cities, towns, boards, school districts and other districts organized pursuant to chapters 244A, 309, 318 and 379 of NRS, NRS 450.550 to 450.750, inclusive [hospital districts], and chapters 474 [fire districts], 541, 543 and 555 of NRS, and any agency or department of a county or city which prepares a budget separate from that of the parent political subdivision.” *Id.* § 354.474.1. Each are authorized to lease property under the terms of the statute. *Id.*

(b) A statement of the facts upon which the finding required pursuant to paragraph (a) is based;

(c) A statement that identifies:

(1) Each source of revenue of the local government that is anticipated to be used to repay the . . . installment-purchase agreement; and

(2) The dollar amount that is anticipated to be available to repay the . . . installment-purchase agreement from each such source; and

(d) If the resolution is for an installment-purchase agreement with a term of more than 10 years:

(1) A statement comparing the cost of installment-purchase financing with other available methods of financing, including, without limitation, financing with general obligation bonds or revenue bonds; and

(2) If such statement concludes that installment-purchase financing is more expensive than other available methods of financing, a statement explaining the reasons for choosing installment-purchase financing instead of a less expensive alternative.

3. Except as otherwise provided in subsection 4, before the adoption of any such resolution, the governing body shall publish notice of its intention to act thereon in a newspaper of general circulation for at least one publication. No vote may be taken upon the resolution until 10 days after the publication of the notice. The cost of publication of the notice required of an entity is a proper charge against its general fund.

4. If such a resolution will be adopted by a metropolitan police committee on fiscal affairs, the sheriff of the county in which the metropolitan police department is located shall publish the notice required pursuant to subsection 3.¹⁰

The resolution for an installment-purchase agreement becomes effective upon the approval of the Executive Director of the Department of Taxation.¹¹

An installment purchase agreement is defined as follows:

“Installment-purchase agreement” means an agreement for the purchase of real or personal property by installment or lease or another transaction that is described in NRS 350.800¹² which:

¹⁰*Id.* § 350.087.

¹¹*Id.* § 350.089.

¹²“Transactions whereby municipality acquires property and another person acquires or retains security interest in that or other property.

1. A transaction whereby a municipality acquires real or personal property and another person acquires or retains a security interest in that or other property creates a general obligation of the municipality which must be counted against any limit upon its debt unless:

(a) The obligation by its terms is extinguished by failure of the governing body to appropriate money for the ensuing fiscal year for payment of the amounts then due; or

(b) The budget of the municipality for the fiscal year in which the transaction occurs includes a provision for the discharge of the obligation in full.

2. Any member of the governing body may vote upon such a transaction whether or not the obligation incurred is expected to extend beyond his or her term of office, without any special notice or other formality.

3. Any such transaction is subject to the requirements of this chapter for an election if it must be counted against a debt limit, but, except as otherwise provided in NRS 350.011 to 350.0165, inclusive, and 350.087 to 350.095, inclusive, is not subject to any other requirement of this chapter.

4. In addition to or as a substitute for granting a security interest in the property being acquired in a transaction described in subsection 1, the municipality may grant a security interest in other property if the governing body finds that:

(a) Granting the security interest in the other property will result in lower financing costs to the municipality; and

1. Is required to be counted against any limit upon the debt of a local government pursuant to subsection 1 of NRS 350.800; or

2. Is not required to be counted against any limit upon the debt of a local government and:

(a) Exceeds \$100,000 for a local government in a county whose population is 100,000 or more; or

(b) Exceeds \$50,000 for a local government in a county whose population is less than 100,000.

The term “installment-purchase agreement” does not include an obligation to pay rent pursuant to a lease which contains no option or right to purchase or which contains only an option or right to purchase the property without any credit towards the purchase price for lease or rental payments.¹³

An installment-purchase agreement may be “general obligation debt:”

“General obligation debt” means debt that is legally payable from general revenues, as a primary or secondary source of repayment, and is backed by the full faith and credit of a governmental entity, and if the governmental entity is authorized to levy taxes, by those taxes. The term includes, without limitation, debt represented by local government securities issued pursuant to this chapter *and installment-purchase agreements described in subsection 1 of NRS 350.0055. The term does not include, without limitation:*

1. *Installment-purchase agreements described in subsection 2 of NRS 350.0055.*¹⁴ [Emphasis added. See *supra* for the difference between subsection 1 and subsection 2 installment-purchase agreements.]

The term of an installment-purchase agreement is provided for as follows:

For the purposes of this chapter, the term of an installment-purchase agreement must be determined as the period from the date the agreement is entered into by a local government to the date that the purchase price will be paid in full and must include the term of the original agreement and the term of any renewal, including, without limitation, an optional renewal, of the agreement.¹⁵

Regarding installment-purchases for capital improvements the statutes provide:

1. Whenever the governing body of any local government is authorized to enter into a[n] . . . installment-purchase agreement as provided in . . . 350.089¹⁶ that is intended to finance a capital project, the governing body shall update its plan for capital improvement in the same manner as is required for general obligation debt pursuant to NRS 350.013.

. . . .

3. Whenever the governing body of any local government is authorized to enter into an installment-purchase agreement as provided in . . . 350.089, the governing body may issue, as evidence thereof, an installment-purchase agreement, lease or other evidence of a transaction described in NRS 350.800.¹⁷ An installment-purchase agreement, lease or other evidence of a transaction described in NRS 350.800 issued pursuant to this subsection:

(a) Must have a term that is 30 years or less;

(b) The value of all property in which a security interest is granted does not, at the time the security interest is granted, exceed an amount equal to one and one-half times the value of the property being acquired. The finding and determination of values by the governing body are conclusive in the absence of fraud or gross abuse of discretion.” *Id.* § 350.800.

¹³*Id.* § 350.0055.

¹⁴*Id.* § 350.0045.

¹⁵*Id.* § 350.008.

¹⁶See, *supra*, note 11 and accompanying text.

¹⁷See, *supra*, notes 11 to 12 and accompanying text for discussion of section 350.800.

(b) Must bear interest at a rate or rates that do not exceed by more than 3 percent the Index of Revenue Bonds which was most recently published before the local government enters into the installment-purchase agreement; and

(c) May, at the option of the local government, contain a provision that allows prepayment of the purchase price upon such terms as are provided in the agreement.

4. If the term of the medium-term obligation or installment-purchase agreement is more than 5 years, the weighted average term of the medium-term obligation or installment-purchase agreement may not exceed the estimated weighted average useful life of the assets being financed with the . . . installment-purchase agreement. For the purposes of this subsection, the Committee on Local Government Finance may adopt regulations that provide guidelines for the useful life of various types of assets and for calculation of the weighted average useful life of assets.¹⁸

Counties have general authority to purchase, lease, and enter into contracts for the acquisition of real property and equipment related to the establishment and operation of airports.¹⁹

Regarding the use of lease purchase and installment purchase agreements by governments, the code provides:

1. The authority provided by other specific statutes for the government of this State and the political subdivisions of this State to use lease-purchase and installment-purchase agreements provides an important and valuable option for these governmental entities and, when this authority is used properly, provides great benefit to the residents of this State.

2. The statutory provisions governing the use of lease-purchase and installment-purchase agreements should be interpreted to allow the process of entering into and carrying out these agreements to be as streamlined and efficient as possible.

3. The government of this State and the political subdivisions of this State should not use lease-purchase and installment-purchase agreements to:

(a) Engage in or allow bid-shopping; or

(b) Avoid or circumvent any requirement regarding the payment of prevailing wages for public works.

4. When using lease-purchase and installment-purchase agreements, the government of this State and the political subdivisions of this State should provide for the preferential hiring of Nevada residents to the extent otherwise required by law.

5. If a lease-purchase or installment-purchase agreement pursuant to this section involves the construction, alteration, repair or remodeling of an improvement:

(a) The person or entity that executes one or more contracts or agreements for the actual construction, alteration, repair or remodeling of the improvement shall include in such a contract or agreement the contractual provisions and stipulations that are required to be included in a contract for a public work pursuant to the provisions of NRS 338.013 to 338.090, inclusive.

(b) The government of this State or a political subdivision of this State, the contractor who is awarded the contract or entered into the agreement to perform the construction, alteration, repair or remodeling of the improvement and any subcontractor on the project shall comply with

¹⁸*Id.* § 350.091. "[T]he term of an installment-purchase agreement must be determined as the period from the date the agreement is entered into by a local government to the date that the purchase price will be paid in full and must include the term of the original agreement and the term of any renewal, including, without limitation, an optional renewal, of the agreement." *Id.* § 350.008.

¹⁹*Id.* §§ 495.010, 495.030.

the provisions of NRS 338.013 to 338.090, inclusive, in the same manner as if the government of this State or a political subdivision of this State had undertaken the project or had awarded the contract.²⁰

Installment and lease-purchase agreements by counties must comply with the provisions set forth, *infra*, in the Miscellaneous section of this survey.

Energy Performance Contracting

Subject to numerous restrictions, counties may enter into lease-purchase agreements for the acquisition of operating cost-savings measures in county owned facilities and buildings.²¹ Such contracts must include a clause that sets out the rights of the local government and the qualified service company if the local government does not appropriate sufficient money for payments to be continued under the performance contract.”²² Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”²³

Municipalities

Municipalities²⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²⁵ eminent domain²⁶ and police powers.²⁷ Municipalities may “acquire and hold real and personal property for corporate purposes,”²⁸ “[p]urchase, receive, hold and use personal and real property,”²⁹ and “sell, convey and dispose of . . . personal and real property for the common benefit.”³⁰ Municipalities may not, unless specifically provided by law, mortgage, hypothecate or pledge any property of the municipality for any purpose.³¹

Like counties, municipalities may approve an installment-purchase agreement by resolution.³²

Like counties, municipalities have general authority to purchase, lease, and enter into contracts for the acquisition of real property and equipment related to the establishment and operation of airports.³³

Installment and lease-purchase agreements by municipalities must also comply with the provisions set forth in the Miscellaneous section of this survey.

²⁰*Id.* § 354.740. References to sections 338.013 to 338.090 refer to employment and wage laws. *See also, id.* § 353.545 (similar provision).

²¹*Id.* §§ 332.300 to .440.

²²*Id.* § 332.400.

²³*Id.* § 334.070.

²⁴Municipalities for purposes of this discussion are cities of the first, second and third categories. *Id.* § 266.055. Home rule powers have been granted to these municipalities. *Id.* § 266.010. The cities of Boulder City, Caliente, Carlin, Carson City, Elko, Gabbs, Henderson, Las Vegas, North Las Vegas, Reno, Sparks, Wells and Yerington have special charters and are not under chapter 266. Carson city and county government functions are consolidated. Nev. Const. art 4, § 37A.

²⁵Nev. Rev. Stat. § 266.600(3).

²⁶*Id.* § 266.270; *id.* § 37.010(1)(c).

²⁷*Id.* § 266.355.

²⁸*Id.* § 266.085(2)(c). *See also* Op. Att’y Gen. 86-14 (Nev. 1986), 1986 WL 224459 (power to acquire includes power to lease-purchase).

²⁹Nev. Rev. Stat. § 268.008.

³⁰*Id.*

³¹*Id.* § 266.265(2).

³²*See, supra*, notes 10 to 13 and accompanying text.

³³*Id.* §§ 495.010, 495.030.

Energy Performance Contracting

Like counties, municipalities may enter into lease-purchase agreements for the acquisition of operating cost-savings measures in municipally owned facilities and buildings.³⁴ Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”³⁵

School Districts

School districts³⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁷ and eminent domain powers.³⁸ School districts have the power to “purchase, lease or otherwise . . . acquire any school site or other real property for necessary school purposes,”³⁹ including making necessary improvements on property not owned by the school district.⁴⁰ “The board of trustees of a school district shall have the power . . . to purchase, rent or otherwise acquire supplies and equipment.”⁴¹

The trustees of a school district may “sell, rent or lease . . . real property belonging to the school district.”⁴² The trustees must advertise the proposed sale or lease,⁴³ and must accept the highest bid “made by [a] responsible bidder.”⁴⁴

Like counties, school districts may approve an installment-purchase agreement by resolution.⁴⁵

Installment and lease-purchase agreements by school districts must also comply with the provisions set forth in the Miscellaneous section of this survey.

Energy Performance Contracting

School districts, like counties and municipalities, may enter into lease-purchase agreements for the acquisition of operating cost-savings measures in county owned facilities and buildings.⁴⁶ Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”⁴⁷

Fire Districts

Fire districts⁴⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.⁴⁹ Fire districts may “[a]cquire real or personal property necessary for the purposes of the

³⁴*Id.* §§ 332.300 to .440. *See, supra*, notes 21 to 23 and accompanying text.

³⁵*Id.* § 334.070.

³⁶School districts consist of county school districts, including the Carson City school district. *Id.* § 386.010.

³⁷*Id.* § 387.195.

³⁸*Id.* § 37.010(1)(c).

³⁹*Id.* § 393.140; *also id.* § 393.080(1).

⁴⁰*Id.* § 393.155.

⁴¹*Id.* § 393.160.

⁴²*Id.* § 393.220(1).

⁴³*Id.* § 393.260(2).

⁴⁴*Id.* § 393.270.

⁴⁵*See supra* notes 10 to 13 and accompanying text.

⁴⁶*Id.* §§ 332.300 to .440. *See, supra*, notes 21 to 23 accompanying text.

⁴⁷*Id.* § 334.070.

⁴⁸Fire districts for purposes of this survey refer to county fire protection districts organized pursuant to *id.* §§ 474.010 to 474.450. They are political subdivisions of the state, *id.* § 474.125, and “local governments” for purposes of *id.* chapter 350. (See

district and dispose of that property when no longer needed.”⁵⁰ They may “[a]cquire by . . . purchase, in the name and on behalf of the district any land or other property necessary for the purpose of the district.”⁵¹ Fire districts may “[p]urchase, . . . [or] lease . . . ambulances.”⁵²

Like counties, fire districts may approve an installment-purchase agreement by resolution.⁵³

Installment and lease-purchase agreements by fire districts must comply with the provisions set forth in the Miscellaneous section of this survey.

Energy Performance Contracting

Fire districts may enter into lease-purchase agreements for the acquisition of operating cost-savings measures in county owned facilities and buildings.⁵⁴ Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”⁵⁵

Hospital Districts

Hospital districts⁵⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.⁵⁷

1. The board of trustees may borrow money and incur or assume indebtedness on behalf of the county hospital district if the total amount of the indebtedness, excluding revenue bonds and other securities constituting special obligations which are not debts, does not exceed an amount equal to 10 percent of the total of the last assessed valuation of taxable property, excluding motor vehicles, located within the district.

2. The board of trustees shall not borrow money or issue securities to evidence such borrowing until the board has obtained the approval of the:

(a) Debt management commission; and

(b) Board of county commissioners of each county in which the hospital district is located.⁵⁸

The board of trustees, with the approval of the board of county commissioners, . . . may, by resolution:

1. Mortgage or pledge the personal property of the hospital, including accounts receivable, and enter into agreements for the sale and leasing back to the hospital of its personal property to provide security for acquiring money for the operation of the hospital; and

2. Acquire real property for the expansion of the hospital by entering into a contract for purchase of a type and duration and on such terms as the governing body determines, including a contract secured by a mortgage or other security interest in the real property.⁵⁹

Miscellaneous section of this survey.) Also authorized are districts for county fire departments under section 244.2961 which have fewer powers and appear to be departments of the county. They are not covered in this survey.

⁴⁹*Id.* § 474.200.

⁵⁰*Id.* § 474.160(8).

⁵¹*Id.* § 474.160(10).

⁵²*Id.* § 474.180.

⁵³*See, supra*, notes 10 to 13 and accompanying text.

⁵⁴*Id.* §§ 332.300 to .440. *See, supra*, notes 21 to 23 and accompanying text.

⁵⁵*Id.* § 334.070.

⁵⁶For purposes of this survey, the term hospital district refers to either those districts governed by a board of trustees or by an ex officio board of county commissioners. *Id.* § 450.550.1(a).

⁵⁷*Id.* § 450.660. Hospital districts may have the power of eminent domain assuming that they qualify as quasi-municipal entities as defined in *id.* § 350.358.

⁵⁸*Id.* § 450.665.

Like counties, hospital districts may approve an installment-purchase agreement by resolution.⁶⁰

Installment and lease-purchase agreements by hospital districts must also comply with the provisions set forth in the Miscellaneous section of this survey.

Energy Performance Contracting

Hospital districts may enter into lease-purchase agreements for the acquisition of operating cost-savings measures in county owned facilities and buildings.⁶¹ Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”⁶²

State Entities

Statutory authorization is required for the lease, purchase or acquisition of real property by a state entity.⁶³

The State has enacted a comprehensive set of provisions regarding lease-purchase or installment-purchase contracts in chapter 353:⁶⁴

353.545

Legislative findings and declaration.

The Legislature hereby finds and declares that:

1. The authority provided by other specific statutes for the government of this State and the political subdivisions of this State to use lease-purchase and installment-purchase agreements provides an important and valuable option for these governmental entities and, when this authority is used properly, provides great benefit to the residents of this State.

2. The statutory provisions governing the use of lease-purchase and installment-purchase agreements should be interpreted to allow the process of entering into and carrying out these agreements to be as streamlined and efficient as possible.

3. The government of this State and the political subdivisions of this State should not use lease-purchase and installment-purchase agreements to:

- (a) Engage in or allow bid-shopping; or
- (b) Avoid or circumvent any requirement regarding the payment of prevailing wages for public works.

4. When using lease-purchase and installment-purchase agreements, the government of this State and the political subdivisions of this State should provide for the preferential hiring of Nevada residents to the extent otherwise required by law.

5. If a lease-purchase or installment-purchase agreement involves the construction, alteration, repair or remodeling of an improvement:

(a) The person or entity that executes one or more contracts or agreements for the actual construction, alteration, repair or remodeling of the improvement shall include in such a contract or agreement the contractual provisions and stipulations that are required to be included in a contract for a public work pursuant to the provisions of NRS 338.013 to 338.090, inclusive.

(b) The government of this State or a political subdivision of this State, the contractor who is awarded the contract or entered into the agreement to perform the construction, alteration, repair or remodeling of the improvement and any subcontractor on the project shall comply with the provisions of NRS 338.013 to 338.090, inclusive, in the same manner as if the government of this State or a political subdivision of this State had undertaken the project or had awarded the contract.

⁵⁹*Id.* § 450.675.

⁶⁰*See, supra*, notes 10 to 13 and accompanying text.

⁶¹Nev. Rev. Stat. §§ 332.300 to .440. *See, supra*, notes 21 to 23 and accompanying text.

⁶²*Id.* § 334.070.

⁶³*Id.* § 334.050.

⁶⁴*Id.* §§ 353.500 to 353.630.

353.550

Requirements for agreement by state agency to acquire real property or interest in or improvement to real property with terms that extend beyond biennium in which executed.

1. A state agency⁶⁵ may propose a project to acquire real property, an interest in real property or an improvement to real property through an agreement⁶⁶ which has a term, including the terms of any options for renewal, that extends beyond the biennium in which the agreement is executed if the agreement:

(a) Provides that all obligations of the State of Nevada and the state agency are extinguished by the failure of the Legislature to appropriate money for the ensuing fiscal year for payments due pursuant to the agreement;

(b) Does not encumber any property of the State of Nevada or the state agency except for the property that is the subject of the agreement;

(c) Provides that property of the State of Nevada and the state agency, except for the property that is the subject of the agreement, must not be forfeited if:

(1) The Legislature fails to appropriate money for payments due pursuant to the agreement; or

(2) The State of Nevada or the state agency breaches the agreement;

(d) Prohibits certificates of participation in the agreement; and

(e) For the biennium in which it is executed, does not require payments that are greater than the amount authorized for such payments pursuant to the applicable budget of the state agency.

2. The provisions of paragraph (d) of subsection 1 may be waived by the Board,⁶⁷ upon the recommendation of the State Treasurer, if the Board determines that waiving those provisions:

(a) Is in the best interests of this State; and

(b) Complies with federal securities laws.

3. Before an agreement proposed pursuant to subsection 1 may become effective:

(a) The proposed project must be approved by the Legislature by concurrent resolution or statute or as part of the budget of the state agency, or by the Interim Finance Committee when the Legislature is not in regular session;

(b) The agency must submit the proposed agreement to the Chief, the State Treasurer and the State Land Registrar for their review and transmittal to the Board;

(c) The Board must approve the proposed agreement; and

(d) The Governor must execute the agreement.

353.555

Approval of Legislature or Interim Finance Committee required for certain changes in scope of agreement.

1. Before the State of Nevada or a state agency causes or allows a change in the scope of an agreement, the change must be approved by:

(a) The Legislature, by concurrent resolution, when the Legislature is in regular or special session; or

(b) The Interim Finance Committee, by resolution, while the Legislature is not in regular or special session.

2. As used in this section, "change in the scope of an agreement" means that, as compared to when the agreement was originally entered into or previously changed, whichever is the more recent:

(a) The square footage of the property that is the subject of the agreement will be increased or decreased by 10 percent or more;

(b) Ten percent or more of the square footage of the property that is the subject of the agreement will be allocated to a different intended use; or

(c) The number of users of the property that is the subject of the agreement will be increased or decreased by 10 percent or more.

⁶⁵“State agency” means an agency, bureau, board, commission, department, division or any other unit of the government of this State that is required to submit information to the Chief [of the Budget Division of the Department of Administration] pursuant to subsection 1 or 6 of NRS 353.210. [This provision covers all executive agencies and those of the Legislative and judicial branches.] ‘State agency’ does not include the Nevada System of Higher Education unless it is anticipated that payments under the agreement will be made with state appropriations.” Nev. Rev. Stat. § 353.540.

⁶⁶“Agreement” means an agreement to purchase property, in the form of a lease or an agreement to pay in installments, pursuant to which the State of Nevada or a state agency may pay the purchase price of real or personal property over a period of time which extends beyond the biennium in which the agreement is executed, including, without limitation: 1. An agreement pursuant to which the State of Nevada or a state agency may acquire the property that is the subject of the agreement at the end of the term of the agreement or the end of the term of a renewal of the agreement upon payment of no additional consideration or nominal additional consideration; and 2. An agreement that, for the purposes of federal income tax, is treated as an agreement for conditional sale.” *Id.* § 353.510.

⁶⁷“Board” means the State Board of Finance.” *Id.* § 353.520.

353.560

Legislature not obligated to appropriate money for payments due pursuant to agreement; prohibition on such representations.

1. The provisions of NRS 353.500 to 353.630, inclusive, do not obligate the Legislature to appropriate money for payments due pursuant to an agreement entered into pursuant to those sections.

2. A state agency, person acting on behalf of a state agency, officer of this State or employee of this State shall not represent that the Legislature is obligated to appropriate money for payments due pursuant to an agreement entered into pursuant to NRS 353.500 to 353.630, inclusive.

353.570

State Treasurer authorized to take appropriate actions to facilitate agreements.

The State Treasurer may take such actions as he or she deems appropriate to facilitate an agreement pursuant to NRS 353.500 to 353.630, inclusive, including, without limitation:

1. Entering into contracts for relevant professional services;
2. Obtaining credit enhancement and interest rate hedges; and
3. Assisting with the offering of certificates of participation pursuant to the limitations set forth in NRS 353.550.

353.580

Exemption of agreement from requirement of competitive bidding or other restrictions on procedure for awarding contracts.

An agreement entered into pursuant to NRS 353.500 to 353.630, inclusive, is not subject to any requirement of competitive bidding or other restriction imposed on the procedure for the awarding of contracts.

353.590

Exemption of agreement involving construction, alteration, repair or remodeling of improvement from laws requiring competitive bidding and certain provisions relating to public works; exceptions.

If an agreement pursuant to NRS 353.500 to 353.630, inclusive, involves the construction, alteration, repair or remodeling of an improvement:

1. Except as otherwise provided in this section, the construction, alteration, repair or remodeling of the improvement may be conducted as specified in the agreement without complying with the provisions of:
 - (a) Any law requiring competitive bidding; or
 - (b) Chapter 341 of NRS. [State public works division provisions.]
2. The person or entity that enters into the agreement for the actual construction, alteration, repair or remodeling of the improvement shall include in the agreement the contractual provisions and stipulations that are required to be included in a contract for a public work pursuant to the provisions of NRS 338.013 to 338.090, inclusive [relating to employment].
3. The State or a state agency, the contractor who is awarded the contract or entered into the agreement to perform the construction, alteration, repair or remodeling of the improvement and any subcontractor on the project shall comply with the provisions of NRS 338.013 to 338.090, inclusive, in the same manner as if the State or a state agency had undertaken the project or had awarded the contract.
4. The provisions of:
 - (a) Paragraph (b) of subsection 9 of NRS 341.100; and
 - (b) NRS 341.105, [both references in this part 4 refer to the deputy administrator for compliance and code enforcement.] apply to the construction, alteration, repair or remodeling of the improvement.

353.600

Lease of property subject to agreement involving improvement to state property: Conditions for entry; review and approval.

1. Except as otherwise provided in this section, if an agreement pursuant to NRS 353.500 to 353.630, inclusive, involves an improvement to property owned by the State of Nevada or the state agency, the State Land Registrar, in consultation with the State Treasurer and in conjunction with the agreement, upon approval of the State Board of Examiners, may enter into a lease of the property to which the improvement will be made if the lease:

- (a) Has a term of 35 years or less; and
- (b) Provides for rental payments that approximate the fair market rental of the property before the improvement is made, as determined by the State Land Registrar in consultation with the State Treasurer at the time the lease is entered into, which must be paid if the agreement terminates before the expiration of the lease because the Legislature fails to appropriate money for payments due pursuant to the agreement.

2. A lease entered into pursuant to this section may provide for nominal rental payments to be paid pursuant to the lease before the agreement terminates.

3. Before the State Land Registrar may enter into a lease pursuant to this section:

- (a) The State Land Registrar must submit the proposed lease to the Chief and the State Treasurer for their review and transmittal to the Board; and
- (b) The Board must approve the lease.

353.610

State agency to file copy of agreement and schedule of payments with Chief and State Treasurer upon execution of agreement.

Immediately after an agreement is executed pursuant to NRS 353.550, the state agency on whose behalf the agreement was executed shall file with the Chief and the State Treasurer:

- 1. A fully executed copy of the agreement; and
- 2. A schedule of payments that indicates the principal and interest payments due throughout the term of the agreement.

353.620

Property subject to agreement exempt from ad valorem property taxation in certain circumstances.

While an agreement entered into pursuant to NRS 353.500 to 353.630, inclusive, is in effect, the property that is the subject of the agreement is exempt from ad valorem property taxation by this State and its political subdivisions if:

- 1. An improvement is being constructed on the property pursuant to the agreement; or
- 2. This State or a state agency is in possession of the property.

The transfer of tangible personal property for use by a state entity in accordance with an agreement executed pursuant to sections 353.500 to 353.630 is exempt from sales tax.⁶⁸

The Administrator of the Purchasing Division is required to “[p]urchase or contract for all supplies, materials and equipment; and . . . [c]ontract for the rental or lease of equipment, needed by any using agency, unless otherwise provided by law.”⁶⁹

The state treasurer may organize “statewide pooled financings, including lease-purchases.”⁷⁰

State motor vehicle purchases must be approved by the State Board of Examiners.⁷¹ Transfers of motor vehicles by sale or lease to the state and its political subdivisions are exempt from sales and use taxes⁷² and school support taxes.⁷³

The Division of State Lands (of the State Department of Conservation and Natural Resources) is authorized to acquire state lands except:

- (a) Lands or interests used or acquired for highway purposes;⁷⁴
- (b) Lands or interests the title to which is vested in the Board of Regents of the University of Nevada;
- (c) Offices outside state buildings leased by the Administrator of the State Public Works Division of the Department of Administration for the use of state officers and employees;⁷⁵ or
- (d) Lands or interests used or acquired for the Legislature or its staff,

and shall administer all lands it holds which are not assigned for administration to another state agency.

⁶⁸*Id.* § 372.7283.

⁶⁹*Id.* § 333.150; Nev. Admin. Code § 333.100.

⁷⁰Nev. Rev. Stat. § 226.110.

⁷¹*Id.* § 334.010.

⁷²*Id.* § 372.325.

⁷³*Id.* § 374.729.

⁷⁴The Dept. of Transportation must acquire property “in the name of and in behalf of the State, either by . . . agreement, . . . lease, option, purchase or through the exercise of the power of eminent domain.” *Id.* § 408.489.

⁷⁵The Chief of the Buildings and Grounds Division “may lease and equip office rooms . . .” and leases extending beyond one year must be approved by the Bd of Examiners. *Id.* § 331.110(1).

2. If additional land or an interest in land is required for the use of any state agency except the Department of Transportation or the Nevada System of Higher Education, the agency and the Division shall select land for use by the agency. The Division shall obtain the approval of the Administrator of the State Public Works Division of the Department of Administration if the land will be used for a building pursuant to NRS 341.141. The Division shall determine the value of that land and obtain the land or interest by negotiation or, if necessary, by exercising the State's power of eminent domain. Title must be taken in the name of the State of Nevada.

3. The Division may acquire and hold land and interests in land required for any public purpose, including the production of public revenue. Title must be taken in the name of the State of Nevada.⁷⁶

There exists additional authority for acquisition of land or personal property by state departments or agencies.⁷⁷

Information Technology

Information technology⁷⁸ acquisitions are managed on behalf of the State and individual agencies by the Division of Enterprise Information Technology Services (EITS):

1. The Division shall provide state agencies and elected state officers with all their required design of information systems.⁷⁹ All agencies and officers must use those services and equipment,⁸⁰ except as otherwise provided in subsection 2.

2. The following agencies may negotiate with the Division for its services or the use of its equipment, subject to the provisions of this chapter, and the Division shall provide those services and the use of that equipment as may be mutually agreed:

- (a) The Court Administrator;
- (b) The Department of Motor Vehicles;
- (c) The Department of Public Safety;
- (d) The Department of Transportation;
- (e) The Employment Security Division of the Department of Employment, Training and Rehabilitation;
- (f) The Department of Wildlife;
- (g) The Housing Division of the Department of Business and Industry;
- (h) The Legislative Counsel Bureau;
- (i) The State Controller;
- (j) The State Gaming Control Board and Nevada Gaming Commission; and

⁷⁶Nev. Rev. Stat. § 321.001.

⁷⁷*Id.* § 349.212 (State board of finance); *id.* § 494.030 (state airports); *id.* § 612.227 (Employment Security Division of the Dept. of Employment, Training and Rehabilitation).

⁷⁸Information technology “means any information, information system or information service acquired, developed, operated, maintained or otherwise used.” *Id.* § 242.059.

⁷⁹Information systems “means any communications or computer equipment, computer software, procedures, personnel or technology used to collect, process, distribute or store information.” *Id.* § 242.057.

⁸⁰Equipment “means any machine or device designed for the automatic handling of information, including but not limited to recording, storage, transmission and retrieval.” *Id.* § 242.051.

(k) The Nevada System of Higher Education.

3. Any state agency or elected state officer who uses the services of the Division and desires to withdraw substantially from that use must apply to the Administrator for approval. The application must set forth justification for the withdrawal. If the Administrator denies the application, the agency or officer must:

(a) If the Legislature is in regular or special session, obtain the approval of the Legislature by concurrent resolution.

(b) If the Legislature is not in regular or special session, obtain the approval of the Interim Finance Committee. The Administrator shall, within 45 days after receipt of the application, forward the application together with his or her recommendation for approval or denial to the Interim Finance Committee. The Interim Finance Committee has 45 days after the application and recommendation are submitted to its Secretary within which to consider the application. Any application which is not considered by the Committee within the 45-day period shall be deemed approved.

4. If the demand for services or use of equipment exceeds the capability of the Division to provide them, the Division may contract with other agencies or independent contractors to furnish the required services or use of equipment and is responsible for the administration of the contracts.⁸¹

The Administrator of EITS must review and approve “any application of an information system having an estimated developmental cost of \$50,000 or more.”⁸²

Acquisitions of information technology are paid for through a fund established for this purpose.⁸³

Higher Education

There is a system of universities, state colleges, community colleges, and other related facilities collectively known as the Nevada System of Higher Education (NSHE), administered by the Board of Regents of the University of Nevada;⁸⁴ the legal and corporate name of the university is the University of Nevada.⁸⁵

1. The Board of Regents may purchase real property for cash or by making a cash down payment and executing or assuming an obligation to pay the remainder of the price in deferred installments.

2. Such obligation may be secured by a mortgage or deed of trust of the real property acquired, but shall not constitute an obligation of the State of Nevada.⁸⁶

Public buildings and grounds for use of the NSHE may be acquired by eminent domain.⁸⁷

The Chancellor, as chief executive officer and treasurer, NSHE, serves as the contracting officer for NSHE unless authority has been expressly retained by the board or delegated elsewhere.⁸⁸

The Board of Regents Business, Finance and Facilities Committee is responsible for reviewing requests to purchase property, to enter into property lease agreements, and to lease NSHE property to an outside agency or private entity.⁸⁹

⁸¹*Id.* § 242.131. The Nevada System of Higher Education and the Nevada Criminal Justice Information System are generally exempted from the policies and standards regarding information systems and the procurement thereof. *Id.* § 242.115.

⁸²*Id.* § 242.171.2.

⁸³*Id.* § 242.211.

⁸⁴*Id.* § 396.020.

⁸⁵*Id.*; *id.* § 396.005. The university is constitutionally established. Nev. Const. art. 11, § 4.

⁸⁶Nev. Rev. Stat. § 396.425.

⁸⁷*Id.* § 37.010.

⁸⁸Bd of Regents Handbook, Bylaws tit. I, art. VII, Section 3.e.8. (Rev. 278 03/18).

The Board of Regents may create nonprofit corporations for the acquisition of real property at the Reno and Las Vegas campuses.⁹⁰

The NSHE is a state agency for purposes of sections 353.500 to 353.630 relating to lease-purchase or installment-purchase contracts if it is anticipated that payments under such contracts will be made with state appropriations.⁹¹

Board of Regents authorized to delegate authority to sign contract for obligations not issued under University Securities Law; approval by Board of Regents; authorized investment of proceeds.

1. Before the sale or delivery by the System of an obligation to repay money in any form, other than an obligation issued under the University Securities Law,⁹² the Board of Regents may delegate to the Chancellor of the System or the Vice Chancellor for Finance of the System the authority to sign a contract for the sale or exchange of the obligation or to accept a binding bid for the obligation subject to the requirements specified by the Board of Regents concerning:

- (a) The rate or rates of interest on the obligation;
- (b) The dates on which and the prices at which the obligation may be prepaid before maturity;
- (c) The price at which the obligation will be sold or the property for which the obligation will be exchanged;

(d) The principal amount of the obligation and the amount of principal and interest due on any specific dates; and

(e) Covenants to protect the owner of the obligation and the System that the Chancellor or the Vice Chancellor for Finance determines are necessary or desirable to obtain favorable terms for the System. A determination made pursuant to this paragraph, absent fraud or gross abuse of discretion, is conclusive.

2. All terms of the obligation other than:

- (a) The rate or rates of interest;
- (b) The dates and prices for the prepayment of the obligation;
- (c) The price for the sale of the obligation or property for which it will be exchanged;
- (d) The principal amount of the obligation;
- (e) The requirements for the payment of principal and interest on specific dates; and
- (f) Covenants to protect the owner of the obligation and the System that the Chancellor or the Vice Chancellor for Finance determines are necessary or desirable to obtain favorable terms for the System as provided in paragraph (e) of subsection 1, must be approved by the Board of Regents before the obligation is delivered.

3. The final rate or rates of interest, dates and prices of prepayments, price for the sale of the obligation or property for which it is exchanged, principal amount, requirements for payment of principal and interest on specific dates, and covenants as described in paragraph (e) of subsection 1, are not required to be approved by the Board of Regents if each of those terms complies with the requirements specified by the Board of Regents before the contract for the purchase or delivery of the obligation is signed or the bid for the obligation is accepted.

4. The proceeds of any money borrowed pursuant to this section may be invested as provided in NRS 396.861 and 396.8615.⁹³

Energy Performance Contracting

State agencies may enter into lease-purchase contracts for cost savings measures, subject to numerous restrictions.⁹⁴ Any public body may enter into a contract to lease property to a lessee “whereby the lessee agrees to construct a facility designed to conserve energy on the property and thereafter lease the property back to the governing body.”⁹⁵

⁸⁹*Id.* art. VI, sect. 3.b; tit. 4, ch. 10.

⁹⁰Nev. Rev. Stat. § 396.7992 (Reno); *id.* § 396.801 (Las Vegas).

⁹¹*Id.* § 353.540. *See, supra*, note 65 and accompanying text.

⁹²*Id.* §§ 396.809 to 396.885.

⁹³*Id.* § 396.381.

⁹⁴*Id.* §§ 333A.010 to 333A.150.

⁹⁵*Id.* § 334.070.

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁹⁶ A county “shall not become indebted by the issuance of bonds or other securities constituting an indebtedness . . . to an amount in the aggregate, including existing indebtedness of the county, . . . exceeding 10 percent of the total last assessed valuation of the taxable property of the county.”⁹⁷ The total bonded indebtedness of a county school district shall not “exceed . . . 15 percent of the total of the last assessed valuation of taxable property . . . within the county school district.”⁹⁸ Municipalities need voter approval to issue general obligation bonds, but may issue special or medium-term obligations without an election.⁹⁹

A transaction whereby a municipality acquires real or personal property and another person acquires or retains a security interest in that or other property creates a general obligation of the municipality which must be counted against any limit upon its debt unless: (a) The obligation by its terms is extinguished by failure of the governing body to appropriate money for the ensuing fiscal year for payment of the amounts then due; or (b) The budget of the municipality for the fiscal year in which the transaction occurs includes a provision for the discharge of the obligation in full.¹⁰⁰

“Any such transaction is subject to the requirements . . . for an election if it must be counted against a debt limit, but is not subject to any other requirement of this chapter.”¹⁰¹

In addition to or as a substitute for granting a security interest in the property being acquired in a transaction described in subsection 1, the municipality may grant a security interest in other property if the governing body finds that:

(a) Granting the security interest in the other property will result in lower financing costs to the municipality; and

(b) The value of all property in which a security interest is granted does not, at the time the security interest is granted, exceed an amount equal to one and one-half times the value of the property being acquired.

The finding and determination of values by the governing body are conclusive in the absence of fraud or gross abuse of discretion.¹⁰²

The attorney general in analyzing a proposed lease-purchase financing was of the opinion that a lease-purchase agreement with nonappropriation provisions would not be debt under Nev. Rev. Stat. § 350.800(1)(a).¹⁰³ He cautioned, however, to beware of *State ex rel. Nevada Building Authority v. Hancock*¹⁰⁴ in which the court held that the current revenues doctrine was not met since it was inconceivable the state would default on future rent payments since its good faith would not allow it. The attorney general was of the opinion that the facts he was asked to address were different. One point not raised by the attorney general is that the debt limitations for counties, municipalities and school districts

⁹⁶Nev. Const. art. 9, § 3. “[D]ebts shall never, in the aggregate, exclusive of interest, exceed the sum of two per cent of the assessed valuation of the State,” *Id.* “Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest.” *Id.*

⁹⁷Nev. Rev. Stat. § 244A.059(2).

⁹⁸*Id.* § 387.400.

⁹⁹*Id.* § 350.020(1), (8). Municipality is defined at *id.* § 350.538 to include counties, cities, towns, school districts, and quasi-municipal districts.

¹⁰⁰*Id.* § 350.800(1). See, *supra*, note 100 for definition of municipality.

¹⁰¹*Id.* § 350.800(3).

¹⁰²*Id.* § 350.800(4). See, *supra*, note 100 and accompanying text for the text of subsection 1 referenced in this section.

¹⁰³Op. Att’y Gen. 86-14 (Nev. 1986), 1986 WL 224459.

¹⁰⁴468 P.2d 333 (Nev. 1970), *overruled* by *Employers Insurance Company of Nevada v. State Board of Examiners*, 21 P.3d 628 (2001), see, *infra*, notes 106 to 107 and accompanying text.

are not constitutional, but statutory and that the legislature in section 350.800(1)(a) provided a specific exception to the debt limitations.

In *Business Computer Rentals v. State Treasurer*, the Supreme Court distinguished the fact situation from that in *Hancock*, and held that the lease agreement in question was not a debt under the Nevada constitution.¹⁰⁵ The State Treasurer entered into a lease agreement for a computer, but failed to make the first payment under the lease, on the basis that the lease agreement could create a debt. The lease contained a non-appropriation clause, and provided for repossession of the equipment in the event of nonpayment. Rental payments by the State were contingent on funds being appropriated by the state legislature. The court held that no debt was created by the lease agreement, as distinguished from *Hancock, supra*. Unlike the latter case where the legislature retained control, in this case the State Treasurer could not commit future appropriations for the rental payments. Further, *Business Computer Rentals* involved personal property which could be easily repossessed, rather than real estate on a state university campus like that involved in *Hancock*.

The distinction between lease-purchase agreements involving personal property and those involving real property was abolished by the Supreme Court, which overruled its earlier decision in *Hancock, supra*, while extending its decision in *Business Computer Rentals, supra*, to encompass real property.¹⁰⁶ In *Employers Insurance*, the Supreme Court held that a twenty-year lease purchase agreement with a nonappropriation clause for an office building did not constitute “public debt,” and thus was not subject to the Nevada constitutional debt limitation.¹⁰⁷ The decision in *Employers Insurance* did not address the issue of whether a lease-purchase agreement with a nonappropriation clause does or does not violate the statutory debt limitation applicable to counties, municipalities and school districts. However, given that the debt limits for such entities are statutory, that the authority for leasing is explicit from the legislature and given the favorable court decisions related to nonappropriation leases, it appears that this issue is resolved in favor of nonappropriation leasing in Nevada.

Interest Rate Limitations

“Except where the provisions, whenever enacted, of a general or special law or of a special charter otherwise require, the rate . . . of interest on securities¹⁰⁸ issued by a [county, municipality or school district] must not exceed by more than 3 percent; . . . [for] general obligations, the Index of Twenty Bonds; and . . . [for] special obligations, the Index of Revenue Bonds, which was most recently published before bids are received or a negotiated offer is accepted.”¹⁰⁹

“Except as otherwise provided by a specific statute, including, without limitation, NRS 99.067, the rate or rates of interest on securities issued by the State must not exceed by more than 3 percent: 1. For general obligations, the Index of Twenty Bonds; and 2. For special obligations, the Index of Revenue Bonds, which was most recently published before the bids are received or a negotiated offer is accepted.”¹¹⁰

“Parties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, and for any other charges or fees.”¹¹¹

¹⁰⁵*Business Computer Rentals v. State Treasurer*, 953 P.2d 13 (1998).

¹⁰⁶*Employers Insurance Company of Nevada v. State Board of Examiners*, 21 P.3d 628 (2001).

¹⁰⁷*Id.*, 21 P.3d at 632.

¹⁰⁸Securities are “bond[s] or other evidence[s] of indebtedness.” Nev. Rev. Stat. § 350.201(3) (citation added).

¹⁰⁹*Id.* § 350.2011 (when read with definitions at *id.* § 350.201(2)). See, *supra*, note 102 and accompanying text stating that no other provision of chapter 350 is applicable to a nonappropriation type lease-purchase agreement.

¹¹⁰Nev. Rev. Stat. § 349.076.

¹¹¹*Id.* § 99.050.

Miscellaneous

Except for some small installment-purchase agreements,¹¹² counties, municipalities, school districts, fire districts and hospital districts¹¹³ need approval of the Executive Director of the Nevada Tax Commission before entering into installment-purchase agreements.¹¹⁴ Installment-purchase agreements also require a two-thirds approval of the governing body of the political subdivision entering into such obligation by resolution, which is required to have certain findings and facts, as well as publication of such resolution.¹¹⁵ An installment-purchase agreement intended to finance a capital project under the requirements of section 350.091, approved by the Nevada Tax Commission under section 350.089, must have a term that is 30 years or less and satisfy other requirements.¹¹⁶

Installment purchase agreements with a term of 10 years or more are subject to particular requirements, such as approval of county tax commissions;¹¹⁷ further findings in the resolution of the governing body approving such installment purchase agreement;¹¹⁸ and notification to and approval by the appropriate debt management commission.¹¹⁹

The legislature has declared with respect to lease-purchase and installment purchase agreements that:

3. The government of this State and the political subdivisions of this State should not use lease-purchase and installment-purchase agreements to:

- (a) Engage in or allow bid-shopping; or
- (b) Avoid or circumvent any requirement regarding the payment of prevailing wages for public works.

....

5. If a lease-purchase or installment-purchase agreement involves the construction, alteration, repair or remodeling of an improvement:

(a) The person or entity that executes one or more contracts or agreements for the actual construction, alteration, repair or remodeling of the improvement shall include in such a contract or agreement the contractual provisions and stipulations that are required to be included in a contract for a public work pursuant to the provisions of NRS 338.013 to 338.090, inclusive.

(b) The government of this State or a political subdivision of this State, the contractor who is awarded the contract or entered into the agreement to perform the construction, alteration, repair or remodeling of the improvement and any subcontractor on the project shall comply with the provisions of NRS 338.013 to 338.090, inclusive, in the same manner as if the government of this State or a political subdivision of this State had undertaken the project or had awarded the contract.¹²⁰

The transfer of motor vehicles by sale or lease to a “county, city, district or other local entity is exempt from sales and school support taxes.”¹²¹

¹⁰⁷See, *supra*, note 12 and accompanying text for the definition of “installment purchase agreement.”

¹¹³See, *supra*, note 11 and accompanying text.

¹¹⁴*Id.* § 350.089. Listing detailed procedures and an appeal process to the Nevada Tax Commission.

¹¹⁵*Id.* § 350.087. Listing detailed procedures. See, *supra*, note 10 and accompanying text.

¹¹⁶*Id.* § 350.091. See, *supra*, note 16 and accompanying text.

¹¹⁷*Id.* § 350.014.

¹¹⁸*Id.* § 350.087(d).

¹¹⁹*Id.* § 350.0145. “Commission” is defined in *id.* § 350.011.

¹²⁰*Id.* § 353.545. See also, *id.* § 354.740 (similar provision).

¹²¹*Id.* § 372.7283 (sales and use tax); *id.* § 374.729 (local school support tax).

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

NEW HAMPSHIRE 2017

Updated by reference to Westlaw, including updates through Ch. 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties “may purchase personal property for the use of the county and its officers; and may sell any of the county personal property that is not needed”⁵ and “may purchase such real estate as may be required for county correctional facilities, including county farms, or other county uses, and may repair, enlarge or erect county buildings at a cost exceeding \$5,000; and, with like authority, they may sell any of the county’s real estate.”⁶ In addition, counties may make “all necessary contracts.”⁷

35:1

Any . . . county, as provided by RSA 35:3 may raise and appropriate money for the establishment of a capital reserve fund for the financing of all or part of the cost of:

I. The construction, reconstruction or acquisition of a specific capital improvement, or the acquisition of a specific item or specific items of equipment; or

II. The construction, reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment; or . . .

III-a. The acquisition of land; or . . .

VI. Municipal and regional transportation improvement projects including engineering, right-of-way acquisition and construction costs of transportation facilities, and for operating and capital costs for public transportation.⁸

35:3

. . . [T]he authority granted in RSA 35:1 shall be exercised by a majority vote of the county delegation after a public hearing on the budget as required by RSA 24:23, RSA 24:13-c, IV, or RSA 24:14-a. The public notice of such hearing shall include a statement distinctly stating the purpose for which such reserve is to be established.⁹

35:8

. . . [N]o county shall raise and appropriate for such reserve an amount in excess of 1/50 of one percent of the last base valuation for debt limit computed pursuant to RSA 33:4.¹⁰

35:15

¹Counties can adopt charters and have home rule powers. N.H. Rev. Stat. Ann. § 28-A:1.

²*Id.* § 24:13, I.

³*Id.* § 26:1.

⁴*Id.* §§ 53:2 and 53:5.

⁵*Id.* § 28:6.

⁶*Id.* § 28:7. Public bidding is required when a county sells or leases property it owns. *Id.* § 28:8-c.

⁷*Id.* § 23:1.

⁸*Id.* § 35:1.

⁹*Id.* § 35:3.

¹⁰*Id.* § 35:8.

I. Persons holding said capital reserve funds in trust, as provided in this chapter, shall hold the same until such time as the . . . county shall have voted to withdraw funds from such capital reserve fund or shall have named agents of the . . . county to carry out the objects designated by the . . . county, in the manner prescribed by RSA 35:3.

II. Expenditures from any fund established for the acquisition of land pursuant to RSA 35:1 shall be made only as authorized:

(a) . . . by majority vote of the county delegation, in the case of a county, or

(b) By the selectmen, appointed as agents pursuant to RSA 41:14-a, provided that the selectmen shall not have authority to expend any sum in excess of the amount contained in any capital reserve account created for the purchase of land other than any grant moneys which may be received.

III. (a) Notwithstanding the prohibition of debt retirement fund establishment in RSA 33:2, capital reserve funds may be used for multiple payments under a financing agreement for the purpose for which the capital reserve was established. If the financing agreement is a lease/purchase agreement the following shall apply:

(1) The lease/purchase agreement does not contain an "escape clause" or "non-appropriation clause"; and

(2) The lease/purchase agreement has been ratified by the legislative body by a vote by ballot of 2/3 of all the voters present and voting at an annual or special meeting.

(b) If agents have been named according to RSA 35:15, then no further vote is required to disburse funds following the initial vote which ratified the financing agreement . . .

* * * *

V. In all cases, expenditures from a capital reserve fund shall be made only for or in connection with the purposes for which said fund was established or as amended as provided in RSA 35:16.¹¹

Energy Performance Contracting

It appears that counties may enter into contracts for implementing energy conservation or alternate energy measures in a facility for a term not to exceed twenty years, subject to numerous restrictions.¹²

Municipalities

Municipalities¹³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁴ eminent domain¹⁵ and police powers.¹⁶ Municipalities "may purchase and hold real and personal estate for the public uses of the inhabitants and may sell and convey the same."¹⁷ Municipalities "may make any contracts which may be necessary and convenient for the transaction of the public business."¹⁸

¹¹*Id.* § 35:15.

¹²*Id.* § 21-I:19-d (applying explicitly to "any state agency or municipality"). In chapter lxiv on Planning and Zoning the term "municipality" "includes and relates to cities, towns, village districts, and counties in which there are located unincorporated towns or unorganized places." *Id.* § 672:10.

¹³Municipalities, for purposes of this discussion, are cities, towns and village districts. Cities have all powers of towns. *Id.* §§ 44:1, 44:2. Village districts have the powers of towns but only to the extent they are performing the function or functions for which they were created. *Id.* §§ 52:1, 52:3. Cities and towns may adopt charters and have home rule powers. *Id.* § 49-B:3.

¹⁴*Id.* § 72:1-c.

¹⁵*Id.* § 31:92.

¹⁶*Id.* § 673:1.

¹⁷*Id.* § 31:3.

¹⁸*Id.*

The governing body may enter into leases of equipment as required by the municipality. Appropriations to fund lease agreements with nonappropriation clauses may be approved by a simple majority vote of the legislative body. Lease agreements with nonappropriation clauses shall not be treated as debt under RSA 33:4-a. For the purposes of this section, "lease" shall include lease-purchase, sale and lease back, installment sale, or other similar agreement to acquire use or ownership of such equipment as is from time to time required by the municipality. For purposes of this section and RSA 382-A, building or facility improvements related to the installation, purpose, or operation of such equipment shall be deemed to constitute equipment and the costs of such improvements may be financed through lease agreements under this section.¹⁹

“The city councils shall have . . . the power to sell or let what may be legally so disposed of, and to purchase property, real or personal, for the use of the city.”²⁰

34:1

Any city may raise and appropriate money as provided by RSA 34:2, from any source other than money given to the city for charitable purposes, for the establishment of a capital reserve fund for the financing of all or part of the cost of:

I. The construction, reconstruction, or acquisition of a specific capital improvement, or the acquisition of a specific item or of specific items of equipment;

II. The construction, reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment; . . .

IV. The acquisition of land;

VI. Municipal and regional transportation improvement projects including engineering, right-of-way acquisition and construction costs of transportation facilities, and for operating and capital costs for public transportation;

or

VII. The repayment of bonded debt issued for the purpose specified in the fund, in conformance with existing Internal Revenue Service rules.²¹

34:2

The authority granted by RSA 34:1 shall be exercised by the city council only after a public hearing on the annual budget as required by RSA 44:10, and by the adoption of a capital improvement budget and program. The public notice of said hearing shall include a statement distinctly stating the purposes for which such reserve is to be established.²²

34:3

I. There may be paid into any such capital reserve fund such amounts as may from time to time be raised and appropriated therefor, from any source other than money given to the city for charitable purposes, within the limits as provided in RSA 34:4.

¹⁹*Id.* § 33:7-e. The term “municipality,” used in this statute, includes school districts and village districts by definition, section 33:1, I.

²⁰*Id.* § 47:5.

²¹*Id.* § 34:1.

²²*Id.* § 34:2.

II. The city council may also by a favorable vote of 3/4 of its members, transfer to such fund after a public hearing with notice as provided in RSA 34:2, not more than 1/2 of its unencumbered surplus funds remaining on hand at the end of the fiscal year, within the limits as provided in RSA 34:4.²³

34:4

No city shall raise and appropriate or transfer from any of its unencumbered surplus funds in any one year for such reserves a total amount in excess of 1/4 of one percent of the last assessed valuation of the city.²⁴

34:10

I. The trustees of trust funds holding said capital reserve funds in trust, as hereinbefore provided, shall hold the same until such time as the city councils shall name agents of the city to carry out the objects designated by the city councils as prescribed by RSA 34:2. Expenditures from said capital reserve funds shall be made only for or in connection with the purposes for which said fund was established, or as amended as provided by RSA 34:11.

II. Notwithstanding the prohibition of debt retirement fund establishment in RSA 33:2, capital reserve funds may be used for multiple payments under a financing agreement for the purpose for which the capital reserve was established. If the financing agreement is a lease purchase agreement, the lease purchase agreement may not contain an "escape clause" or a "non-appropriation clause."²⁵

Energy Performance Contracting

Municipalities may enter into contracts for implementing energy conservation or alternate energy measures in a facility for a term not to exceed twenty years, subject to numerous restrictions.²⁶

School Districts

School districts²⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁸ and eminent domain powers.²⁹ School districts may "hold and dispose of real and personal property for the use of schools therein."³⁰ School districts may "make necessary contracts."³¹ School districts may "procure land for lots for schoolhouses and school administrative unit facilities, and for the enlargement of existing lots,"³² "build, purchase, rent, repair or remove [school buildings],"³³ "provide suitable furniture . . . apparatus and conveniences for schools,"³⁴ and "purchase vehicles for the transportation of children."³⁵

School districts may enter into lease-purchase agreements for equipment.³⁶

²³*Id.* § 34:3.

²⁴*Id.* § 34:4.

²⁵*Id.* § 34:10.

²⁶*Id.* § 21-I:19-d.

²⁷School districts for purposes of this discussion are school districts based upon each town. *Id.* § 194:1. New Hampshire also has cooperative school districts, area schools and special school districts.

²⁸*Id.* § 194:5.

²⁹*Id.* § 31:92; *id.* § 194:1 (the word "town," wherever used in the statutes in connection with the government, administration, support or improvement of the public schools, shall mean "district").

³⁰*Id.* § 194:2.

³¹*Id.*

³²*Id.* § 194:3, I.

³³*Id.* § 194:3, II.

³⁴*Id.* § 194:3, VI.

³⁵*Id.* § 194:3, VII.

³⁶*Id.* § 33:7-e (covering school districts because "municipality" as used therein is defined to include school districts in section 33:1). *See, supra*, note 19 and accompanying text.

Like counties, school districts may establish reserve funds for the acquisition of capital improvements and equipment.³⁷

Energy Performance Contracting

There does not appear to be specific statutory authority for school districts to enter into energy performance contracts.

Fire Districts

"Village districts"³⁸ may be established for any of several purposes including "for the extinguishment of fires"³⁹ and may be tax-exempt issuers for purposes of federal income tax law due to their tax,⁴⁰ and eminent domain powers.⁴¹ Village districts have the powers of towns.⁴² "Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same."⁴³

Like municipalities and school districts, village districts may enter into lease-purchase agreements for equipment.⁴⁴

Like counties, village districts may establish reserve funds for the acquisition of capital improvements and equipment.⁴⁵

Energy Performance Contracting

It appears that village districts may enter into contracts for implementing energy conservation or alternate energy measures in a facility for a term not to exceed twenty years, subject to numerous restrictions.⁴⁶

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

Regarding approval of expenditures by departments of state government the statutes provide:

The expenditure of any moneys appropriated or otherwise provided to carry on the work of any department of the state government shall be subject to the approval of the governor, with the advice of the council, under such general regulations as the governor and council may prescribe with reference to all or any of such departments, for the purpose of securing the prudent and economical expenditures of the moneys appropriated. . . .⁴⁷

³⁷*See, supra*, notes 8 to 11 and accompanying text.

³⁸*Id.* § 52:1.

³⁹*Id.* § 52:1,I(a).

⁴⁰*Id.* § 52:16.

⁴¹*Id.* § 52:18.

⁴²*Id.* § 52:3.

⁴³*Id.* § 31:3.

⁴⁴*Id.* § 33:7-e (referring to municipalities, which include village districts by definition in section 33:1). *See, supra*, note 19 and accompanying text.

⁴⁵*See, supra*, notes 8 to 11 and accompanying text.

⁴⁶*Id.* § 21-I:19-d (applying explicitly to "any state agency or municipality").

⁴⁷N.H. Rev. Stat. Ann. § 4:15.

The treasurer may establish financing criteria to be met by state agencies and departments before entering into leases for equipment.⁴⁸

Any information return for tax-exempt governmental obligations to be filed with the United States Internal Revenue Service, by or on behalf of the state or any state agency or department resulting from a lease entered into under RSA 6:35, shall first be submitted to the state treasurer for review and execution. This section shall not apply to any return filed for a state authority, political subdivision, or other separate body politic and corporate created by state law.⁴⁹

The Department of Administrative Services coordinates public works design and construction by state departments and agencies except as otherwise provided by law and assists in the acquisition of land by agencies and institutions when requested.⁵⁰ One such exception relates to transportation projects; the construction, reconstruction, alteration, or maintenance of highways, bridges, or other items directly related to transportation, are managed by the Department of Transportation.⁵¹

The management and administration of space rented by state agencies is overseen by the Department of Administrative Services.⁵²

The Department of Administrative Services has been granted oversight of “property and physical plant management.”⁵³ The division of plant and property management within the Department of Administrative Services manages buildings for the state house, legislative office buildings and other state-owned property not charged to some other department.⁵⁴ The division of plant and property management is responsible for “[p]urchasing⁵⁵ all . . . equipment, supplies,⁵⁶ and services for all departments and agencies⁵⁷ of the state including contracting for the purchase or rental of data processing equipment”⁵⁸ State-wide contracts are authorized.⁵⁹ A total expenditure of not more than \$10,000 or a purchase in an approved class can be made without competitive bidding.⁶⁰ Except where competitive bidding has been employed, no purchase involving an expenditure of more than \$10,000 or purchase in an approved class may be made without the written approval of the commissioner.⁶¹

⁴⁸*Id.* § 6:35. [L]eases shall include lease-purchase, sale and lease back, installment sale, or other similar agreements entered into by various agencies or departments to acquire such equipment from time to time for the agencies or departments; provided that funding for such equipment leases was specifically approved by the legislature in a budget. Payment obligations under any lease entered into under this section shall be subject to annual appropriation and shall not be treated as debt obligations of the state. Nothing in this chapter shall prohibit the treasurer from entering into financing agreements or executing any related documents, including any document creating or confirming any security interest retained by the seller or lessor of the equipment. *Id.*

⁴⁹*Id.* § 6:36.

⁵⁰*See generally, id.* §§ 21-I:78 to 21-I:86.

⁵¹*Id.* § 21-I:78. *See* chapter 21-L (relating to the department of transportation).

⁵²*Id.* § 21-I:1, II(n). *See also*, N. H. Admin. Code part adm 610 (oversight of leased space by Bureau of Planning and Management).

⁵³N.H. Rev. Stat. Ann. § 21-I:1, II(h).

⁵⁴N.H. Rev. Stat. Ann. § 21-I:11(1).

⁵⁵The term purchase “shall mean all contracts for the purchase of supplies or services, as well as the act of purchasing.” *Id.* § 21-I:11, II(c).

⁵⁶Supplies “shall mean all materials, equipment, printing, furniture, furnishings, and books, of every name and nature, including computer hardware, software, related licenses, media, and documentation, and support and maintenance services, excluding any systems that collect or store data off-site.” *Id.* subsectionII(a).

⁵⁷Agency “shall mean any board, department, commission, hospital, sanitarium, home, library, school, college, prison or other institution conducted or operated by or for the state of New Hampshire.” *Id.* subsectionII(b). Certain departments are exempted: the university system of New Hampshire is not required to make any purchases through the director of plant and property management, unless it wishes to do so; the legislature, the court systems and the liquor commission are completely exempted (“unless the governing body thereof so desires” *id.* § 21-I:17); and certain other exemptions apply. *Id.* § 21-I:18.

⁵⁸*Id.* § 21-I:11(I)(a)(1).

⁵⁹*Id.* § 21-I:17-c..

⁶⁰N.H. Rev. Stat. Ann. § 21-I:11(I)(a)(2)I.

⁶¹*Id.* § 21-I:11(I)(a)(3).

Leases or purchases of motor vehicles must be assessed by the Department of Administrative Services. Recommendations against a purchase or lease must be conveyed to the fiscal committee of the general court (the legislature) which may conclude that the lease is appropriate.⁶²

The commissioner of the department of employment security is authorized to enter into lease-purchase agreements with the approval of the governor and council for (a) acquisition of land or existing buildings; (b) new construction; (c) an addition to an existing facility; or (d) an improvement or repair to a facility which exceeds routine maintenance, but projects exceeding \$50,000 require consent of the capital budget overview committee, established in N.H. Rev. Stat. Ann. § 17-J.⁶³

Information Technology

The Department of Information Technology manages and coordinates all technology resources in the executive branch,⁶⁴ and in concert with the Department of Administrative Services, develops “specifications for the procurement of computer hardware, software, related licenses, media, documentation, support and maintenance services, and other related services.”⁶⁵

The department of information technology, in consultation with the information technology council, shall annually review and set dollar, or other, limits for purchases and contracts that require approval from the chief information officer before proceeding.⁶⁶

* * *

The [Department of Administrative Services shall require], prior to an agency's submission of a request for purchase of computer hardware, software, related licenses, media, documentation, support and maintenance services, and other related services that either require an expenditure of more than \$5,000, or involve a purchase that is not on an approved standards list established by the department of information technology which requires an expenditure of more than \$500, up to \$5,000, that the agency obtain approval of the proposal by the chief information officer, or designee, to ensure that the procurement is consistent with the state information technology plan..⁶⁷

Higher Education

The University System of New Hampshire⁶⁸ is governed by a board of trustees⁶⁹ which has management and control of all the property and affairs of the university system.⁷⁰

By and with the consent of the governor and council, [the board of trustees may] borrow on the credit of the university system in anticipation of income, for the purpose of forwarding its building program, not exceeding

⁶²*Id.* § 21-I:19-i.

⁶³*Id.* § 282-A:112.

⁶⁴*Id.* § 21-R:2.

⁶⁵*Id.* § 21-R:4, XII.

⁶⁶*Id.* § 21-R:8-a. Agency has the meaning defined in section 21-I:11, but shall not include those agencies exempt under section 21-I:18. *Id.*

⁶⁷*Id.* § 21-I:11(8), XI; N. H. Admin. Code part adm. 607.01(f).

⁶⁸The University System of New Hampshire consists of the University of New Hampshire and its schools and divisions, the Plymouth state university, the Keene state college, and the Granite state college. *Id.* § 187-A:2.

⁶⁹*Id.* § 187-A:2-a.

⁷⁰*Id.* § 187-A:16.

\$500,000 in any one fiscal year. All amounts so obtained in any fiscal year shall be repaid from the income of the next succeeding fiscal year.⁷¹

The system has a fund constituted of a continuing appropriation for the benefit of the university system.⁷² However:

The trustees of the university system shall keep the income from each of the following specified facilities in a separate fund for each division or campus of the university system: housing facilities, dining halls and other food service facilities, student unions, and bookstores. From each such fund shall be paid the proportionate part of the annual interest on the state borrowing for the purpose of constructing any of the 4 specified facilities at the particular division or campus, and a like proportionate payment of installments of principal as the same become due until such time as all obligations incurred by the state for any of said 4 facilities at any division or campus have been met. All operating and maintenance expenses of the 4 specified facilities shall be paid from the applicable separate fund.⁷³

With the approval of the capital budget overview committee of the general court (the legislature) and the approval of the governor, the university system of New Hampshire or any of its components, may participate with the New Hampshire Health and Education Facilities Authority in the acquisition of real and personal property.⁷⁴

The property of the university system of New Hampshire and each of its constituent institutions and divisions is exempt from taxation, as provided in section 72:23.⁷⁵

The Community College System of New Hampshire is governed by a board of trustees⁷⁶ which has management and control of all the property and affairs of the community college system.⁷⁷ The board may “[e]nter into any contracts, leases, and any other instruments or arrangements that are necessary, incidental, or convenient to the performance of its duties and responsibilities;”⁷⁸ “[a]cquire by purchase, gift, lease, or rent any property, lands, buildings, structures, facilities, or equipment necessary to fulfill the purposes of [chapter 188, covering the community college system];”⁷⁹ “[a]uthorize and enter any contracts, leases, and any other instruments or arrangements that are necessary, incidental, or related to the construction, maintenance, renovation, reconstruction, or other necessary improvements of community college system of New Hampshire buildings, structures, and facilities.”⁸⁰ The property of the community college system of New Hampshire is exempt from taxation as provided in RSA 72:23.⁸¹

Energy Performance Contracting

Any state agency may enter into an energy performance contract, not to exceed twenty years from the date of project implementation, for the purpose of undertaking or implementing energy conservation or alternate energy measures in a facility, subject to numerous restrictions.⁸²

⁷¹*Id.* § 187-A:16, XVII.

⁷²*Id.* § 187-A:7.

⁷³*Id.* § 187-A:18.

⁷⁴*Id.* §§ 195-D:5; 195-D:6.

⁷⁵*Id.* § 187-A:25.

⁷⁶*Id.* § 188-F:2.

⁷⁷*Id.* § 188-F:6.

⁷⁸*Id.* § 188-F:6, XI.

⁷⁹*Id.* § 188-F:6, XIII.

⁸⁰*Id.* § 188-F:6, XV.

⁸¹*Id.* § 188-F:12.

⁸²*Id.* §§ 21-I:19-a to 21-I:19-f.

Debt Limitations

There are no constitutional debt limitations. The State, counties, municipalities, school districts and village districts are statutorily limited in the amount of debt which they may incur.⁸³ None of these provisions have been interpreted by the courts.⁸⁴

Interest Rate Limitations

The legal rate of interest unless otherwise agreed upon in writing is 10 percent per annum.⁸⁵

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁸³*Id.* § 6:13, *id.* § 6-C:2 (state); *id.* § 33:4 (counties); *id.* § 33:4-a (municipalities, school districts and village districts).

⁸⁴In *Jane M. v. Mongan*, 533 A.2d 37 (N.H. 1987), the court upheld a lease-purchase arrangement by the state. The arrangement was challenged using the argument that there was no legal authority for the arrangement and for failure to publicly bid the project. The court held that only projects funded from the capital budget must be publicly bid and since this project was funded from the operating budget the public bidding requirements were inapplicable. Authorization by way of appropriation from the operating budget was sufficient.

⁸⁵N.H. Rev. Stat. Ann. § 336:1.

NEW JERSEY 2017

Current with Laws effective through L.2016, C. 83, Westlaw
Regs current through New Jersey Register, Volume 48, Issue 23, dated December 5, 2016ⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax² and eminent domain powers.³ A county “may acquire [by gift, devise, purchase, exchange, grant, lease or condemnation, or installment purchase agreement], . . . construct and maintain such buildings or other capital improvements as may be necessary and suitable for the performance of its functions.”⁴ Counties may acquire “the necessary land for the construction thereon of buildings or other capital improvements or additions thereto.”⁵ Counties “by resolution . . . may provide for the acquisition of any real property, capital improvement, or personal property by purchase, gift, devise, lease, exchange, condemnation, or installment purchase agreement.”⁶

(b) To the extent that the acquisition is by an installment purchase agreement, the obligation of the county or municipality shall be valid and binding for the term thereof which shall not be greater than forty years and shall not be otherwise subject to annual appropriation, and the authorization of such obligation shall not be subject to any of the provisions of the “Local Bond Law” (N.J.S. 40A:2-1 et seq.), except that:

(1) the repayment schedule of the principal shall be consistent with the requirements of N.J.S. 40A:2-26 et seq., [re maturities of bonds] unless otherwise approved by the Local Finance Board within the Division of Local Government Services in the Department of Community Affairs;

(2) a supplemental debt statement reflecting the principal sum of the installment purchase agreement shall be filed consistent with the provisions of N.J.S. 40A:2-10 [requiring filing of supplemental debt statement]; and

(3) to the extent that such supplemental debt statement reflects debt in excess of the debt limitations imposed on counties or municipalities, as appropriate, by N.J.S. 40A:2-6 and not otherwise within the exceptions contained in N.J.S. 40A:2-7, the county or municipality must obtain the approval of the Local Finance Board.⁷

Subject to numerous restrictions, including voter approval of a tax levy, counties may acquire by “installment purchase agreement” lands for recreation and conservation purposes.⁸

Counties have authority to sell or lease real property, capital improvements and personal property.⁹ Counties also have authority to convey real and personal property to a county improvement authority and to lease from such an authority.¹⁰

¹Counties are classed by population, first through sixth. N.J. Stat. Ann. § 40A:6-1. Counties may adopt charters. *Id.* § 40:41A-1.

²*Id.* § 40:23-7.

³*Id.* § 40A:12-3(when read in conjunction with *id.* § 40A:12-2(a)).

⁴*Id.* § 40A:12-3(a). The definition of “acquire” is set forth in the quotation. *Id.* § 40A:12-2(a). Counties also have authority to “furnish and equip” such buildings and capital improvements. *Id.* § 40A:12-3(c).

⁵*Id.* § 40A:12-3(b). The same definition of “acquire” applies.

⁶*Id.* § 40A:12-5(a)(1). The term “personal property,” as used in section 40A:12-5, is arguably limited to personal property used in the furnishing, refurbishing, or refurbishing of a building. Section 40A:12-2(f) defines “personal property” as “any personal property necessary and incidental to the furnishing, refurbishing, or refurbishing of a building. ‘Personal property’ shall also include, but not be limited to, office furniture, office equipment, office supplies, computers, computer equipment, telephone equipment, cameras, tractors, lawn mowers, golf carts, modular office trailers tools, janitorial supplies and farm animals.”

⁷*Id.* § 40A:12-5(b).

⁸*Id.* § 40:12-15.2.

⁹See generally *id.* §§ 40A:12-13 to -17.1.

¹⁰*Id.* §§ 40:37A-77, -78.

Counties may enter into contracts for the following purposes:

(7) Leasing or servicing of automobiles, motor vehicles, machinery and equipment of every nature and kind, for a period not to exceed five years; or (b) machinery and equipment used in the generation of electricity by a municipal shared services energy authority established pursuant to section 4 of P.L.2015, c. 129 (C.40A:66-4) or a contracting unit engaged in the generation of electricity, for a period not to exceed 20 years; provided, however, such contracts shall awarded into only subject to and in accordance with the rules and regulations promulgated by the Director of the Division of Local Government Services of the Department of Community Affairs;

(8) The supplying of any product or the rendering of any service by a company providing voice, data, transmission or switching services for a term not exceeding five years;

....

(15) Leasing of motor vehicles, machinery and other equipment primarily used to fight fires, for a term not to exceed ten years, when the contract includes an option to purchase, subject to and in accordance with rules and regulations promulgated by the Director of the Division of Local Government Services of the Department of Community Affairs; and

(16) The provision of water supply services or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility, or any component part or parts thereof, including a water filtration system, for a period not to exceed forty years, when the contract for these services is approved by the Division of Local Government Services in the Department of Community Affairs, the Board of Public Utilities, and the Department of Environmental Protection. . . .¹¹

Multi-year leases and contracts for the purposes set forth above, except for the purpose stated in item 16, “shall contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.”¹²

The state division of purchase and property may allow counties and other “local contracting units” to participate in state lease or installment-purchase contracts for supplies, equipment or services.¹³

Energy Performance Contracting

Counties may finance energy savings improvement programs to implement energy conservation measures in existing facilities through a lease-purchase agreement, subject to numerous restrictions.¹⁴

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸ The Local Lands and Building Law and Local Public Contracts Law are applicable to municipalities as well as counties.¹⁹

¹¹*Id.* § 40A:11-15.

¹²*Id.* Pursuant to section 40A:11-15 regulations have been adopted which relate to (1) duration of contract; (2) application of bidding requirements, (3) option to purchase, prohibitions, cancellation clause, and (4) equipment changes. N.J. Admin. Code §§ 5:34-3.1 to -4 (WL Dec. 5, 2016)).

¹³*Id.* §52:25-16.1.

¹⁴ *Id.* §40A:11-4.6. This section applies to municipalities as well.

¹⁵Municipalities for purposes of this discussion are any town, township, borough, village or city of whatever class. N.J. Stat. Ann. § 40A:12-2(e).

¹⁶*Id.* § 40:48-7.

¹⁷*Id.* § 40A:12-3(a) (when read in conjunction with *id.* § 40A:12-2(a)).

¹⁸*Id.* § 40:48-1.

¹⁹*See, supra*, notes 4-12 and accompanying text.

Municipalities falling under the Rehabilitation and Recovery Act must include provisions in all contracts stating that the contract or agreement may be terminated for any reason upon 30 days notice, without penalty.²⁰

The state division of purchase and property may allow municipalities and other “local contracting units” to participate in state lease or installment purchases of supplies equipment or services.²¹

Energy Performance Contracting

Like counties, municipalities may finance energy savings improvement programs to implement energy conservation measures in existing facilities through a lease-purchase agreement, subject to numerous restrictions.²²

School Districts

School districts²³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁴ and eminent domain powers.²⁵ School districts may “acquire, by purchase or lease, . . . and sell and lease real estate and personal property.”²⁶

School districts may “erect, lease for a term not exceeding 50 years, enlarge, improve, repair or furnish buildings.”²⁷ Any lease in excess of five years must be approved by the Commissioner of Education and the Local Finance Board in the Department of Community Affairs.²⁸ School districts also have authority to lease-purchase, for a term not in excess of five years, improvements and additions to school buildings.²⁹ Lease-purchase agreements must be approved by the Commissioner of Education or the board of school estimate and in some instances the voters of the district.³⁰ As part of a lease-purchase transaction the school district may “transfer or lease land and rights in land, including any building thereon, after publicly advertising for proposals for the transfer for nominal or fair market value. . . .”³¹ The lease-purchase agreement shall contain a provision making payments thereunder “subject to the annual appropriation of funds sufficient to meet the required payments or shall contain an annual cancellation clause . . . and shall require all construction contracts let by public school districts or let by developers or owners of property used for school purposes to be competitively bid.”³² The land and building thereon is treated as property of the school district and is exempt from property taxation.³³ Equipment may also be lease-purchased under this statute so long as the term does not exceed five years, ten years for school buses. Commissioner of Education approval is not required for equipment lease-purchases provided that the amount of the first installment and each subsequent installment for the lease purchase payments is included in the budget that

²⁰*Id.* § 52:27BBB-61.

²¹*Id.* § 52:25-16.1.

²²*See, supra*, note 14 and accompanying text.

²³School districts are classed as “type I” and “type II.” N.J. Stat. Ann. § 18A:9-1.

²⁴*Id.* § 18A:22-40.

²⁵*Id.* § 18A:20-2.

²⁶*Id.* Sale of property must be publicly bid unless part of a lease-purchase transaction. *Id.* § 18A:20-6. Lease of property not necessary for school purposes is also restricted. *Id.* § 18A:20-8.2.

²⁷*Id.* § 18A:20-4.2(c).

²⁸*Id.* § 18A:20-4.2(e)(4).

²⁹*Id.* § 18A:20-4.2(f).

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

is advertised and submitted for approval to the voters of the district or the board of school estimate, as appropriate.³⁴

School districts may lease “automobiles, motor vehicles, electronic communications equipment, machinery and equipment of every nature and kind, for any term not exceeding in the aggregate, five years; except that contracts for the leasing of school buses may be awarded for any term not exceeding in the aggregate ten years.”³⁵ Such contracts shall be entered into only subject to and in accordance with rules and regulations promulgated by the State Board of Education.”³⁶ Such leases shall contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.³⁷

Administrative rules require that equipment lease-purchase agreements be filed with the county superintendent of schools and that they shall include:

1. The lease purchase agreement which shall contain the following provision: "Payments shall be subject to the annual appropriation of funds sufficient to meet the required payments or shall contain an annual cancellation clause pursuant to N.J.S.A. 18A:20-4.2(f)";
2. A resolution of the district board of education approving the application and authorizing submission to the county superintendent of an application form prescribed by the Commissioner; and
3. Evidence acceptable to the Department that the school district has procured the equipment in accordance with N.J.S.A. 18A:18A-1 et seq.³⁸

Generally, rules require that lease-purchase agreements of five years or less “shall contain the following provisions:

1. Payments shall be subject to the annual appropriation of funds sufficient to meet the required payments or shall contain an annual cancellation clause pursuant to N.J.S.A. 18A:20-4.2(f);
2. All construction contracts let by public school districts or let by developers or owners of property used for school purposes shall be competitively bid pursuant N.J.S.A. 18A:20-4.2(f); and
3. The district board of education at its sole discretion may refinance the lease purchase agreement or purchase the leased premises, by defeasance or otherwise, at any time during the leased period.”³⁹

There are numerous approval procedures:

(a) School districts shall submit to the Division for approval all lease purchase agreements to fund the local share or a portion of the total costs of a school facilities project for improvements or additions to a school facility that has no excess costs t. No lease-purchase agreement of that will fund excess costs of a school facilities project for improvements or additions to a school facility or the local funding of an other capital project shall be submitted to the Division for approval. If the Division does not approve a lease purchase agreement, the school district shall frame a separate question to authorize the lease purchase-agreement and obtain voter or board of school estimate approval to enter into the agreement. No lease purchase agreement for a capital project shall be executed by a school district unless it has received written approval of the Division, or the voters, or board of school estimate, as appropriate.

³⁴*Id.* § 18A:20-4.2(f). It appears that the provisions for multi-year contracts set forth in the Public Schools Contracts Law, *id.* § 18A:18A-42(f), *see, infra*, notes 36 to 38 and accompanying text, are also applicable to the lease-purchase of equipment.

³⁵*Id.* § 18A:18A-42(f).

³⁶*Id.* *See* chapter 6A of the N.J. administrative code (numerous and extensive rules, including rules covering the refinancing, § 6A:26-10.6 and defeasance, § 6A:26-10.7 of lease-purchase agreements).

³⁷N.J. Stat. Ann. § 18A:18A-42.

³⁸N.J. Admin. Code § 6A:26-10.1 (June 7, 2004).

³⁹*Id.* § 6A:26-10.4 (am. by R.2007 d.81, eff. March 19, 2007; R.2013 d.145, eff. Dec. 16, 2013).

(b) School districts shall file with the Division a copy of all lease purchase agreements approved by voters or the board of school estimate.

(c) A school district shall not enter into a lease purchase agreement until the Division has notified the school district of the final eligible costs of a school facilities project or the consistency of an other capital project with the school district's approved LRFP and other applicable standards, as set forth in N.J.A.C. 6A:26-3.11.

(d) The Division shall approve a lease purchase agreement for local share or total costs of a school facilities project receiving State debt service aid payments that does not include excess costs only upon a demonstration by the school district that the payments for a lease purchase agreement and any operating expenses related to the agreement can be included within the school district's net budget spending growth limitations and will not result in the need for approval by voters or the board of school estimate, as appropriate, of additional spending proposals to maintain existing instructional programs or extracurricular activities.

(e) All requests for approval of lease purchase agreements for capital projects that are required to be filed with, and approved by, the Division shall include the following:

1. A copy of the Department's approval letter for the school facilities project and calculation of final eligible costs;

2. The lease agreement in accordance with N.J.A.C. 6A:26-10.4;

3. If applicable, an intercept agreement among the school district, the lessor and the State, executed by the school district and the lessor, providing that the State shall have the right to withhold the portion of State support owed to the school district necessary to make timely payments under the lease-purchase and agent agreements, and apply the withheld State support to pay the school district's obligation, subject to available State appropriation;

4. The ground lease in accordance with N.J.A.C. 6A:26-10.5, except for the lease-purchase of equipment only;

- 5., Evidence of clear title to the proposed building site(s) and any land stated in the ground lease except for the lease purchase of equipment only;

6. A resolution of the district board of education approving the application and authorizing submission to the Division of an application on a form prescribed by the Commissioner;

7. A copy of the newspaper advertisement for the public hearing;

8. A copy of the newspaper advertisement for request for proposals;

9. A copy of detailed board minutes for the public hearing resolution and vote on the approval of the lease purchase concept, approval of the projected maximum funding level, assurance that annual lease payments can be included within the school district's base budget spending growth limitation, and authorization for the chief school administrator or board secretary to advertise for proposals for the selection of underwriter/lessor; and

10. Any additional information that a school district deems relevant for the Division's review of the lease purchase agreement.

(f) Upon receipt of an application for approval of a lease purchase agreement for a capital project, the Division shall review the application and inform the school district in writing whether the application is complete. If the application is determined incomplete, the Division shall request additional information from the school district.

(g) After reviewing and assessing a complete application, the Division shall notify the school district in writing whether the lease purchase is approved and, if the lease purchase is not approved, the reason(s) for not approving it.

(h) For lease purchase agreements that must be submitted to the Division, a district board of education shall conduct a minimum of one public hearing prior to adoption of a resolution endorsing the lease purchase concept and approving the submission of an application to the Division. All provisions of the Open Public Meetings Act (N.J.S.A. 10:4-6 through 21) shall be followed for the public hearing. In addition, notice of the public

hearing shall be published in at least one newspaper published in the school district or circulating in the school district if no newspaper is published therein. The notice shall fix a date, place and time for holding the public hearing and shall include a description of the proposed capital project, the estimated cost and the proposed method of project financing.

1. The public hearing shall provide taxpayers and other interested persons an opportunity to present to the district board of education questions or other commentary with respect to the proposed capital project, the estimated cost thereof and the proposed financing method.

2. After the public hearing, a district board of education shall, adopt by affirmative vote of at least two-thirds of the full board membership a resolution that includes the following provisions:

i. Approval of the lease purchase concept;

ii. Approval of the projected maximum funding level;

iii. An assurance that annual lease payments and any operating expenses related to the agreement can be included within the school district's net budget spending growth limitations and will not result in the need for approval by the voters or board of school estimate, as appropriate, of additional spending proposals to maintain existing instructional programs or extracurricular activities; and

iv. Authorization for the chief school administrator and board secretary to advertise and solicit proposals for the selection of a lessor and underwriter in connection with a lease-purchase agreement and to request Departmental approval of a lease-purchase agreement not including excess costs.

(i) A district board of education having entered into a lease-purchase agreement for a capital project shall not terminate, materially change, or alter the approved lease-purchase agreement and accompanying legal documents without first obtaining the Division's written approval

(j) Upon completion of the transaction, the school district shall file with the Division an opinion from the school district's legal counsel stating the following:

1. The transaction is in conformance with local, State and Federal law; and

2. The parties hereto are properly organized; are in good standing; have the requisite power; and have been properly authorized to enter into the transaction.

(k) Upon completion of a lease-purchase agreement, a district board of education shall file with the Division the Official Statement (Prospectus) of the transaction.⁴⁰

The state division of purchase and property may allow school districts and "other local contracting units" to participate in state lease or installment-purchases of supplies equipment or services.⁴¹

There is a New Jersey Schools Development Authority with broad powers authorized to construct schools for certain qualifying districts.⁴²

Lease-purchase agreements by school districts under State intervention are subject to restrictions.⁴³

⁴⁰*Id.* § 6A:26-10.3 (am. by R.2004 d.214, eff. June 7, 2004; R.2007 d.81, effective March 19, 2007; R.2013 d.145, effective December 16, 2016).

⁴¹N.J. Stat. Ann. § 52:25-16.1.

⁴²*Id.* § 52:18A-237. *See generally id.* §§18A:7G-1,-48 (Educational Facilities Construction and Financing Act relating to Abbott districts and others which are beyond the scope of this survey).

⁴³*Id.* § 18A:7A-46.2.

Energy Performance Contracting

School districts may finance energy savings improvement programs to implement energy conservation measures in existing facilities through a lease-purchase agreement, subject to numerous restrictions.⁴⁴

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.⁴⁵ Fire districts may “acquire, hold, lease, sell or otherwise convey in its corporate name such real and personal property as the purposes of the corporation shall require.”⁴⁶ “All sales and leases of real and personal property shall be in accordance with the provisions of section 13 or 14, as appropriate, of the “Local Lands and Buildings Law,” P.L.1971, c.199 (C.40A:12-13 [this is selling as surplus by the District] or 40A:12-14 [this is leasing out by the District]).”⁴⁷

The commissioners of a fire district shall have the powers, duties and functions within said district to the same extent as in the case of municipalities, relating to the prevention and extinguishment of fires and the regulation of fire hazards.⁴⁸

* * *

The legal voters, at the annual meeting or at a special meeting called by the commissioners of the fire district, may vote to raise money for a firehouse, apparatus and appliances in connection therewith for fire extinguishing purposes, in an amount not exceeding 5 mills on the dollar of the last assessed valuation of the property in the fire district. The amount so voted for shall be included in the next succeeding annual budget of the fire district under the section for capital appropriations.

Any such special meeting shall be called on 10 days' notice by the board of fire commissioners, to be posted in five public places in the district, setting forth the time, place and object of the meeting and the legal voters shall determine the amount of money to be raised.⁴⁹

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

State procurement is centralized in the Division of Purchase and Property (DPP)⁵⁰ and the Division of Property Management and Construction (DPMC) in the Department of the Treasury.⁵¹ The DPP exercises the powers of the treasurer⁵² relative to personal property and the DPMC exercises the treasurer's

⁴⁴*Id.* § 18A:18A-4.6.

⁴⁵*Id.* § 40A:14-79.

⁴⁶*Id.* § 40A:14-70.

⁴⁷*Id.*

⁴⁸*Id.* § 40A:14-81.

⁴⁹*Id.* § 40A:14-84.

⁵⁰*Id.* § 52:18A-3. Procurement has been centralized in the DDP since the abolition of the Dept. of Administration 1997. Reorganization Plan No. 003-1997 (Gov. Christine Todd Whitman)(published following N.J. Stat. Ann. § 52:18A-178. It is successor to previous organizations: the Division of Purchase and Property in the State Department of Taxation and Finance transferred to the Department of the Treasury in 1948, *id.* § 52:18A-16, and subsequently transferred to the Dept. of Administration in 1984. *Id.* § 52:18A-184. The functions, powers and duties of the previous organizations have been continued and transferred to the DPP and the DPMC and references to predecessor organizations remain in the statutes. Reorganization Plan No. 003-1997.

⁵¹Reorganization Plan No. 003-1997.

⁵²N.J. Stat. Ann. § 52:34-13.

powers as to real property.⁵³ The procurement laws apply to the executive branch; such laws are coordinating and advisory as to the judicial and legislative branches.⁵⁴

The DPMC negotiates leases for state agencies through the Office of Leasing Operations.⁵⁵ Prior lease approval is required by the legislative State Leasing and Space Utilization Committee.⁵⁶

The State Capitol Joint Management Commission and its subcommittees are charged with management of the State capitol complex.⁵⁷

The New Jersey Building Authority was created for “financing, acquiring, constructing, reconstructing, rehabilitating and improving office buildings and related facilities to meet the needs of State agencies:”⁵⁸

All State agencies may purchase, lease, rent, sublease or otherwise acquire any project or any space embraced in any project and pay such amount as may be agreed upon between the State agency and the authority or a person, firm, partnership or corporation as the purchase price, rent or other charge therefor, except that all leases shall be subject to the approval of the State Leasing and Space Utilization Committee established pursuant to P.L.1992, c.130 (C.52:18A-191.1 et al.). Any agreement entered into by any State agency with the authority or a person, firm, partnership or corporation pursuant to the aforesaid authorization, shall expressly provide that the incurrence of any liabilities by the agency under the agreement, including, without limitation, the payment of any and all rentals or other amounts required to be paid by the agency thereunder, shall be subject to and dependent upon appropriations being made from time to time by the Legislature for that purpose and upon the approval of the lease agreement by the State Leasing and Space Utilization Committee.⁵⁹

Property leased from the authority by state agencies is exempt from state and local taxation.⁶⁰

The DPP has authority to procure goods and services on behalf of the state and its agencies.⁶¹

Procurement procedures are set out in Title 17, chapter 12 of the administrative code. Threshold amounts to avoid competitive bidding are as follows:

2. a. Any such purchase, contract or agreement may be made, negotiated, or awarded by the Director of the Division of Purchase and Property or the Director of the Division of Building and Construction, as the case may be, without advertising, in any manner which the director may deem effective to promote full and free competition whenever competition is practicable, if: (1) the aggregate amount involved does not exceed \$25,000.00 or the amount determined pursuant to subsection b. of this section; or (2) (Deleted by amendment, P.L.1985, c.107) or (3) the aggregate amount involved including labor and construction materials does not exceed \$25,000.00 or the amount determined pursuant to subsection b. of this section in the case of contracts or agreements for the erection, construction, alteration, or repair of any public building or facility.

⁵³Reorganization Plan No. 003-1997.

⁵⁴*Id.* § 52:18A-194; *id.* § 52:34-10.11.

⁵⁵N.J. Stat. Ann. § 52:18A-191.3; Reorganization Plan No. 003-1997 Prov. 10. State agency is defined to mean “any department, division, office, board, commission, council, or bureau in the Executive branch of State government.” *Id.* § 52:18A-191.2. Rules concerning state leasing can be found at N.J. Admin. Code § 17:11-1.1 et seq.

⁵⁶N.J. Stat. Ann. § 52:18A-191.5; N.J. Admin. Code. § 17:11-7.1(a). Acquisition of real property for all agencies other than by the Departments of Environmental Protection, Education, Military and Veteran's Affairs, or State Colleges, the Hackensack Meadowlands Development Commission or independent authorities properties or ^{SEP}the Department of Transportation shall be made pursuant to a statewide plan and approved by the OMB. Circular, Dept. of the Treas. No. 95-22-GSA (eff. July, 1996) (available at state.nj.us).

⁵⁷N.J. Stat. Ann. § 52:31-39.

⁵⁸N.J. Stat. Ann. §§ 52:18A-78 to -78.32.

⁵⁹*Id.* § 52:18A-78.22.

⁶⁰*Id.* § 52:18A-78.23.

⁶¹*Id.* § 52:25-6; N.J. Admin. Code § 17:12-1.1.

When the aggregate amount involved does not exceed \$25,000.00 or the amount determined pursuant to subsection b. of this section in the case of contracts or agreements for the erection, construction, alteration, or repair of any public building or facility, the Director of the Division of Purchase and Property or the Director of the Division of Building and Construction may, at the director's discretion, delegate to the appropriate State department or using agency the director's authority to make, negotiate, or award a contract or agreement without advertising.

The Director of the Division of Purchase and Property or the Director of the Division of Building and Construction, as the case may be, shall establish, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations concerning procedural requirements for the making, negotiating or awarding of purchases, contracts or agreements pursuant to this section, at the director's discretion.

b. The Governor, in consultation with the Department of the Treasury, shall, no later than March 1 of every fifth year beginning in the fifth year after the year in which P.L.1999, c.440 takes effect, adjust the threshold amount set forth in subsection a. of this section, or the threshold amount resulting from any adjustment under this subsection, in direct proportion to the rise or fall of the index rate as that term is defined in section 2 of P.L.1971, c.198 (C.40A:11-2), and shall round the adjustment to the nearest \$1,000. The Governor shall, no later than June 1 of every fifth year, notify the Director of the Division of Purchase and Property and the Director of the Division of Building and Construction of the adjustment. The adjustment shall become effective on July 1 of the year in which it is made

For transactions in an amount below the threshold:

If the aggregate amount involved does not exceed the threshold established pursuant to N.J.S.A. 52:34-7,⁶² any procurement or contract may be made, negotiated, or awarded by the Director without advertising, in any manner the Director may deem effective and practicable to permit full and free competition.⁶³

When the procurement amount exceeds threshold limits, several procurement methods are available, although formal advertised competitive bidding is generally required.⁶⁴ Some exceptions to the formal bid process are an agency's participation in cooperative procurement agreements⁶⁵ or its exercise of delegated authority or the receipt of a waiver.⁶⁶ Request for waiver of advertising procurements may be made by an agency when "[t]he transaction is a lease of office space, machinery, specialized equipment, building or real property, as needed for the State's business,"⁶⁷ or "[t]he purchase is of equipment of a technical nature and standardization of equipment and interchangeability of parts is in the public interest."⁶⁸

State contracts are managed and administered by a "state contracts manager."⁶⁹

Procurements of information technology (IT) hardware, software and related services, and non-IT equipment are directed by the Office of Information Technology in the Office of Management and Budget.⁷⁰

Dollar thresholds for OIT/OMB review:

a) IT purchases whose total dollar value exceeds \$50,000 are subject to OIT review and approval, in order to assure compliance with statewide policies and standards. Purchases whose total dollar value exceeds \$100,000 are also subject to simultaneous OMB review and approval. Any requested purchase that is more

⁶²N.J. Stat. Ann. § 52:34-7 provides for thresholds of \$25,000 for personal property and \$25,000 for construction, which may be adjusted by the governor.

⁶³N.J. Admin Code § 17:12-1.1 (b) (am. by R.2012 d.074, eff. April 2, 2012).

⁶⁴N.J. Stat. Ann. § 52:34-6; N.J. Admin. Code § 17:12-1.1 (c); *id.* § 17:12-1A.2 (am. by R.2012 d.074, eff. April 2, 2012).

⁶⁵N.J. Stat. Ann. § 52:34-6.2.

⁶⁶N.J. Admin. Code § 17:12-1A.2.

⁶⁷*Id.* § 17:12-1A.2(c) (iii).

⁶⁸N.J. Stat. Ann. § 52:34-10(g); N.J. Admin. Code § 17:12-1A.2(c)(xi). Other exceptions exist too numerous to list herein.

⁶⁹N.J. Stat. Ann. § 52:34-10.7.

⁷⁰*Id.* § 52:18A-191.

than \$50,000 and less than \$100,000 is subject to OMB review on an as-needed basis as determined by the Director, OMB. Procurements of less than \$50,000 do not require advance approval, but should conform to allowable procurement justifications summarized in Section II.A.4.

b) Non-IT purchases greater than \$40,000 require prior approval from OMB. For equipment valued at less than \$40,000, agencies may invoke one of the allowable purchase justifications noted in Section II.A.4 of this Circular, however, that action is subject to a post-audit review by OMB. If an agency is found to be in violation of the letter or spirit of this Circular (exhibiting, for instance, a series of questionable purchases of discretionary items), they will be held to a threshold limit set at the OMB Director's discretion for future purchases. In addition, the Office of the State Comptroller may conduct periodic audits to ensure that agencies are operating within the guidelines and boundaries set by this Circular.⁷¹

Purchases and leases of motor vehicles by other than autonomous agencies, such as the judiciary and state colleges, must be made through a formal request procedure to Treasury Transportation Services.⁷²

The Structured Financing Act⁷³ authorizes the State Treasurer to enter into "structured financing agreements," which includes lease and sublease agreements. This statute appears to be a method for the state to pull its equity out of state assets.

Higher Education

The Board of Governors of Rutgers, the State University of New Jersey⁷⁴ is authorized to "[d]irect and control expenditure and transfer of funds appropriated to the corporation and the university by the State in accordance with the provisions of the state budget and appropriation acts of the Legislature"⁷⁵ It may

[b]orrow money for the needs of the corporation and the university, as deemed requisite by the board, in such amounts and for such time and upon such terms as may be determined by the board, with the consent and advice of the board of trustees; provided, that no such borrowing shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, or be payable out of property or funds (other than moneys appropriated for that purpose) of the State.⁷⁶

The board of governors may "[p]urchase all lands, buildings, equipment, materials and supplies,"⁷⁷ and may "[m]anage and maintain, and provide for the payment of all charges on and expenses in respect of, all properties utilized by the university."⁷⁸

State colleges other than Rutgers are governed by a board of trustees⁷⁹ which "may direct and control expenditures in accordance with the state budget and appropriation acts of the legislature."⁸⁰ They have the following powers:

⁷¹Jt. Circular, Dept. of the Treas. No. 117-02-OMB/DPP/OIT (Eff. Aug. 8, 2016), available at: <http://www.state.nj.us/infobank/circular/circindx.htm>.

⁷²Jt. Circular, Dept. of the Treas. No. 17-06-ADM (eff. Sept. 3, 2016).

⁷³N.J. Stat. Ann. §§ 52:31c-1 to -13.

⁷⁴Originally established under royal charter, the institution received the name "Rutgers, the State University" when it was reorganized as a state university in 1956. *Id.* § 18A:65-10. Rutgers's government is vested in a board of governors (the governing body) and a board of trustees (historical governing body now in an advisory capacity with fiduciary duties). N.J. Stat. Ann. § 18A:65-24.

⁷⁵*Id.* § 18A:65-25(d).

⁷⁶*Id.* § 18A:65-25(e).

⁷⁷*Id.* § 18A:65-25(f.1).

⁷⁸*Id.* § 18A:65-25(g). Board of governors policies cover purchasing, but do not appear to have any specific policies relating to lease-purchases. Purchasing policies are available at Rutgers's website.

⁷⁹*Id.* § 18A:64-6.

⁸⁰*Id.* § 18A:64-6(f).

Pursuant to the provisions of the 'State College Contracts Law,' P.L.1986, c.43 (C.18A:64-52 et seq.) enter into contracts and agreements for the purchase of lands, buildings, equipment, materials, supplies and services;⁸¹

....

Acquire by gift, purchase, condemnation or otherwise, own, lease, dispose of, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for college purposes;⁸²

...

Borrow money for the needs of the college, as deemed requisite by the board, in such amounts, and for such time and upon such terms as may be determined by the board, provided that this borrowing shall not be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, or be payable out of property or funds, other than moneys appropriated for that purpose, of the State;⁸³

...

Pursuant to the "State College Contracts Law," P.L.1986, c.43 (C.18A:64-52 et seq.), award contracts and agreements for the purchase of goods and services, as distinct from contracts or agreements for the construction of buildings and other improvements, to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State college, price and other factors considered;⁸⁴

...

and [p]ursuant to the "State College Contracts Law," P.L.1986, c.43 (C.18A:64-52 et seq.),⁸⁵ award contracts and agreements for the construction of buildings and other improvements to the lowest responsible bidder, whose bid, conforming to the invitation for bids, will be the most advantageous to the State college.⁸⁶

Under the State College Contracts Law⁸⁷ competitive bidding is not required for contracts authorized by resolution of the board of trustees in an amount under threshold amounts biennially determined by the Governor in consultation with the Department of the Treasury.⁸⁸ Such a purchase, contract or agreement may be awarded for a period of 36 consecutive months.⁸⁹ State colleges may otherwise enter into multi-year contracts extending beyond 36 months for certain items, including the following:

Purchase, lease or servicing of information technology for any term of not more than five years;⁹⁰

Leasing or service of automobiles, motor vehicles, machinery and equipment of every nature and kind for any term not exceeding in the aggregate five years;⁹¹

Performance of work or services or the furnishing of materials or supplies for the purpose of conserving energy in buildings owned by, or operations conducted by, the contracting unit, the entire price of which is to be established as a percentage of the resultant savings in energy costs, for a term not exceeding 10 years; provided that a contract is entered into only subject to and in accordance with rules and regulations adopted and guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings;⁹²

Purchase of alternative energy or the purchase or lease of alternative energy services or equipment for conservation or cost saving purposes for a term not exceeding 30 years.⁹³

⁸¹*Id.* § 18A:64-6(k).

⁸²*Id.* § 18A:64-6(q).

⁸³*Id.* § 18A:64-6(t).

⁸⁴*Id.* § 18A:64-6(w).

⁸⁵Construction contracts are subject to code sections 18A:64-74 to -77.

⁸⁶*Id.* § 18A:64-6(x).

⁸⁷*Id.* §§ 18A:64-52 to -93.

⁸⁸*Id.* § 18A:64-54. The initial threshold was \$26,200 in 2005.

⁸⁹*Id.* § 18A:64-54(c).

⁹⁰*Id.* § 18A:64-79(d).

⁹¹*Id.* § 18A:64-79(f).

⁹²*Id.* § 18A:64-79(i).

⁹³*Id.* § 18A:64-79(n).

An appropriation clause is required in multi-year contracts:

All multiyear leases and contracts entered into pursuant to this section, except contracts and agreements for the provision of work or the supplying of equipment to promote energy conservation and authorized pursuant to subsection i. of this section, shall contain a clause making them subject to the availability and appropriation annually of sufficient funds to meet the extended obligation or contain an annual cancellation clause.⁹⁴

State colleges are authorized to enter into certain public/private partnerships for the purpose of financing on-campus construction or improvements where the project is financed by the private entity and ownership is retained by the institution of higher education.⁹⁵

The University of Medicine and Dentistry of New Jersey, through its board of trustees, has the power “to acquire own, lease, dispose of, use, and operate property.”⁹⁶

The New Jersey Institute of Technology,⁹⁷ through its board of trustees has the power to:

Direct and control expenditures and transfers of funds appropriated and provided by the State through its legislative and executive branches and as to funds received from other sources . . . ;⁹⁸

Borrow money for the needs of the university, as deemed requisite by the board, in such amounts, for such time and upon such terms as may be determined by the board; provided that no such borrowing shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, or be payable out of property or funds, other than moneys appropriated for that purpose, of the State;⁹⁹

Purchase, lease, acquire by gifts, condemnation or otherwise, manage, use, control, encumber and dispose of property, or any interest therein, whether real, personal or mixed, including, but not limited to, all buildings and grounds, as necessary or deemed desirable for university purposes.¹⁰⁰

Adopt standing operating rules and procedures for the purchase of all properties, whether real, personal or mixed and including all equipment, materials and supplies and for the purchase of all services. These rules and procedures shall include public competitive bidding, where the sum to be expended exceeds \$17,700 or the amount determined by the Governor¹⁰¹

Enter into contracts and agreements with . . . any individual, firm or corporation which are deemed necessary or advisable by the board for carrying out the provisions of [chapter 64E].¹⁰²

The board of governors of Rutgers, and the boards of trustees of the state colleges, Rowan University, and the New Jersey Institute of Technology may sell or lease land and dormitories to and from the New Jersey Educational Facilities Authority.¹⁰³ The aforementioned institutions may similarly enter into conveyance and lease back arrangements for revenue producing facilities such as student unions and parking lots¹⁰⁴ or for educational facilities¹⁰⁵ generally.¹⁰⁶ However, proposed projects relating to the financing of nonrevenue producing educational facilities must be submitted to the legislature for approval

⁹⁴*Id.* § 18A:64-79.

⁹⁵*Id.* § 18A:64-85.

⁹⁶*Id.* § 18A:64G-6.1.

⁹⁷*Id.* § 18A:64E-13.

⁹⁸*Id.* § 18A:64E-18(f).

⁹⁹*Id.* § 18A:64E-18(j).

¹⁰⁰*Id.* § 18A:64E-18(k).

¹⁰¹*Id.* § 18A:64E-18(k, 3).

¹⁰²*Id.* § 18A:64E-18(n).

¹⁰³*Id.* § 18A-72A-26; 18A:72A-27.

¹⁰⁴*Id.* § 18A:72A-27.1.

¹⁰⁵*Id.* § 18A:72A-3.

¹⁰⁶*Id.* § 18A:72A-27.2.

or rejection.¹⁰⁷ In regard to execution of documents relating to such conveyance and leaseback arrangements: Real or personal property titled in the name of the State Board of Education or the State Department of Education “shall be titled in the name of the State of New Jersey only.” Conveyances and leases “shall be made, executed and delivered in the name of the state and shall be signed by the State Treasurer and sealed with the seal of the state.” Acts by the university and the state colleges shall be done by resolution of the board of governors and board of trustees. Conveyance and leases shall be made, executed and delivered in the name of the university or college and signed by the president or vice president and sealed with the seal of the university or college.¹⁰⁸

The Higher Education Equipment Leasing Fund Act allows individual institutions to enter into lease agreements with the New Jersey Educational Facilities Authority to finance the acquisition of equipment.¹⁰⁹

Energy Performance Contracting

“Public agencies” and “state contracting agencies” are authorized to enter into lease-purchase agreements for energy savings improvement programs, for a term not to exceed 15 years, subject to numerous restrictions.¹¹⁰ The boards of trustees of public institutions of higher education are also authorized to implement energy savings improvement programs for conservation measures through the use of lease-purchase agreements, generally for a term not to exceed 15 years, and subject to numerous restrictions.¹¹¹ Such agreements may contain non-appropriation and non-substitution clauses.¹¹²

Debt Limitations

The state is constitutionally limited in the amount of debt it may incur.¹¹³ There are no constitutional debt limitations that apply to counties, municipalities, school districts, or fire districts. The bonded indebtedness of counties and municipalities is limited in amount.¹¹⁴ There are special spending provisions that apply to municipalities and school districts that are deemed in “unsound financial condition”¹¹⁵ or which fall under the Municipal Rehabilitation and Recovery Act.¹¹⁶

In *Bulman v. McCrane*,¹¹⁷ the court held that a lease-back transaction, whereby the state leased land to a developer at no charge, who constructed a building and then leased it to the state over twenty-five years, did not violate the state’s constitutional debt limit. The court held that it was a *bona fide* lease. It noted that there was no acceleration and forfeiture in the event of nonpayment of rentals, something customary for installment contracts,¹¹⁸ and that the lease term and life of the asset were such that it was appropriate for the developer to recoup his investment with a return thereon and for the state to receive the

¹⁰⁷*Id.* § 18A:72A-27.3.

¹⁰⁸*Id.* § 18A:72A-29.

¹⁰⁹*Id.* § 18A:72A-40 to -48.

¹¹⁰N.J. Stat. Ann. § 52:35A-1 (public agency; public agency “means any government entity that is authorized to expend public funds and enter into contracts which is not otherwise authorized to implement an energy savings improvement program . . .”); *id.* § 52:34-25 (state agency; state contracting agency “means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality created by a principal department.”).

¹¹¹*Id.* § 18A:65A-1. “In the case of Rutgers, the State University, references in this section to the board of trustees shall mean the Rutgers board of governors.” *Id.*

¹¹²*Id.* § 18A:65A-1(c) (2).

¹¹³N.J. Const. art. VIII, section II.

¹¹⁴N.J. Stat. Ann. § 40A:2-6.

¹¹⁵*Id.* §§ 52:27BB-55, 52:27BB-57.

¹¹⁶*Id.* § 52:27BBB-28.

¹¹⁷312 A.2d 857 (N.J. 1973). *See also* 405 Monroe Company v. City of Ashbury Park, 193 A.2d 115 (N.J. 1963).

¹¹⁸*Id.* at 862.

building at the end for a nominal sum.¹¹⁹ Lease payments were paid out of current revenues annually as appropriated.¹²⁰ It seems that no nonappropriation-type provision was incorporated into the documents. The court also upheld the transaction from an unconstitutional lending of credit and donation of property challenge.¹²¹

In *Enourato v. New Jersey Building Authority*,¹²² the court held that the state's lease agreements with the New Jersey Building Authority, whereby rental payments are subject to legislative appropriations, do not violate the debt limitations clause.¹²³ Dicta in *Enourato* implies that "the state may incur liability for future rentals without violating the debt limitations clause,"¹²⁴ but the facts of the case show that the state's obligation to make payments under its lease agreements was subject to annual appropriation. Use of "subject to appropriation" language is advisable.

In *McGuire v. City of Jersey City*,¹²⁵ the city entered into a twenty year lease of real property pursuant to an ordinance which included the following clause: "The continuation of this lease beyond each fiscal year during the term shall be subject to the availability and appropriation of funds in the temporary and permanent budgets for the subsequent fiscal year."¹²⁶ Within a year, the city government changed hands and canceled the lease relying on the nonappropriation clause in the ordinance. The court ruled that the municipality was bound. "The scheme of municipal statutory powers envisions that a city can make a lease for longer than one year and bind itself to appropriate funds to pay the rentals in each successive year of the lease term."¹²⁷ "An ordinance's reference to future appropriations cannot be equated with a right of cancellation on the part of the municipality."¹²⁸ Long term leases are exempted from the Local Budget Law's prohibition against expenditures without a corresponding current appropriation.¹²⁹ The Local Public Contracts Law, relating to leases for goods and services; does not apply to acquisitions of interests in real property.¹³⁰ The lease in *McGuire* was structured as a true lease so the lessor would get investment tax credits.

The New Jersey Supreme Court held that the Pension Bond Financing Act of 1997, which provided for bonds to be issued by the Economic Development Authority to fund the accrued unfunded liability of state pension plans/systems, is invalid, being contrary to the Debt Limitation Clause of the constitution.¹³¹ The court distinguished this fact situation from that in *Enourato*, *supra*, and concluded

that all of the other debt limitation cases contained features that distinguished the current bond case. In other cases, the independent authorities were clearly separate government entities that served special and discrete governmental purposes. See *Enourato* . . . (State created Building Authority which issued bonds to build and operate facilities for state agencies); *New Jersey Sports & Exposition Auth.*, *supra*, 61 N.J. 1 (State created the Sports & Exposition Authority to issue bonds to bring about the construction, operation and maintenance of a sports complex). Here, the EDA is functioning solely as a conduit to sell bonds.

¹¹⁹*Id.* at 862-863.

¹²⁰*Id.* at 864. See also *D'Ercole v. Mayor and Council of the Borough of Norwood*, 487 A.2d 1266 (N.J. Super. 1984) (upholding the current expense exception in the case of a true lease).

¹²¹*Id.*

¹²²448 A.2d 449 (N.J. 1982) (overruling *McCutcheon v. State Building Authority*, 97 A.2d 663 (N.J. 1953)).

¹²³*Id.* at 456.

¹²⁴*Id.*

¹²⁵593 A.2d 309 (N.J. 1991).

¹²⁶*Id.* at 311.

¹²⁷*Id.* at 313.

¹²⁸*Id.*

¹²⁹*Id.* (citing N.J. Stat. Ann. § 40A:4-57b).

¹³⁰*Id.* (citing N.J. Stat. Ann. 40A:11-15).

¹³¹*Spadoro v. Whitman*, 695 A.2d 654 (N.J. 1997).

In *Lonegan v. State of New Jersey*,¹³² the New Jersey Supreme Court upheld the State's use of contract bond financing for educational facilities where the obligation of the State was subject to appropriation by the State legislature. The court upheld the use of the contract bond financing for education by the State due to prior case law and mandates in the New Jersey Constitution related to education. On the issue of the use of contract bond financing by the State under other statutes, other than education, the court held that additional briefing and reargument was necessary.¹³³ The issue is whether such contract bond financing, which is subject to appropriation of payment by the State legislature, violates the Debt Limitations Clause of the New Jersey Constitution,¹³⁴ in which case voter approval would be required prior to issuance. In the court's order granting the Attorney General's motion for acceleration of the proceedings, the court noted that clarification on whether the court would apply any decision retroactively was not necessary since the court had not previously suggested it would grant any remedy not requested by plaintiff and plaintiff had not requested retroactive application of any decision.¹³⁵ Some of the questions raised by the court is whether it should make a difference if the obligation is payable from specific revenues, such as a special fund obligation, whether the project is essential or speculative and whether the rental payments should represent fair market rentals. The court asked that the parties "assume that the court intends to reconsider its precedents sustaining contract debt (or debt subject to future appropriations). . . ."¹³⁶

Subsequent to such reargument, the New Jersey Supreme Court rejected the broad challenge to the validity of fourteen New Jersey statutes authorizing contract or appropriations-backed debt, recognizing the reliance on the court's precedence when crafting complex financing mechanisms in changing market conditions, the need to maintain market stability and problems with creating classes of debt under the New Jersey debt limitation clause.¹³⁷ Only debt that is legally enforceable against the state is subject to the debt limitation clause.

Interest Rate Limitations

"[E]very county, municipality, school district, agency or other public institution . . . created by the state . . . is hereby authorized and empowered to contract to pay interest on or an interest cost per annum for money borrowed and evidenced by bonds, notes or other obligations without limit as to the rate of interest per annum."¹³⁸

Miscellaneous

*Scotsman v. Garfield Board of Education*¹³⁹ involved an analysis by the court of the concept of estoppel against a public entity. The court noted the difference between an act utterly beyond the jurisdiction of a municipal corporation, which are ultra vires in the primary sense and are void, so that estoppel would not be allowed, and the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional, which are ultra vires only in a secondary sense, so that ratification is not precluded and the application of estoppel is not precluded in the interest of equity and essential justice. The court remanded the case to the trial court for further development of the record, noting that the facts were not sufficient to rule as a matter of law on the estoppel issue.

¹³²809 A.2d 91 (N.J. 2002).

¹³³Such reargument was set for October 21, 2002.

¹³⁴N.J. Const. art. VIII, Sec. 2.

¹³⁵Order issued on 9/20/2002, available at <http://lawlibrary.rutgers.edu/decisions/supreme/m-145-02.opn.html>.

¹³⁶Lonegan, *see, supra*, note 132.

¹³⁷Lonegan v. State of New Jersey, 819 A.2d 395 (N.J. 2003).

¹³⁸N.J. Stat. Ann. § 31:1-7.

¹³⁹876 A.2d 877 (N.J. Super. 2005).

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

NEW MEXICO-2017

Current including emergency chs. 3, 19 of the 1st regular session of the 53rd Legislature (2017), West Lawⁱ

EDITOR’S NOTE: Any statutory authority for leasing should be reviewed in light of the New Mexico Supreme Court’s decision in *Montano v. Gabaldon*.¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties have all powers that municipalities have unless “inconsistent with statutory or constitutional limitations.”⁵

Energy Performance Contracting

Counties, municipalities, school districts, and other political subdivisions may enter into lease-purchase agreements for modifications to facilities and vehicles designed to reduce energy consumption or provide water conservation, pursuant to numerous restrictions.⁶

Municipalities

Municipalities⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,⁸ eminent domain⁹ and police powers.¹⁰ Municipalities may “acquire and hold property, both real and personal and enter into contracts or leases.”¹¹ Extensive provisions exist for the lease or sale of municipal property.¹²

¹*See, infra*, note 93 and accompanying text.

²N.M. Stat. Ann. § 4-38-17.

³*Id.* § 42A-3-1.

⁴*Id.* § 4-37-1.

⁵*Id.*

⁶*Id.* §§ 6-23-1 to -9. Query whether the energy savings pledge only would we a special fund obligation under *Montano*.

⁷Municipalities for purposes of this discussion are incorporated cities, towns, villages, incorporated counties and H class counties. *Id.* § 3-1-2. All may adopt home rule charters. *Id.* § 3-15-2. Query whether a home rule municipality can avoid the constitutional debt limits that create problems under *Montano*. *Id.* § 3-15-7 requires that the charter “not be inconsistent with the constitution of New Mexico.” N.M. Const. Art. 10, § 6 provides:

D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.

⁸N.M. Stat. Ann. § 3-18-2.D.

⁹*Id.* § 42A-3-1.

¹⁰*Id.* § 3-18-1.

¹¹*Id.* “Acquire” means “purchase, construct, accept or any combination of purchasing, constructing or accepting.” *Id.* § 3-1-2.A.

¹²*Id.* §§ 3-54-1, -3.

Energy Performance Contracting

Counties, municipalities, school districts, and other political subdivisions may enter into lease-purchase agreements for modifications to facilities and vehicles designed to reduce energy consumption or provide water conservation, pursuant to numerous restrictions.¹³

School Districts

School districts may qualify as tax-exempt issuers for purposes of federal income tax law due to their tax¹⁴ and eminent domain powers.¹⁵ School districts have the power to “acquire, lease, and dispose of property.”¹⁶ Extensive provisions exist for the disposition of property by school districts.¹⁷

School districts have been given the authority under the New Mexico Constitution to enter into a lease-purchase arrangement for education technology equipment:¹⁸

A school district may create a debt by entering into a lease-purchase arrangement to acquire education technology equipment without submitting the proposition to a vote of the qualified electors of the district, but any debt created is subject to the limitation of Subsection B of this section.¹⁹

This authority has been implemented under the Education Technology Equipment Act.²⁰ Implementing legislation defines “education technology equipment” as

tools used in the educational process that constitute learning and administrative resources and may include:

(1) closed-circuit television systems; educational television and radio broadcasting; cable television, satellite, copper and fiber-optic transmission; computer, network connection devices; digital communications equipment (voice, video and data); servers; switches; portable media such as discs and drives to contain data for electronic storage and playback; and purchase or lease of software licenses or other technologies and services, maintenance, equipment and computer infrastructure information, techniques and tools used to implement technology in schools and related facilities;

(2) improvements, alterations and modifications to, or expansions of, existing buildings or personal property necessary or advisable to house or otherwise accommodate any of the tools listed in Paragraph (1) of this subsection”²¹

The term “lease-purchase arrangement” is defined as:

a financing arrangement constituting debt of a school district pursuant to which periodic lease payments composed of principal and interest components are to be paid to the holder of the lease-purchase arrangement and pursuant to which the owner of the education technology equipment may retain title to or a security interest in the equipment and may agree to release the security interest or transfer title to the equipment to the school district for nominal consideration after payment of the final periodic lease payment. “*Lease-purchase arrangement*” also means any debt of the school district incurred for the purpose of acquiring education technology equipment pursuant to the Education Technology Equipment Act whether designated as a general obligation lease, note or other instrument evidencing a debt of the school district [Emphasis added.];²²

¹³*Id.* §§ 6-23-1 to -9.

¹⁴*Id.* § 22-18-12.

¹⁵*Id.* §§ 22-5-4.F, 42A-3-1.

¹⁶*Id.* § 22-5-4.D.

¹⁷*Id.* §§ 13-6-1, -4.

¹⁸N.M. Const. art. IX, § 11(C).

¹⁹*Id.* art IX, § 11(B) provides “No school district shall ever become indebted in an amount exceeding six percent on the assessed valuation of the taxable property within the school district as shown by the preceding general assessment.”

²⁰N.M. Stat. Ann. § 6-15A-1 to -17.

²¹*Id.* §6-15A-3(C).

²²*Id.* §6-15A-3(E).

The last sentence of this definition of “lease purchase arrangement,” emphasized *supra*, previously read “Lease purchase arrangement also means any debt of the school district incurred for the purpose of acquiring education technology equipment pursuant to the Education Technology Act whether designated as a lease, bond, note, loan, warrant, debenture, obligation or other instrument evidencing a debt of the school district.” The New Mexico attorney general took the position that this previous statutory definition of “lease purchase arrangement” “improperly expands the exception for lease-purchase arrangements under Article IX, Section 11(C) [of the New Mexico Constitution] beyond what the drafters intended and is invalid.”²³

The Education Technology Equipment Act is quite detailed in its requirements. The lease-purchase arrangements resulting are full faith and credit obligations that, assuming certain requirements are complied with, can include the power to levy taxes for the lease-purchase payments. Notices are required to the state department of public education. There are requirements concerning the preparation of transcripts for filing with the state department of education. Procedures are set forth for levy of taxes. The term is a maximum of five years after date of issuance. A preliminary resolution with specific findings is required. Special time periods are required between preliminary and final action. Published notice is required both for the meeting for final action and of passage of the final resolution. The contract is subject to the debt limitation for the school district, but does not require voter approval. Special provisions are provided for a refinancing or refunding of such a lease-purchase arrangement. The interest rate cannot exceed the amount as prescribed by the Public Securities Act.²⁴ Lease-purchase payments made pursuant to financing arrangements as defined by the Education Technology Act are “capital expenditures” under the Public School Buildings Act, allowing local school boards to submit the question of imposing a property tax for educational technology, for a period not to exceed six years, to the voters.²⁵

Under the New Mexico Constitution a financing agreement entered into by a school district or charter school for leasing of a building or other real property is not debt, if it complies with the terms set forth therein as set forth as follows:

D. For the purposes of this section, a financing agreement entered into by a school district or a charter school for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the school district or charter school pursuant to the financing agreement is not a debt if:

- (1) there is no legal obligation for the school district or charter school to continue the lease from year to year or to purchase the real property; and
- (2) the agreement provides that the lease shall be terminated if sufficient money is not available to meet the current lease payments.²⁶

Implementing legislation for this constitutional provision requires school districts to provide notice of intent to enter into a lease-purchase arrangement for the acquisition of buildings or other real property

²³08-01 Op. Att’y Gen. (N.M. February 15, 2008), 2008 WL 538449.

²⁴See Interest Rate Limitations, *herein*.

²⁵N.M. Stat. Ann. § 22-26-3.

²⁶N.M. Const. art. IX, § 11(D).

by forwarding a copy of the proposed lease-purchase arrangement²⁷ along with an identified source of funds to the department of education for approval.²⁸

Lease-purchase arrangements:

A. may have payments payable annually or more frequently as may be determined by the governing body;

B. may be subject to prepayment at the option of the governing body at such time or times and upon such terms and conditions with or without the payment of such premium or premiums as may be determined by the governing body;

C. may have a final payment date not exceeding thirty years after the date of execution;

D. may be acquired or executed at a public or negotiated sale;

E. may be entered into between the governing body and the owner of the building or other real property who may be a trustee or other person that issues or sells certificates of participation or other interests in the payments to be made under the lease purchase arrangement, the proceeds of which may be used to acquire the building or other real property;

F. shall specify the principal and interest component of each payment made under the lease purchase arrangement; provided that the net effective interest rate shall not exceed the maximum permitted by the Public Securities Act;

G. shall provide that, if the school district or charter school makes capital improvements to the building or other real property, there shall be no change in the lease payments or final payment without a written amendment approved by the department;

H. shall provide that, if state, school district or charter school funds, above those required for lease payments, are used to construct or acquire improvements, the cost of the improvements shall constitute a lien on the real estate in favor of the school district or charter school and then, if the lease purchase arrangement is terminated prior to the final payment and the release of the security interest or the transfer of title at the option of the school district or charter school:

(1) the school district or charter school may foreclose on the real estate lien; or

(2) the current market value of the building or other real property at the time of termination, as determined by an independent appraisal certified by the taxation and revenue department, in excess of the outstanding principal due under the lease purchase arrangement shall be paid to the school district or charter school;

I. shall provide that there is no legal obligation for the school district or charter school to continue the lease purchase arrangement from year to year or to purchase the building or other real property;

J. shall provide that the lease purchase arrangement shall be terminated if sufficient money is not available to meet any current lease payment;

K. shall provide that, with the prior approval of the lessor, which shall not be unreasonably withheld, the lease purchase arrangement is assignable, without cost to the school district, or charter school and with all of the rights and benefits of its predecessor in interest being transferred to the assignee, to:

(1) a school district or charter school; or

(2) the state or one of its institutions, instrumentalities or other political subdivisions; and

²⁷For purposes of the act, “‘financing agreement’ or ‘lease purchase arrangement’ means an agreement for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made, which periodic lease payments composed of principal and interest components are to be paid to the holder of the agreement and pursuant to which the owner of the building or other real property may retain title to or a security interest in the building or other real property and may agree to release the security interest or transfer title to the building or other real property to the school district for nominal consideration after payment of the final periodic lease payment” N.M. Stat. Ann. § 22-26A-3.

²⁸*Id.* § 22-26A-4.

L. shall provide that amendments to the lease purchase arrangement, except amendments that would improve the building or other real property without additional financial obligations to the school district or charter school, shall be approved by the department.²⁹

Lease-purchase arrangements may not exceed a duration of thirty years.³⁰ The school board must follow numerous requirements in authorizing a lease-purchase arrangement and in adopting a resolution for the imposition of a property tax, if any,³¹ but after the passage of thirty days from publication of notice of the adoption of the school board's resolution approving a lease-purchase arrangement, "any action attacking the validity of the proceedings taken by the local school board preliminary to and in the authorization of and entering into the lease purchase arrangement described in the notice is perpetually barred."³² There are additional requirements relating to the refinancing of existing lease-purchase agreements.³³ Lease purchase arrangements are exempt from state taxation.³⁴ The authority granted is to be liberally construed.³⁵

Energy Performance Contracting

School districts may enter into contracts pursuant to an energy assessment in accordance with the procurement code for the installation of energy efficiency measures for a term of up to ten years, subject to numerous restrictions.³⁶ They may enter into lease-purchase agreements for modifications to facilities and vehicles designed to reduce energy consumption or provide water conservation, pursuant to numerous restrictions.³⁷

Fire Districts

Fire districts do not appear to exist as separate political subdivisions.

Hospital Districts

Hospital districts³⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.³⁹ The boards of trustees of hospital districts may "acquire . . . one or more hospital facilities in the special hospital district for the purposes for which the special hospital district was created."⁴⁰

A. The board of trustees may acquire by purchase, lease-purchase or lease for the use of the special hospital district, any existing hospital facility (including buildings, property, furniture and equipment).⁴¹

A special hospital district may enter into a lease, loan or other financing agreement, with a term not exceeding thirty years from the date of execution, with the New Mexico hospital equipment loan council created under the Hospital Equipment Loan Act [Chapter 58, Article 23NMSA 1978] to acquire funds for the construction, purchase, renovation, remodeling, equipping, reequipping or refinancing of hospital facilities under its control,

²⁹*Id.* § 22-26A-5.

³⁰*Id.* § 22-26A-6.E.

³¹*Id.* § 22-26A-6; §§ 22-26A-8 to -12.

³²*Id.* § 22-26A-13.

³³*Id.* § 22-26A-14

³⁴*Id.* § 22-26A-17.

³⁵*Id.* §§ 22-26A-18, -20.

³⁶*Id.* § 6-21D-4. State agencies may exercise the same authority.

³⁷*Id.* §§ 6-23-1 to -9.

³⁸Hospital districts are "special hospital districts." N.M. Stat. Ann. § 4-48A-1.

³⁹*Id.* § 4-48A-14 and -16.

⁴⁰*Id.* § 4-48A-9.

⁴¹*Id.* § 4-48A-11.

for the purchase of the land necessary therefor and for refunding revenue bonds previously issued for any of the foregoing purposes or for any combination thereof.⁴²

Energy Performance Contracting

Political subdivisions may enter into lease-purchase agreements for modifications to facilities and vehicles designed to reduce energy consumption or provide water conservation, pursuant to numerous restrictions.⁴³

State Entities

The State's constitutional debt limitation provides for the leasing of buildings or other real property with an option to purchase:

For the purposes of this section and Article 4, Section 29 of the constitution of New Mexico, a financing agreement entered into by the state for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the state pursuant to the financing agreement is not a debt if:

- (1) there is no legal obligation for the state to continue the lease from year to year or to purchase the real property; and
- (2) the agreement provides that the lease shall be terminated if sufficient appropriations are not available to meet the current lease payments.⁴⁴

Legislation implementing this provides:

A. A financing agreement under which a state agency is to occupy a building or other real property and that contains an option to purchase for a price that is reduced according to the lease payments made is subject to the following criteria:

- (1) the agreement shall not become effective until it has been ratified and approved by the legislature; and
- (2) if the state agency is subject to the jurisdiction of the property control division of the general services department pursuant to the Property Control Act [15-3B-1 NMSA 1978], the agreement shall provide that, if the real property is purchased, title to the real property shall be issued in the name of the facilities management division.

B. Legislative ratification and approval of an agreement pursuant to Subsection A of this section shall not create a legal obligation for the state agency to continue the lease from year to year or to purchase the real property.

C. As used in this section, "state agency" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions, but "state agency" does not include state educational institutions or state-chartered charter schools.⁴⁵

Review by the capitol buildings planning commission is required:

A. Before submitting a proposed lease-purchase agreement to the legislature for ratification and approval pursuant to Section 15-3-35 NMSA 1978, the proposed lessee shall notify the commission. The commission shall review a proposed lease-purchase agreement if:

- (1) the total lease revenues to be generated during the term of the lease-purchase agreement, including any possible extensions or renewals, exceed five million dollars (\$5,000,000); or

⁴²*Id.* § 4-48A-29.A.

⁴³*Id.* §§ 6-23-1 to -9.

⁴⁴N.M. Const. art. IX, § 8. B.

⁴⁵N.M. Stat. Ann. § 15-3-35.

(2) pursuant to criteria adopted by the commission, the commission selects the lease-purchase agreement for review.

B. A review conducted pursuant to this section shall include findings by the commission as to whether:

- (1) the leasehold property and the term of the lease-purchase agreement are sufficient to meet the identified needs of the state agency that will occupy the leasehold property;
- (2) the payment of all lease revenues due pursuant to a lease-purchase agreement will be sufficient, at the end of the term of the lease-purchase agreement, to acquire ownership of the leasehold property;
- (3) the lease-purchase agreement provides that there is no legal obligation for the state or state agency to continue the lease-purchase agreement from year to year or to purchase the leasehold property, and that the lease-purchase agreement shall be terminated if sufficient appropriations are not available to meet the current lease payments; and
- (4) the lease-purchase agreement is the most cost-effective alternative for acquiring the leasehold property, taking into account currently available alternative lease arrangements, lease-purchase agreements or other financing arrangements permitted by law.

C. After a review pursuant to this section, the commission shall submit its findings and recommendations to the legislature.

D. As used in this section:

- (1) "commission" means the capitol buildings planning commission;
- (2) "facilities" means buildings and the appurtenances and improvements associated therewith, including the real estate upon which a building is constructed; suitable parking for use of the building; utilities, access roads and other infrastructure; and related real estate. "Facilities" can also mean undeveloped or developed real estate that is transferred or leased with the intent that a new building or improvement be constructed thereon;
- (3) "lease-purchase agreement" means a financing agreement for the leasing of facilities by the state or a state agency from a public or private entity with an option to purchase the leasehold property for a price that is reduced according to the payments made pursuant to the financing agreement;
- (4) "leasehold property" means facilities that are subject to a lease-purchase agreement;
- (5) "lease revenues" means the amounts payable pursuant to a lease-purchase agreement; and
- (6) "state agency" means any department, branch, institution, board, officer, bureau, instrumentality, commission, district or committee of government of the state of New Mexico except:
 - (a) the state armory board;
 - (b) the commissioner of public lands;
 - (c) state institutions under the jurisdiction of the higher education department;
 - (d) the economic development department when the department is acquiring property pursuant to the Statewide Economic Development Finance Act [6-25-1 NMSA 1978];
 - (e) the public school facilities authority when the authority is acquiring property pursuant to the Public School Capital Outlay Act [22-24-1 NMSA 1978]; and
 - (f) a state-chartered charter school.⁴⁶

Individual agencies have statutory authority to enter into lease-purchase agreements to acquire buildings with the New Mexico Finance Authority:

G. The authority may enter into an agreement with the property control division of the general services department or other agency specified by law for the lease purchase of the building acquired with the lease

⁴⁶*Id.* § 15-10-2.

purchase revenue bond proceeds. The agreement shall provide the lessee with an option to purchase for a price that is reduced according to the lease payments made and shall also provide that:

- (1) there is no legal obligation for the state to continue the lease from year to year or to purchase the building;
- (2) the lease shall be terminated if sufficient appropriations are not available to meet the current lease payments;
- (3) if authorized by the legislature, the lease payments include a maintenance component that may escalate annually and, over the length of the agreement, approximate the amount that will be needed for the maintenance and repair of the building; and
- (4) if the lessee is the property control division of the general services department or an agency under the jurisdiction of the property control division, the title to the building shall be issued in the name of the property control division if the building is purchased.

H. The provisions of this section apply to state buildings specifically authorized by law to be acquired pursuant to this section through lease purchase agreements with the authority. Nothing in this section limits or otherwise affects the power that the authority has under other laws to incur debt, acquire and dispose of property or enter into agreements.⁴⁷

State agency⁴⁸ procurement⁴⁹ of tangible personal property, services or construction must comply with the procurement code.⁵⁰ Procurement is made through a “central purchasing office” of an agency authorized to make its own procurements or through the central purchasing office of the purchasing division of the general services department.⁵¹ Procurements are done through the state purchasing office unless exempted⁵² from applicability of the code or excluded⁵³ from the requirement of using the state purchasing agent. Emergency procurements may not include the lease-purchase of heavy road equipment.⁵⁴

A multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under twenty-five thousand dollars (\$25,000), may be entered into for any period of time deemed to be in the best interests of the state agency or a local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is twenty-five thousand dollars (\$25,000) or more, the term shall not exceed eight years, including all extensions and renewals, except that for a contract entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [Chapter 6, Article 23 NMSA 1978], the term shall not exceed twenty-five years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.⁵⁵

⁴⁷*Id.* § 6-21-6.14, subsections G and H.

⁴⁸State agency “means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of this state. ‘State agency’ includes the purchasing division of the general services department and the state purchasing agent but does not include local public bodies.” *Id.* § 13-1-90.

⁴⁹Procurement means “purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction. . . .” *Id.* § 13-1-74.

⁵⁰*Id.* §§ 13-1-28 to -199. N.M. Admin. Code § 1.4.1. A guide to the procurement process is available on line at <http://www.generalservices.state.nm.us/statepurchasing>. Click on “resources.”

⁵¹N.M. Stat. Ann. § 9-17-3; N.M. Admin. Code § 1.4.1; *id.* § 1.4.1.8.

⁵²N.M. Stat. Ann. § 13-1-98. There are numerous exemptions.

⁵³*Id.* § 13-1-99. Exclusions from use of the state purchasing agent include . . . B. small purchases having a value not exceeding one thousand five hundred dollars (\$1,500); C. emergency procurement; D. procurement of highway construction or reconstruction by the department of transportation; E. procurement by the judicial branch of state government; F. procurement by the legislative branch of state government; G. procurement by the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico. . . . J. procurement by all local public bodies; . . . N. procurement by the public school facilities authority.

⁵⁴*Id.* § 13-1-127. The phrase “heavy road equipment” means “any motor-driven vehicle or apparatus capable of use for earth moving or mixing components which has an aggregate value or price of over one thousand dollars (\$1,000).” *Id.* § 13-1-60.

⁵⁵*Id.* § 13-1-150.

Prior to the utilization of a multi-term contract, the state purchasing agent or the central purchasing office involved shall make a determination that:

- A. the estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- B. the contract will serve the best interests of the state agency or a local public body.⁵⁶

When funds are not appropriated or otherwise made available to support continuation of performance of a multi-term contract in a subsequent fiscal period, the contract shall be cancelled.⁵⁷

Statewide price agreements are allowed.⁵⁸

State vehicles⁵⁹ are managed and purchased or leased by the transportation services division of the department of general services.⁶⁰ “No motor vehicle shall be leased with state money unless such lease is first specifically approved by the division.”⁶¹ Title to vehicles is in the name of the division.⁶²

The state highway and transportation department “may acquire property by purchase, lease, donation, gift, bequest, devise or eminent domain for the purpose of construction and operation of a transportation system.”⁶³ The state transportation commission is authorized to “acquire by reasonable purchase or condemnation and construct a section or a part of a state or federally designated highway as a freeway or controlled access highway.”⁶⁴ It may “acquire by purchase, [or] condemnation . . . any and all lands or property necessary for the construction, maintenance and use of a flight strip.”⁶⁵

Information technology

The secretary of the department of information technology administers functions related to information technology⁶⁶ and telecommunications generally and may promulgate rules relating to the acquisition of information technology in compliance with the procurement code and in coordination with the department of general services.⁶⁷ The secretary is required to “approve agency information technology requests for proposals prior to final approval” and to “approve executive agency information technology contracts and amendments prior to approval by the department of finance and administration.”⁶⁸

Higher Education

⁵⁶*Id.* § 13-1-151.

⁵⁷*Id.* § 13-1-152.

⁵⁸N.M. Admin. Code § 1.4.1.65 (2013). A facsimile of a master lease agreement is available online under the link “Resources and Information” at <http://www.generalservices.state.nm.us>.

⁵⁹State vehicle means “an automobile, van, sport-utility truck, pickup truck or other vehicle with a declared gross vehicle weight of less than ten thousand pounds used by a state agency to transport passengers or property.” N.M. Stat. Ann. § 15-8-3.G. State agency means “a state department, agency, board or commission but does not include the legislative and judicial branches, public schools and institutions of higher education.” *Id.* § 15-8-3.F.

⁶⁰*Id.* § 15-8-7.

⁶¹*Id.* § 15-8-8.

⁶²*Id.* § 15-8-9.

⁶³*Id.* § 67-3-71. “As used in Chapter 67, Article 3 NMSA 1978, ‘transportation system’ means facilities used for the transportation of natural resources, manufactured products or passengers and includes communication and transportation structures and other facilities necessary for the operation of the transportation facilities.” *Id.* § 67-3-77.

⁶⁴*Id.* § 67-11-2.

⁶⁵*Id.* § 67-3-56.

⁶⁶Information technology “means computer hardware and software and ancillary products and services, including:

(1) systems design and analysis; (2) acquisition, storage and conversion of data; (3) computer programming; (4) information storage and retrieval; (5) voice, radio, video and data communications; (6) requisite systems; (7) simulation and testing; and (8) related interactions between users and information systems.” *Id.* § 9-27-3.

⁶⁷*Id.* § 9-27-6 (powers of secretary); *id.* § 9-27-9 (purpose of department). Guidance to information technology contracts is available at the state’s information technology website: <http://www.doit.state.nm.us/contracts.html>.

⁶⁸N.M. Stat. Ann. § 9-27-6.C(2), (4).

Institutions of higher education,⁶⁹ “controlled and managed” by boards of regents,⁷⁰ have the power “to buy and sell or lease or mortgage realty.”⁷¹

No expenditure shall be made by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or the construction of buildings or other major structures or for major remodeling projects without prior approval of the proposed purchase or construction or remodeling by the board of educational finance and the state board of finance.⁷²

Institutions of higher education are excluded from the requirement of procurement through the state purchasing agent but not from the requirements of the procurement code.⁷³

The University of New Mexico’s board of regents retains the right to authorize the execution of contracts for the purchase of goods or services in excess of \$1,000,000.⁷⁴ The board must approve the “purchase, sale or transfer of real property” and “the leases of real property, the annual cost of which is \$1,000,000 or more,” and if the lease contains an option to purchase the real property, the Regents must approve exercising the option.⁷⁵ Contracts for the purchase of goods and services must be signed by the chief procurement officer or designee. The president has the power to sign goods and services contracts and all other contracts and agreements for the operation of the university.⁷⁶ The university may borrow money through the issuance and sale of bonds.⁷⁷

The New Mexico State University purchases of real property and construction of buildings or other major remodeling projects must be approved by the board of educational finance and the state board of finance.⁷⁸

The New Mexico State University purchases of supplies and equipment are made through the university’s central purchasing office in accordance with procedures set out in its Business Procedures Manual.⁷⁹

4.25.05 Lease/Buy Analysis of Equipment

The originating department must provide the following information on all Purchase Requisitions (PR) for the lease or lease/purchase of any type of equipment:

- Cost of the item, if it were to be purchased instead of leased or rented
- Interest rate, number of payments, amount of down payment, and any other significant terms of the lease agreement
- Date of the first payment to be made, if known

⁶⁹State educational institutions of post-secondary education include the university of New Mexico, the New Mexico state university, the New Mexico highlands university, the western New Mexico university, the eastern New Mexico university, the New Mexico institute of mining and technology, the New Mexico military institute (includes a junior college), and the northern New Mexico state school. N.M. Const. Art. XII, § 11.

⁷⁰*Id.* Art. XII, § 13.

⁷¹N.M. Stat. Ann. § 21-1-20.

⁷²*Id.* § 21-1-21; N.M. Admin. Code §§ 2.70.4; 5.3.10.8, -10. There are numerous requirements.

⁷³N.M. Stat. Ann. § 13-1-99.G.

⁷⁴Univ. N. Mex. Bd of Regents Pol’y Man. § 7.4 (Sept. 12, 1996, am. 04-08-2014).

⁷⁵*Id.* § 7.9.

⁷⁶*Id.* § 7.8.

⁷⁷*Id.* § 7.10.

⁷⁸N.M. Stat. Ann. § 21-1-21; N.M. Admin. Code §§ 2.70.4.

⁷⁹Business Procedures Manual (July 2013, rev’d 01/04/2013). Available online at <http://af.nmsu.edu/bpm/bpm-4/#00>.

A signature authority table is available at <http://af.nmsu.edu/wp-content/uploads/sites/4/2015/08/signature-authority-table-revised-07.31.15.pdf>.

- Total amount to be paid over the term of the lease, including both principal and interest
- Maintenance costs included in the monthly payment
- Buy-out option

If the total lease amount (point 4 above) exceeds the cost amount calculated (under point 1), a justification for leasing versus direct purchase must be submitted to the Central Purchasing Office.

4.40.15 Contractual Agreements

All licensing, rental, maintenance, and lease agreements are not legally binding until signed by an authorized representative of the Central Purchasing Office (CPO). The CPO will forward agreements over \$20,000 to NMSU's attorney for additional review.

Lease Agreement

The acquisition of tangible personal property by means of a contract in which the leasing agent (Supplier) conveys to the lessee (NMSU) the use of the property for a specified term. At the end of the lease term, the equipment is either returned to the leasing agent or NMSU may have the option to purchase the tangible personal property. Leases are non-taxable transactions.

Multi-term Contracts

A multi-term contract for items of tangible personal property or services may be executed for any period of time deemed to be in the best interests of NMSU, not to exceed four years (in some cases eight years), provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications; that funds are available for the first fiscal period at the time of contracting; and that the lease is in accordance with New Mexico regulations. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds.

Vehicle requisitions must have the approval of the Dean or Vice President of the relevant department.⁸⁰

Energy Performance Contracting

“Governmental units,” including institutions of higher education, may enter into installment-payment contracts or lease-purchase agreements for the purchase and installation of energy or water conservation measures pursuant to a guaranteed utility savings contracts in accordance with the provisions of the Public Facility Energy Efficiency and Water Conservation Act and Section 13-1-150 [multi-term contracts], and subject to numerous restrictions.⁸¹

Debt Limitations

The State (except as to certain real property),⁸² counties,⁸³ municipalities,⁸⁴ and school districts⁸⁵ are constitutionally limited as to amount and purpose of debt which they may incur. All are also limited by statute to debts that are or can be “paid out of the money actually collected and belonging to that current

⁸⁰*Id.* § 4.45.

⁸¹N.M. Stat. Ann. §§ 6-23-1 to -10. Governmental unit “means an agency, political subdivision, institution or instrumentality of the state, including two- and four-year institutions of higher education, a municipality, a county or a school district.” *Id.* § 6-23-2. Competitive sealed proposals are required. *Id.* § 13-1-111. State agencies may enter into contracts funded by bonds in accordance with the procurement code for the installation of energy efficiency measures for a term of up to ten years, subject to numerous restrictions. *Id.* § 6-21D-1 to -10. School districts may exercise the same authority.

⁸²N.M. Const. art. IX, § 8. “A financing agreement entered into by the state for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the state pursuant to the financing agreement is not a debt if: (1) there is no legal obligation for the state to continue the lease from year to year or to purchase the real property; and (2) the agreement provides that the lease shall be terminated if sufficient appropriations are not available to meet the current lease payments.” *Id.*

⁸³*Id.* art. IX, §§ 10, 13. The 1996 constitutional amendment added “acquiring necessary real estate for open space, open space trails and related areas and facilities” as a purpose for which a county shall have the authority to borrow money.

⁸⁴*Id.* art. IX, §§ 12, 13.

⁸⁵*Id.* art. IX, § 11.

year.”⁸⁶ However, “lease-purchase agreements . . . are exempt . . . [and] are declared not to constitute the creation of debt.”⁸⁷ The attorney general has said that despite this statutory language “certain lease-purchase agreements may constitute the creation of debt within the . . . constitutional provisions”⁸⁸ and recommends “that each agreement’s provisions be scrutinized in the light of the State Supreme Court’s definition of debt.”⁸⁹ The Supreme Court has said that debt, as used in the constitutional provisions, is a contractual obligation that entitles the creditor unconditionally to receive a specific sum of money without regard to future contingencies.⁹⁰ In *McKinley v. Alamogordo Municipal School District Authority*,⁹¹ the court struck down a lease-purchase financing between a school district and an authority it created that would issue bonds for the project. The court held that the bonds of the authority would be debt of the school district. The lease-purchase agreement provided for renewal annually unless either party notified the other of its option not to renew. The lease-purchase agreement provided for a purchase option equal to the outstanding debt of the authority. The court held that the authority was “clearly nothing less than the school district acting through a public entity other than its regularly designated Board.”⁹²

In *Montano v. Gabaldon*,⁹³ the Supreme Court of the State of New Mexico held that a lease-purchase financing of a jail facility by a county created debt under article IX, section 10 of the New Mexico Constitution requiring voter approval. The lease-purchase agreement was for a term of twenty years, contained a non-appropriation provision and was to be certificated to multiple investors. The county would have acquired the jail facility and reacquired the underlying land at the end of the twenty-year term upon payment of the final rental payment. The court stated that regardless of whether an agency of government is bound *in personam* to pay a debt, a borrowing under article IX, section 10 of the New Mexico Constitution has occurred “when, by transfer of legal title and/or the payment of money, the agency of government obtains an equitable interest in property which is subject to forfeiture in the event future periodic payments are not made as agreed.”⁹⁴ The court further stated “An agreement that commits the county to make payments out of general revenues in future fiscal years, without voter approval, violates the New Mexico Constitution even if that obligation is merely an ‘equitable or moral’ duty.”⁹⁵ The court’s holding was prospective only in light of past attorney general opinions advising that lease-purchase financings permitted by the legislature did not create debt. The *Montano* decision is read such that a lease-purchase agreement would be permitted if payable from a special fund of revenues not consisting of tax revenues. The state has taken the position that the *Montano* decision is applicable to the state.⁹⁶

⁸⁶N.M. Stat. Ann. § 6-6-11 (“Bateman Act”).

⁸⁷*Id.* § 6-6-12 (text includes lease-purchase agreements relating to energy savings). *Montano*, see, *infra*, note 93 and accompanying text, holds that such lease-purchase agreements do create debt.

⁸⁸69-39 Op. Att’y Gen. 61 (N.M. May 7, 1969).

⁸⁹76-20 Op. Att’y Gen. 87, 89 (N.M. June 23, 1976).

⁹⁰*State v. Connelly*, 46 P.2d 1097, 1100-01 (N.M. 1935). The court has also said that debt limits apply only to those entities to which they are directed, thus a flood control authority was exempt from constitutional debt limits. *Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne*, 394 P.2d 998, 1003 (N.M. 1964). In *Hamilton Test Systems, Inc. v. City of Albuquerque*, 704 P.2d 1102 (N.M. 1985), the supreme court held that a five-year service contract that was not subject to non-appropriation created debt. The court in refusing to follow the “service contract doctrine” stated that it was “a device to evade constitutional debt restrictions, and it would allow just what our constitutional debt restriction is meant to prohibit: the burdening of future taxpayers, without the prior approval of the municipality’s voters.” *Id.* at 1105. *But see Allstate Leasing Corp. v. Rio Arriba County*, 450 F.2d 26 (10th Cir. 1971) (holding that a true lease, without an option to purchase and a non-appropriation clause, did not create debt under New Mexico law).

⁹¹465 P.2d 79 (N.M. 1969).

⁹²*Id.* at 82. See also *State Office Building Comm. v. Trujillo*, 120 P.2d 434 (N.M. 1941).

⁹³766 P.2d 1328 (1989).

⁹⁴*Id.* at 1329.

⁹⁵*Id.* at 1329-30.

⁹⁶N.M. Admin. Code § 2.2.2.10.R. This section, which provides criteria for audits of agencies, says: “(1) The New Mexico supreme court has held that it is unconstitutional for agencies to enter into lease purchase agreements after January 9, 1989, unless special revenue funds are the designated source of payments for the agreement. (Any agreements executed prior to that date may not be extended or amended without compliance with the guidelines of *Montano v. Gabaldon*, 108 N.M. 94, 766 P.2d 1328). (a)

The attorney general's office issued a memorandum on April 4, 1989, stating that a lease for more than one fiscal year must (i) be terminable at the end of each fiscal year by the lessee without penalty, (ii) include a nonappropriation clause, (iii) impose no equitable or moral obligation to continue making payments, (iv) not provide for build-up of equity or automatic extensions, and (v) not include (a) principal and interest breakdown, (b) a nonsubstitution clause, (c) title transfers at the outset nor (d) language indicating funds will be available for the full term of the lease.

In *Naranjo v. County of Rio Arriba, State of New Mexico*,⁹⁷ the United States District Court for the District of New Mexico held that a limited non-appropriation clause and a non-substitution clause left future county commissioners with little choice but to build their own building or continue lease payments, and therefore the lease was unenforceable.⁹⁸

In *Wisznia v. State Human Services Department*, the State asked for proposals (RFPs) for the lease of a state office building, and the selection committee designated the plaintiff as the best bidder.⁹⁹ The plaintiff was notified that the award of the contract was subject to the approval of the plans by the General Services Department, and the appropriation by the State legislature. When the legislature did not appropriate the funds and the project did not go forward, the plaintiff brought an action claiming that a contract was formed when the State selected the bid of the plaintiff. The court held, however, that the RFP was not an offer to enter into a contract, but rather a request for an offer.

Interest Rate Limitations

"A public body may not issue its public securities . . . at any net effective interest rate in excess of twelve percent a year, except for general obligation bonds which shall have a net effective interest rate of not more than ten percent a year, unless the state board of finance at any time prior to delivery of the public securities approves such higher net effective interest rate in writing . . ."¹⁰⁰ A public body includes the state or any department, board, agency or instrumentality of the state, counties, municipalities and school districts,¹⁰¹ and public securities includes . . . bonds, notes, warrants or other obligations . . ."¹⁰² Some exceptions apply.

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or**

The attorney general interpreted Montano to mean that long-term contracts for professional services, leases, and real property rental agreements may still be entered into within the constraints of the Bateman Act and the Procurement Code. However, any agreement which is in effect for more than one fiscal year, including leases of real property, must have a provision allowing the agency to terminate the agreement at will at any time, or at least at the end of each fiscal year, without penalty. Furthermore, the agency must have no 'equitable or moral' duty to continue to make payments under the contract. The agreements must also contain a non-appropriation clause allowing for termination of the agreement in the event the agency decides not to appropriate funds for each fiscal year. (b) The attorney general subsequently opined that if the source of funds to repay the debt is solely repaid from the project revenue or from a special non-general-tax fund and not from any general tax revenue, then the debt, be it in the form of bonds or a lease purchase agreement, is not the sort of debt which triggers the constitutional requirement of approval by the voters. This is the teaching of the Connelly case relied on by the court in Montano. Montano did not reverse Connelly, Seward and the other cases which have consistently limited the application of constitutional restrictions to debts which are paid out of general tax revenues. (2) If specific questions as to the constitutionality of a particular lease agreement remain, an independent legal opinion should be obtained from the attorney general."

⁹⁷862 F. Supp. 328 (1994).

⁹⁸*Id.* at 332.

⁹⁹958 P.2d 98 (N.M. 1998).

¹⁰⁰N.M. Stat. Ann. § 6-14-3.B (2005).

¹⁰¹*Id.* § 6-14-2.B.

¹⁰²*Id.* § 6-14-2.C.

completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

NEW YORK 2017

Current through L.2016, chapters 1 to 442. McKinney's on Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴

A county may enter into installment contracts or lease-purchase agreements or similar agreements for equipment, machinery or apparatus⁵ in accordance with the following until July 15, 2018:

§ 109-b. Installment contracts. 1. As used in this section:

(a) "Political subdivision" shall mean a municipal corporation, school district, district corporation or board of cooperative educational services.

(b) "Installment purchase contract" shall mean any lease-purchase agreement, installment sales agreement or other similar agreement providing for periodic payments between a corporation, person or other entity and a political subdivision which has as its purpose the financing of equipment, machinery or apparatus.

(c) "Certificate of participation" shall mean a security or other instrument representing a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made or to be made by a political subdivision or made by the agency on behalf of a political subdivision pursuant to an installment purchase contract.

(d) "Agency" shall mean the state of New York municipal bond bank agency established by section 2433 of the public authorities law.

(e) "Agency certificates of participation" shall mean certificates of participation executed and delivered by the agency on behalf of, for the benefit of and pursuant to a written agreement with a political subdivision.

(f) Functions performed by a governing board under this section shall, in the city of New York, be performed by the mayor and comptroller, and the approvals of the mayor and the comptroller of any agreement, contract, instrument, arrangement or transaction contemplated by this section shall be the only approvals required therefor, subject to the provisions of the New York state financial emergency act for the city of New York.

2. A political subdivision may enter into an installment purchase contract subject to the following restrictions:

(a) Neither any person, partnership, corporation or other legal entity nor any political

¹Counties have home rule powers. N.Y. Mun. Home Rule Law § 33. Counties may adopt a charter for an alternative form of county government. *Id.* § 33. Counties are included in the definition of "local government" under the Statute of Local Governments. N.Y. Stat. Local Gov'ts Law §§ 1-21. *See infra* notes 14 and 18-20 and accompanying text. Counties are municipalities for purposes of the General Municipal Law and of Article 9 of the Energy Law relating to energy performance contracts, N.Y. Gen. Mun. Law § 2, and for purposes of the Local Finance Law. N.Y. Local Fin. Law § 2.00.

²N.Y. Const. art. 8, § 10.

³*Id.* art. 9, § 1(e).

⁴*Id.* art. 9, § 2(c)(10).

⁵From 1991 until its amendment in 1994, Section 109-b of the General Municipal Law authorized installment purchase contracts for the financing of "capital improvements." This term was defined to include both equipment, machinery and apparatus, and "the acquisition, erection, construction, reconstruction, alteration or renovation of buildings or any physical public betterment, including any land or rights to land reasonably related or incidental thereto" (former N.Y. Gen. Mun. Law, § 109-b(1)(d), as added by L. 1991, Chapter 413, Section 35). The 1994 amendment to Section 109-b, however, eliminated the definition of "capital improvement", and authorized installment purchase contracts only for "equipment, machinery and apparatus." This amendment effectively repealed the authority for municipalities to enter into lease purchase contracts for real property. However, an exception for energy performance contracts under Article 9 of the N.Y. Energy Law, exempts municipalities from the limitations under Section 109-b for municipalities entering into qualifying energy performance contracts pursuant to a written request for proposals. N.Y. Energy Law § 9-103(7).

subdivision, officer, employee, agency or department nor the agency for agency certificates of participation shall execute and deliver or cause the execution and delivery of certificates of participation except in accordance with the provisions of this section and with express written approval of the governing board of such political subdivision and with the concurrence of the agency for agency certificates of participation. The provisions of this section are hereby made a part of every installment purchase contract entered into by such a political subdivision or by the agency for agency certificates of participation. Every such contract shall contain a clause expressly reciting the provisions of this subdivision, provided, however, that the absence of such clause in such a contract shall not obviate the duty of all parties thereto to comply with the provisions of this subdivision. Neither this provision, nor any other provision of this section, shall be construed to prevent such political subdivisions from entering into installment purchase or lease-purchase agreements funded without the use of certificates of participation or similar instruments, as otherwise provided in this section.

(b) Subject to the provisions of subdivision five of this section, the governing board of a political subdivision shall adopt a resolution authorizing the installment purchase contract.

(c) Subject to the provisions of subdivision five of this section, where the financing of equipment, machinery or apparatus pursuant to an installment purchase contract is to be provided by agency certificates of participation, the governing board of a political subdivision shall adopt a resolution authorizing the written contract with the agency setting forth the rights and liabilities of the agency and the political subdivision as provided for in section twenty-four hundred thirty-five-a of the public authorities law.

(d) The term of such installment purchase contract, including all renewals thereof, shall not exceed the period of probable usefulness prescribed by section 11.00 of the local finance law for the equipment, machinery or apparatus being financed under the installment purchase contract.

(e) The installment purchase contract shall separately state the principal and interest component of the periodic payments to be made thereunder. The total of all periodic payments which include both principal and interest components made by the political subdivision during each year throughout the term of the installment purchase contract, shall be substantially level or falling.

(f) The installment purchase contract shall contain the following clause: "This contract shall be deemed executory only to the extent of monies appropriated and available for the purpose of the contract, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such monies. The installment purchase contract is not a general obligation of (insert name of political subdivision(s)). Neither the full faith and credit nor the taxing power of (insert name of political subdivision(s)) are pledged to the payment of any amount due or to become due under such installment purchase contract. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make moneys available for the purpose of the contract." Where agency certificates of participation are the security for such contract, such contract shall also contain the following clause: "Further no liability on account thereof shall be incurred by the state of New York municipal bond bank agency beyond the amount of such monies. It is understood that neither this contract nor any representation by any employee or officer of such agency creates any legal or moral obligation to appropriate or make state monies available for the purpose of the contract."

(g) No payment under the installment purchase contract except payment for the total amount outstanding shall be financed from the proceeds of obligations issued pursuant to the local finance law other than the proceeds of revenue anticipation notes, tax anticipation notes or budget notes.

3. (a) Installment purchase contracts for equipment, machinery or apparatus shall constitute purchase contracts for public bidding purposes and shall be subject to public bidding requirements to the extent applicable by law. For purposes of determining whether the cost of the equipment, machinery or apparatus exceeds the monetary threshold fixed in section one hundred three of this article, the cost of the equipment, machinery or apparatus, exclusive of the cost of financing, shall be considered. If the equipment, machinery or apparatus is to be financed by a party other than the party submitting the bid, the bid specifications may provide that the political subdivision may assign its right to purchase to a third party without the necessity of approval by the other party to the contract. Nothing herein shall preclude a political subdivision from advertising for bids in the alternative with and without financing.

(b) Certificates of participation caused to be executed and delivered by the political subdivision pursuant to this section, in connection with one or more installment purchase contracts entered or expected to be entered into by such political subdivision may be sold at public or private sale, either independently or in connection with a pooled or aggregate program, as determined by the governing board. The governing board may, by resolution, delegate such power to the chief fiscal officer, in which event such chief fiscal officer shall exercise such powers and perform such duties until the governing board shall, by resolution, elect to reassume the same. If certificates of participation are sold at public sale, they shall be sold

to the bidder offering the lowest interest cost as computed in accordance with the net interest cost method, taking into consideration any premium or discount, or the actuarial or true interest cost method, whichever is specified in the notice of sale, not less than four nor more than fifteen days, Sundays excepted, after a notice of such sale has been circularized in accordance with any rule or order prescribed by the state comptroller, pursuant to paragraph d of section 57.00 of the local finance law, for the circularization of notices for the sale of bonds. The terms of the sale may not be changed unless a supplemental notice of sale is provided in accordance with the procedure for the sale of bonds in paragraph b of section 58.00 of the local finance law.

(c) Whenever in the judgment of the governing board, or if authorized by the governing board, the chief fiscal officer, the interest of the political subdivision will be served thereby, the governing board, or chief fiscal officer as the case may be, may authorize the sale of such certificates of participation at private sale, including such sale in connection with a pooled or aggregate program.

(d) The state comptroller shall promulgate rules in conformance with the state administrative procedure act governing the procedure which shall be adhered to when entering into installment purchase contracts or authorizing the execution and delivery of certificates of participation pursuant to this section, including guidelines for the private sale of certificates of participation. No private sale of certificates of participation shall be conducted by a political subdivision without prior approval of the state comptroller except as provided in such rules which shall set forth the circumstances under which such approval shall not be required. The state comptroller shall annually deliver to the state division of the budget, the senate finance committee and the assembly ways and means committee a report listing all negotiated sales conducted in the previous year, including the name of the issuer and amount of the issue for each such sale.

4. (a) The proceeds of certificates of participation executed and delivered in connection with the installment purchase contract made pursuant to this section, in addition to being applied towards the cost of the equipment, machinery or apparatus, may also be used for the establishment of reserve funds to secure such certificates, the cost or premium of letters of credit, insurance or other credit enhancements, the costs of bond counsel, a financial advisor, underwriter, trustees and paying agent, and other actual and necessary expenses directly related to the issuance of such certificates. The foregoing shall not be construed to authorize the use of such proceeds for the payment of personal service expenses of the political subdivision. Where agency certificates are executed and delivered, proceeds may be used for payment by the political subdivision of the expenses incurred by the agency in connection with the execution and delivery and sale of such certificates.

(b) Each political subdivision shall have the power to enter into agreements providing credit enhancement with respect to the installment purchase contract and/or certificates of participation, but any reimbursement obligation of the political subdivision shall be subject to appropriation.

(c) The proceeds from certificates of participation may be invested only in obligations of the United States of America, obligations guaranteed by agencies of the United States of America where the payment of principal and interest are guaranteed by the United States of America, obligations of the state of New York, or special time deposit accounts in or certificates of deposit issued by a bank or trust company located and authorized to do business in the state and secured by a pledge of obligations of the United States of America, obligations of the state of New York, or obligations of any political subdivision, school district or district corporation of the state of New York.

(d) All certificates of participation shall contain the following clause: "This certificate shall be deemed executory only to the extent of monies appropriated and available for the purpose of the installment purchase contract to which it relates, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such monies. The installment purchase contract is not a general obligation of (insert name of political subdivision(s)). Neither the full faith and credit nor the taxing power of (insert name of political subdivision(s)) are pledged to the payment of any amount due or to become due under such installment purchase contract. It is understood that neither this certificate nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make monies available for the purpose of the contract."

Agency certificates of participation shall also bear the following legend: "Further, the installment purchase contract is not a general obligation of the state of New York municipal bond bank agency. Neither the full faith and credit nor the taxing power of the state of New York are pledged to the payment of any amounts due or to become due under such installment purchase contract."

5. (a) If an authorization for the issuance of obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to a permissive or mandatory referendum, then the authorization to enter into an installment purchase contract shall be subject to a permissive or mandatory referendum, as the case may be, in the same manner as provided for such referendum on the issuance of obligations.

(b) If the authorization for the issuance of obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to: (i) a certain supermajority vote of the governing board, (ii) a mandatory or permissive referendum, or (iii) both, then the authorization to enter into an installment purchase contract for equipment, machinery or apparatus shall be subject to such vote, referendum or such referendum and vote, as the case may be, in the same manner as provided for such vote and/or referendum on the issuance of obligations.

(c) If the authorization for the issuance of obligations would have been subject to a referendum only if the obligations had a maturity of more than five years or not less than some other minimum period, then the authorization to enter into the installment purchase contract shall be subject to referendum only if the term of the contract is equal to or more than such minimum period of maturity.

6. (a) Installment purchase contracts made pursuant to this section, together with any certificates of participation executed and delivered or caused to be executed and delivered in connection therewith, shall not constitute or create indebtedness of the state or a political subdivision for purposes of article seven or eight of the state constitution or section 20.00 of the local finance law, nor shall they constitute a contractual obligation in excess of the amounts appropriated therefor. Neither the state nor a political subdivision has any continuing legal or moral obligation to appropriate money for said payments or other obligations due under the installment purchase contract. No installment purchase contract shall contain any provision which, in the event of nonappropriation, precludes a political subdivision from acquiring equipment, machinery or apparatus for the same or similar purpose as the equipment, machinery or apparatus included in the installment purchase contract for a period of more than sixty days from the date of expiration, termination or cancellation of such contract, provided, however, that in no case shall an installment purchase contract contain any provision which would preclude a political subdivision from performing any statutorily or constitutionally required duties or functions, or require the political subdivision to pay liquidated damages.

(b) In the case of the failure to appropriate, the sole security, apart from any security provided by a credit enhancement, for any remaining periodic payments shall be the equipment, machinery or apparatus subject to the installment purchase contract, and if certificates of participation are executed and delivered or caused to be executed and delivered, reserve funds, if any, or any remaining proceeds from certificates executed and delivered by or on behalf of the political subdivision. Any installment purchase contract or any agreement for the execution and delivery of certificates of participation to fund an installment purchase contract may provide that the installment purchase contract or certificates of participation are secured by the underlying equipment, machinery or apparatus and that, in the event the political subdivision fails to appropriate funds sufficient for payments required under the contract, the financed equipment, machinery or apparatus may be sold on behalf of the holders of the certificates or other person entitled to receive payments under the installment purchase contract, provided that any excess proceeds from such a sale, after deduction for and payment of fees, expenses and any taxes levied on the sale, and distribution to the holders of the certificates in the amount of the face value of the certificates plus accrued interest shall be paid to the political subdivision.

(c) The aggregate amount of unpaid periodic payments, excluding interest, to be made under any outstanding installment purchase contract shall be deemed to be existing indebtedness for the purpose of determining the power of any political subdivision to contract indebtedness under section 104.00 of the local finance law. No political subdivision shall enter into any installment purchase contract if the amount of unpaid periodic payments, excluding interest, proposed to be made under such installment purchase contract and those outstanding, together with the amount of outstanding indebtedness, would exceed 115 percent of the limit prescribed by such section 104.00 or if the total amount of such payments, excluding interest, under such proposed contract and those outstanding would exceed forty percent of such limit.

7. A political subdivision shall not have the power to enter into an installment purchase contract except as authorized in this section or the education law and nothing in this section shall authorize the conveyance or lease of property owned by a political subdivision except as authorized by law.

8. Whether or not certificates of participation are of such form and character as to be negotiable instruments under the terms of the uniform commercial code, the certificates of participation are hereby made negotiable instruments within the meaning of and for all purposes of the uniform commercial code, subject only to the provisions of the certificates of participation for registration.

9. All installment purchase contracts and certificates of participation of a political subdivision and the interest thereon, shall be exempt from taxation for municipal and state purposes.

10. Certificates of participation are hereby made securities in which all public officers and bodies of this state and all municipalities and municipal subdivisions, all insurance companies and associations and other persons carrying on an insurance business, all banks, bankers, trust companies, savings banks and savings associations, including savings and loan associations, building and loan associations, investment companies

and other persons carrying on a banking business, all administrators, guardians, executors, trustees and other fiduciaries, and all other persons whatsoever who are now or may hereafter be authorized to invest in bonds or in other obligations of the state, may properly and legally invest funds, including capital, in their control or belonging to them; and are also hereby made securities which may be deposited with and may be received by all public officers and bodies of the state and all municipalities and public corporations for any purpose for which the deposit of bonds or other obligations of the state is now or may hereafter be authorized.

11. Enactment of this section shall not be construed as invalidating any installment purchase contract for any improvement to real property entered into by a political subdivision prior to the effective date of such enactment.

12. References in this section to the agency and agency certificates of participation shall cease to have force and effect on and after July first, nineteen hundred ninety two.⁶

Such installment contracts shall not constitute or create indebtedness of the state or a political subdivision for purposes of articles seven and eight of the state constitution or section 20.00 of the Local Finance Law.⁷ Contracts under this section are subject to the public bidding requirements to the extent applicable by law. The State comptroller's office has ruled that certain computer software may qualify for the "sole source" exception to the competitive bidding rules. The sole source exception is not a part of the statute itself; it is a judicially-created exception by which the courts recognize that certain "one of a kind" products, for which there is no competitive market, may uniquely serve the public interest, justifying an exception to the public bidding rules.⁸

For purposes of determining whether the cost of equipment, machinery or apparatus exceeds the monetary threshold fixed in section 103 of the General Municipal Law, the cost of equipment, machinery or apparatus, exclusive of the cost of financing, shall be considered.⁹ If the issuance of obligations to finance the equipment, machinery or apparatus would have been subject by law to permissive or mandatory referendum, then such requirements will be applicable, subject to certain conditions, to the authorization of an installment purchase contract.¹⁰

The following are the N.Y. Admin. Code provisions relating to Gen. Mun. Law § 109-b. Installment Purchase Contracts by Political Subdivisions.¹¹

* Section 39.0.* Background.

General Municipal Law, section 109-b authorizes political subdivisions to enter into installment purchase contracts to finance capital improvements and to cause or permit certificates of participation to be issued in connection therewith. Subparagraph (d) of subdivision (3) of that statute requires the State Comptroller to adopt rules "governing the procedure which shall be adhered to when entering into installment purchase contracts or authorizing the execution and delivery of certificates of participation...." This provision further provides that a political subdivision shall not conduct the private Best Section Begin sale of certificates of participation without prior approval of the State Comptroller "except as provided in such rules which shall set forth the circumstances

⁶N.Y. Gen. Mun. Law § 109-b (effective until July 15, 2018 although this statute seems to be continually reauthorized). A comptroller's opinion has taken the position that this statute should only be used for costs related to capital improvements. A decision interpreting language similar to the executory clause in section 2(f) is discussed *infra* note 46 and accompanying text.

⁷N.Y. Gen. Mun. Law § 109-b(6).

⁸Op. State Compt. 88-35 (N.Y. 1988). The State comptroller's office ruled that the sole source exemption will apply to software under the following circumstances: If a municipality objectively determines that particular prepackaged or canned software uniquely serves the public interest and that such software is available from only one source, it would appear that the software could be acquired without competitive bidding under the sole source exception. As noted, the municipality should be prepared to show, at a minimum, the unique benefits to the municipality of the software to be purchased as compared to other software in the market place; that no other software provides substantially equivalent or similar benefits; and that, considering the benefits received, the cost of the software is reasonable in comparison to other software in the marketplace.

⁹N.Y. Gen. Mun. Law § 109-b(3).

¹⁰*Id.* § 109-b(5).

¹¹2 N.Y. Admin. Code §§ 39.0 to 39.10 (current with amendments included in the New York State Register, XXXVIII, Issue 48 dated Nov. 30, 2016 (Westlaw)).

under which such approval shall not be required." This Part is being promulgated in accordance with the requirements of General Municipal Law, section 109-b (3)(d). The primary purposes of these rules are to:

- (a) cause a political subdivision to critically evaluate the financing alternatives available to it under section 109-b of the General Municipal Law and the Local Finance Law;
- (b) ensure that a political subdivision, when procuring the capital improvements to be financed, complies with the competitive bidding requirements of article 5-a of the General Municipal Law or any other general, special or local law or, if such competitive bidding requirements are not applicable, the policies required to be adopted pursuant to General Municipal Law, section 104- b; and
- (c) require a political subdivision to seek competition for financing unless the political subdivision determines that it is in its best interests to conduct a private sale of certificates of participation.

* Section 39.1.* Definitions.

For purposes of this Part:

- (a) Cost of financing shall mean the total payments of principal and interest estimated to become payable pursuant to an installment purchase contract or due on indebtedness, as the case may be, together with any estimated actual and necessary expenses incurred in connection with the execution of such installment purchase contract or the issuance of such indebtedness to the extent such expenses are not included in the periodic payments to be made under the installment purchase contract or paid from the proceeds of the indebtedness.
- (b) Evaluation of financing alternatives shall mean the evaluation prepared pursuant to section 39.2 of this Part.
- (c) Indebtedness shall mean bonds or notes issued in accordance with the Local Finance Law.
- (d) Political subdivision, capital improvement, installment purchase contract and certificate of participation shall have the meanings ascribed to them by paragraphs (a) through (d) inclusive of subdivision (1) of section 109-b of the General Municipal Law.
- (e) Pooled or aggregate program shall mean any program under which certificates of participation are issued and represent a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made or to be made by a political subdivision and one or more parties, other than the political subdivision, pursuant to installment purchase contracts.
- (f) Private sale shall mean any sale of certificates of participation, other than a public sale, conducted by a political subdivision.
- (g) Public sale shall mean any sale of certificates of participation conducted by a political subdivision pursuant to section 39.6 of this Part.

* Section 39.2.* Evaluation of financing alternatives.

No governing board shall adopt a resolution authorizing an installment purchase contract unless an evaluation of financing alternatives has been prepared in connection therewith. Such evaluation shall set forth the financing alternatives considered and the criteria used to evaluate these alternatives. The evaluation shall also contain written documentation substantiating the estimates required to be included in the evaluation pursuant to this section. At a minimum, the evaluation of financing alternatives shall contain the following:

- (a) a statement indicating the estimated cost of each capital improvement to be financed, exclusive of the cost of financing;
- (b) a statement indicating whether the proposed capital improvements may be financed with indebtedness issued under the Local Finance Law and if not, the specific reasons why such financing is not authorized;

(c) if the capital improvements may be financed with indebtedness, a statement indicating the estimated total cost of the capital improvements, inclusive of the cost of financing, if financed pursuant to the Local Finance Law;

(d) a statement indicating the estimated total cost of the proposed capital improvements, inclusive of the cost of financing, if financed pursuant to an installment purchase contract;

(e) a comparison of the estimated total costs required by subdivisions (c) and (d) of this section; and

(f) a recommendation as to whether it is in the best interests of the political subdivision to finance the capital improvements pursuant to the Local Finance Law or pursuant to an installment purchase contract and the specific reasons for such recommendation.

*** Section 39.3.* Adoption of resolution authorizing an installment purchase contract.**

Any resolution authorizing a political subdivision to utilize an installment purchase contract to finance capital improvements shall refer to the evaluation of financing alternatives and, after taking into account such evaluation, set forth the specific reasons why the governing board has determined that it is in the best interests of the political subdivision to finance the capital improvements pursuant to an installment purchase contract. The evaluation of financing alternatives shall be maintained by the political subdivision as a public record and be filed with the resolution to which it pertains.

*** Section 39.4.* Compliance with competitive bidding statutes or other applicable provisions.**

No political subdivision shall enter into an installment purchase contract unless and until it has complied with the competitive bidding requirements of article 5-A of the General Municipal Law or of any other general, special or local law. If no such competitive bidding requirements are applicable, the political subdivision shall comply with its procurement policies and procedures adopted pursuant to General Municipal Law, section 104-b. For purposes of complying with such requirements or procedures, a political subdivision may determine to solicit bids, quotations or proposals, as the case may be, in the alternative, exclusive and inclusive, of the cost of financing.

*** Section 39.5.* Procurement of vendor and nonvendor financing.**

(a) If the governing board of the political subdivision determines that it is in the best interests of the political subdivision to select a bid, offer or proposal, as the case may be, inclusive of the cost of financing, the governing board shall adopt a resolution authorizing the political subdivision to enter into an installment purchase contract with the successful bidder or offeror making a bid or offer inclusive of the cost of financing.

(b) If the governing board determines that it is in the best interests of the political subdivision to select a bid, offer or proposal, as the case may be, exclusive of the cost of financing, it shall adopt a resolution requiring the capital improvement to be procured from the successful party making a bid, offer or proposal, exclusive of the cost of financing, and directing that nonvendor financing be obtained pursuant to either section 39.6, 39.7 or 39.8 of this Part. Such resolution shall also authorize the political subdivision to enter into an installment purchase contract with any party selected to provide the financing or, if certificates of participation are to be issued, with a party acting on behalf of the holders of the certificates of participation. The resolution may also delegate to the chief fiscal officer the power to cause certificates of participation to be sold pursuant to section 39.6 or 39.7 of this Part.

(c) Any resolution adopted pursuant to this section must include a statement that execution of the installment purchase contract will not cause the political subdivision to exceed the limits prescribed by paragraph c of subdivision 6 of section 109-b of the General Municipal Law.

*** Section 39.6.* Public sale of certificates of participation.**

A political subdivision may cause certificates of participation issued in connection with one or more of its installment purchase contracts to be sold at public sale. Such certificates of participation shall be sold to the bidder offering the lowest interest cost as computed in accordance with the net interest cost method, taking into consideration any premium or discount, or the actuarial or true interest cost method, whichever is specified in the notice of sale. The notice of such sale must be circularized in accordance with any rule or order prescribed

by the State Comptroller pursuant to paragraph d of section 57.00 of the Local Finance Law for the circularization of notices for the sale of bonds. Where the notice of sale provides that bids shall be awarded based on net interest cost, the notice shall also require that the interest rate for each maturity shall not be less than the interest rate for any prior maturity. The notice of sale must be circularized not less than four nor more than 15 days, Sundays excepted, before the date fixed for the public sale unless the notice provides for a supplemental notice of sale in accordance with the procedure for the sale of bonds in paragraph (d) of section 58.00 of the Local Finance Law.

*** Section 39.7.* Private sale of certificates of participation.**

The governing board or the chief fiscal officer, if the governing board has delegated such power to him, may determine that a public sale of certificates of participation is not in the best interests of the political subdivision. The determination of the governing board or chief fiscal officer, as the case may be, shall state that a private sale of such certificates of participation is expected to reduce the cost of financing and set forth the specific factors upon which the governing board or chief fiscal officer has relied on making such determination. The factors recited in such determination may include:

- (a) unstable or volatile market conditions;
- (b) conditions of fiscal stress or negative credit factors being experienced by the issuer;
- (c) the large dollar amount of the proposed issue;
- (d) the complexity of the issue; or
- (e) any other factor which the governing board or chief fiscal officer, as the case may be, reasonably and in good faith believes will cause the cost of financing to be lower if the certificates of participation are sold at private rather than public sale.

Such determination, if made by the governing board, shall be made by resolution and if made by the chief fiscal officer, shall be made in a certificate filed with the governing board prior to such sale. Upon making the determination required by this paragraph, such certificates of participation may be sold at private sale provided that any underwriters, providers of letters of credit or liquidity facilities, bond counsel and financial advisors to be used in connection with such sale have been selected in accordance with the policies and procedures contained in section 37.5(b)-(e) of this Title. The prior approval of the State Comptroller shall not be required for any private sale of certificates of participation conducted in accordance with the requirements of this paragraph.

*** Section 39.8.* Solicitation of alternative financing quotations.**

The governing board, or if authorized by the governing board, the chief fiscal officer may solicit alternative quotations for financing from qualified interested parties. The political subdivision or chief fiscal officer, as the case may be, shall prepare and maintain written documentation of compliance with this section, including the names and addresses of all qualified interested parties from which financing quotations were sought, the responses received from such parties and written justification of the ultimate selection made. Any political subdivision which enters into an installment purchase contract pursuant to this section shall not permit certificates of participation to be issued in connection therewith except as part of a pooled or aggregate program.

*** Section 39.9.* Application of periodic payments and proceeds of certificates of participation.**

Periodic payments to be made under an installment purchase contract and the proceeds of certificates of participation shall only be applied towards the following:

- (a) the cost of the capital improvements being financed;
- (b) the payment of interest pursuant to paragraph (e) of subdivision 2 of the General Municipal Law, section 109-b;
- (c) preliminary costs of surveys, maps, plans, estimates, taking of title and interest during construction;

- (d) the establishment of reserve funds;
- (e) the cost or premiums of letters of credit, insurance or other credit enhancements;
- (f) the costs of bond counsel, financial advisors, underwriters, trustees and paying agents; and
- (g) other actual and necessary expenses directly related to the issuance of certificates of participation or execution of the installment purchase contract.

* Section 39.10.* Report to the State Comptroller.

The political subdivision shall include in its annual report filed with the State Comptroller in accordance with section 31 of the General Municipal Law such information as the Comptroller may require for all installment purchase contracts and certificates of participation that are issued in connection with such installment purchase contracts, including the amount and date of all certificates of participation sold at private sale.

Energy Performance Contracting

Counties have authority, subject to certain requirements, to enter into energy performance contracts and such contracts are not governed by Sections 103 or 109b of the General Municipal Law pertaining to installment contracts.¹² Counties are encouraged “to consult with and seek advice and assistance from the New York state energy research and development authority concerning energy performance contracts.”¹³

Municipalities

Municipalities¹⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁵ eminent domain¹⁶ and police powers.¹⁷ Municipalities have the same authority as counties and school districts to enter into installment contracts and lease-purchase agreements for the financing of equipment, machinery or apparatus.¹⁸ Municipalities have the “power to acquire real and personal property or any interest therein for its purposes, and to construct, reconstruct, equip, maintain, repair and operate the same for such purposes.”¹⁹ Municipalities also have the “power to dispose of its real or personal property or any interest therein when no longer required for its purposes, except that this power shall not be applicable to inalienable real or personal property or any inalienable interest therein.”²⁰ Municipalities may enter into sale leaseback transactions regarding ferry boats and buses.²¹

Energy Performance Contracting

Municipalities have authority, subject to certain requirements, to enter into energy performance contracts and such contracts are not governed by section 103 or 109b of the General Municipal Law pertaining to installment contracts.²² Municipalities are encouraged “to consult with and seek advice and

¹²N.Y. Energy Law § 9-103(6), (7).

¹³*Id.* § 9-103(4).

¹⁴Municipalities here considered are under the Statute of Local Governments (codified as N.Y. Stat. Local Gov’ts Law §§ 1-21, which covers counties, cities, towns and villages. *See also, supra*, note 1.

¹⁵N.Y. Const. art. 8, § 10.

¹⁶*Id.* art. 9, § 1(e).

¹⁷*Id.* art. 9, § 2(c)(10).

¹⁸*See, supra*, notes 5-11 and accompanying text.

¹⁹N.Y. Stat. Local Gov’ts Law § 10(2). Cities have the power to “take, purchase, hold and lease real and personal property within or without the limits of the city.” N.Y. Gen. City Law § 20(2). *See also* N.Y. Town Law §§ 64(2), (2-a) (towns); N.Y. Village Law § 1-102 (villages).

²⁰N.Y. Stat. Local Gov’ts Law § 10(4).

²¹N.Y. Gen. Mun. Law § 99-n.

²²N.Y. Energy §9-103(6), (7).

assistance from the New York state energy research and development authority concerning energy performance contracts.”²³

School Districts

School districts²⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁵ and eminent domain powers.²⁶

School districts have the same authority as counties and municipalities to enter into installment contracts and lease-purchase agreements for equipment, machinery or apparatus under Section 109-b.²⁷ Section 37.00(a) of the Local Finance Law provides that “school districts” other than a city school district cannot adopt a bond resolution or capital note resolution unless a tax to be collected in installments has been voted in the manner provided in the Education Law. Section 109-b(5) requires that if the other authorizing authority for financing an asset requires a referendum, then a referendum is required for an installment contract under Section 109-b. Clause 2 of Section 2.00 of the Local Finance Law defines a “school district” as any school district other than the school districts of the cities of New York, Buffalo, Rochester, Syracuse and Yonkers. Clause 2-a of Section 2.00 of the Local Finance Law defines a “city school district” as a school district of any city having less than 125,000 inhabitants. Accordingly, the referendum requirement applicable to Section 109-b wouldn’t apply to either the school districts of the cities of New York, Buffalo, Rochester, Syracuse and Yonkers, or the school districts of cities with less than 125,000 inhabitants. **All other school districts in New York appear to require voter referendum in order to enter into an installment contract under Section 109-b for equipment, machinery or apparatus.**

Common school districts have the authority to “. . . purchase or lease such schoolhouse sites and other grounds to be used for playgrounds, or for agriculture, athletic center and social center purposes, and to purchase or build such schoolhouses, as a district meeting may authorize . . . and to purchase such implements, supplies and apparatus as may be necessary to provide instruction in agriculture, or to equip and maintain playgrounds, and to conduct athletic and social center activities in the district, when authorized by a vote of a district meeting.”²⁸

Union free school districts are authorized to “provide, purchase, lease, furnish and maintain buildings or other suitable accommodations for the use of teachers or other employees of the district.”²⁹ Union free school districts may enter into agreements for the lease-purchase of instructional equipment³⁰ and of school buildings for school purposes.³¹

Central school districts and central high school districts have the same powers as union free school districts.³²

²³ *Id.* § 9-103(4).

²⁴ School districts are common school districts, union free school districts, central and central high school districts, and city school districts.

²⁵ N.Y. Const. art. 8, § 10.

²⁶ N.Y. Educ. Law § 404(2).

²⁷ *See, supra*, notes 5-11 and accompanying text.

²⁸ N.Y. Educ. Law § 1604(4). *See also id.* § 1709(6) (similar provisions applicable to union free school districts).

²⁹ *Id.* § 1709(22). *See also id.* § 2556(1), (2) (city school districts of cities of 125,000 inhabitants or more).

³⁰ *Id.* § 1725-a; N.Y. Comp. of Codes, Rules and Regs. § 170.7

³¹ *Id.* § 1726.

³² *Id.* § 1805 (central school districts); *id.* § 1903 (central high school districts).

City school districts with fewer than 125,000 inhabitants have the powers conferred to common school districts and union free school districts.³³

[Such districts shall] lease, for such term as may be necessary, and equip property when necessary for the purpose of furnishing school accommodations for the schools of the district and may enter into leases and lease-purchase agreements under the same terms and conditions as may boards of education of union free school districts.³⁴

City school districts with fewer than 125,000 inhabitants may sell and convey real and personal property when it is deemed by the board of education to be in the best interest of the school district.³⁵

City school districts with 125,000 or more inhabitants may “lease property required for the purpose of furnishing school accommodations for schools administered by the board of education and to prepare and execute leases therefor.”³⁶

Energy Performance Contracting

School districts have restricted authority to enter into energy performance contracts and such contracts “shall be an ordinary contingent expense, and shall in no event be construed as or deemed a lease or lease-purchase of a building or facility, for purposes of the education law.”³⁷ School district energy performance contracts are regulated by the commissioner of education.³⁸

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁹ and eminent domain⁴⁰ powers. Fire districts “may acquire by purchase [or] lease . . . real property and erect, construct, alter, repair and equip suitable buildings, and may furnish necessary supplies for such purposes.”⁴¹ They may “purchase or lease apparatus and equipment for the extinguishment and the prevention of fires and for the purposes of emergency rescue and first aid and fire police squads.”⁴²

In any fire district in which the office of director of purchasing has been established and a director of purchasing shall have been appointed and qualified, the director of purchasing shall make all purchases and all contracts for supplies, materials and equipment of every nature for the fire district within budgetary appropriations provided therefor. Before making any purchase, the director of purchasing shall comply with such rules and regulations in relation thereto as may be established by resolution of the fire commissioners and such provisions of law as may be applicable thereto, including article five-A of the general municipal law.⁴³

Article 5-A, referenced in the above statutory excerpt includes section 109-b relating to installment or lease-purchase contracts.⁴⁴

Numerous limitations on expenditures by fire districts exist.⁴⁵

³³*Id.* § 2503(1).

³⁴*Id.* § 2503(8).

³⁵*Id.* § 2511

³⁶N.Y. Educ. Law § 2554(6). *See also, supra*, notes 5-11 and accompanying text.

³⁷N.Y. Energy § 9-103 (3).

³⁸*Id.* § 9-103(8).

³⁹N.Y. Twn. Law § 181.

⁴⁰*Id.* § 176(14).

⁴¹*Id.*

⁴²*Id.* § 176(13).

⁴³*Id.* § 177-c.

⁴⁴ Section 109-b of the General Municipal Law is set out in the County section of this survey. *See, supra*, notes 5-11 and accompanying text.

⁴⁵N.Y. Town Law § 176(18).

Energy Performance Contracting

Fire districts have authority, subject to certain requirements, to enter into energy performance contracts and such contracts are not governed by section 103 or 109b of the General Municipal Law pertaining to installment contracts.⁴⁶ Municipalities are encouraged “to consult with and seek advice and assistance from the New York state energy research and development authority concerning energy performance contracts.”⁴⁷

Hospital Districts

There appears to be no general statutory framework for hospital districts.

State Entities

State agencies must procure goods, including technology, pursuant to Article 11 of the New York State Finance Law. Purchases of commodities⁴⁸ and services⁴⁹ may be procured by state agencies⁵⁰ through the Office of General Service centralized contracts.⁵¹ State agencies may competitively purchase commodities in lieu of using centralized contracts when the resulting price is less than the centralized contract price.⁵² The Commissioner of General Services has supervision and control of the state’s public buildings,⁵³ except that the Commissioner does not have control over facilities used by the public institutions of higher education.⁵⁴ The Commissioner may lease space for the state for a term not exceeding ten years, or sometimes 15 years, with optional renewals.⁵⁵ Construction contracts are covered by section eight of the New York State Public Buildings Law, section 38 of the New York State Highway Law, and section 376 of the New York State Education Law.

The procurement of equipment involves the Office of the Comptroller and the Division of Budget as well as the Office of General Services.

Contracts exceeding certain dollar amounts must be approved by the state comptroller:

⁴⁶N.Y. Energy § 9-103(6), (7). Fire districts are municipalities for purposes of the energy law. *Id.* § 9-102(2). .

⁴⁷*Id.*

⁴⁸Commodities means “material goods, supplies, products, construction items, electronic information resources or other standard articles of commerce which are the subject of any purchase or other exchange.” N.Y. St. Fin. Law art. 11 § 160(3) .

⁴⁹Services means “the performance of a task or tasks and may include a material good or a quantity of material goods, and which is the subject of any purchase or other exchange. For the purposes of this article, technology shall be deemed a service. Services, as defined in this article, shall not apply to those contracts for architectural, engineering or surveying services, or those contracts approved in accordance with article eleven-B [11-B] of this chapter.” *Id.* subsection 7.

⁵⁰State agency means “all state departments, boards, commissions, offices or institutions but excludes, however, for the purposes of subdivision five of section three hundred fifty-five [355(5)] of the education law, the state university of New York and excludes, for the purposes of subdivision a of section sixty-two hundred eighteen [6218] of the education law, the city university of New York; provided, however, that the state university of New York and the city university of New York shall be subject to the provisions of section one hundred sixty-five-a [165-a] of this article. Furthermore, such term shall not include the legislature or the judiciary.” *Id.* subsection 9.

⁵¹*Id.* § 163. “Service and commodities incident to the performance of a contract for labor and material and which are subject to the jurisdiction of the public service commission or subject to the jurisdiction of another similar entity shall be exempt...” *Id.* § 164.

⁵²*Id.* § 163(3)(a)(v).

⁵³N.Y. Pub. Bd. Law. § 2.

⁵⁴*Id.* § 3(7). The commissioner may act as agent for the state university pursuant to agreement with the state university construction fund. *Id.*

⁵⁵*Id.* § 3(12).

Before any contract made for or by any state agency, department, board, officer, commission, or institution, except the office of general services, shall be executed or become effective, whenever such contract exceeds fifty thousand dollars [\$50,000] in amount and before any contract made for or by the office of general services shall be executed or become effective, whenever such contract exceeds eighty-five thousand dollars [\$85,000] in amount, it shall first be approved by the comptroller and filed in his or her office, with the exception of contracts established as a centralized contract through the office of general services and purchase orders or other procurement transactions issued under such centralized contracts. The comptroller shall make a final written determination with respect to approval of such contract within ninety days of the submission of such contract . . .⁵⁶

The director of budget “shall determine whether the use of certificates of participation to finance and/or to refinance installment purchase or lease purchase contracts entered into by state departments, agencies or the city university of New York is financially desirable and in the best interest of the state.”⁵⁷

Equipment acquisition by lease-purchase or installment purchase agreement is authorized statutorily as follows:

1. a. No financed equipment acquisition⁵⁸ may be approved by the state comptroller unless the acquisition has been approved by the director of the budget and the outright purchase cost of the equipment is at least fifty thousand dollars [\$50,000] for new financed equipment acquisitions during the fiscal year nineteen hundred eighty-eight--eighty-nine [1989], and at least one hundred thousand dollars [\$100,000] for new financed acquisitions during subsequent fiscal years provided, however, that the comptroller may issue regulations establishing higher minimum outright purchase costs. Multiple items of the same type of equipment or related items of equipment procured pursuant to a single request for proposals may be grouped under one or several contracts as part of a procurement package to reach the applicable minimum. The financing of the creation or improvement of information technology systems and related research and development is authorized pursuant to this section.

b. Notwithstanding the provisions of paragraph a of this subdivision, which shall not apply to financed equipment acquisitions for units of the state university and city university of New York, no financed equipment acquisition may be approved by the state comptroller for such units until the director of the budget has determined whether such financed equipment acquisition shall be financed by certificates of participation pursuant to section sixty-six-b [66b] of this chapter. The director of the budget shall make such determination no later than thirty days following the submission of documentation, satisfactory to the director from the state university or city university of New York.

If within such period of time the director does not indicate that such financed equipment acquisition shall be financed by certificates of participation, the state university or city university of New York may proceed with a financed equipment acquisition in accordance with any other applicable provision of law. The board of trustees of the city university of New York and the board of trustees of the state university of New York shall each promulgate regulations in consultation with the comptroller and subject to the approval of the director of the budget regarding the circumstances under which units of the respective universities may use certificates of participation or other financed equipment acquisitions. Such regulations shall include but not be limited to: the establishment of minimum finance acquisition cost; restrictions on the use of certificates of participation; and annual ceilings on financed equipment acquisitions. Each board shall file copies of its regulations with the director of the budget, the comptroller, and the chairs of the senate finance committee and the assembly ways and means committee.

2. The director of the budget shall transmit to the state comptroller and the chairs of the senate finance committee and assembly ways and means committee a quarterly report on new financed equipment

⁵⁶N.Y. St. Fin. Law art. 7, § 112(2).

⁵⁷*Id.* § 66-b.

⁵⁸Financed equipment acquisition means “[p]ersonal property acquired or to be acquired by any state department and agency or unit of the state university or city university of New York through (i) lease purchase or installment purchase agreements financed or to be financed by certificates of participation sold pursuant to article five-A of this chapter or (ii) other lease purchase or installment purchase agreements.” *Id.* § 2(18).

acquisitions approved by the director of the budget during the previous quarter. The report shall identify the following:

- a. The agency and program procuring the equipment.
- b. A brief description of the equipment.
- c. The cost of the equipment if purchased outright.
- d. The interest rates and terms of such financing.
- e. The total lease purchase or installment purchase payments for the equipment.
- f. The lease purchase or installment purchase payments by fiscal year for the current fiscal year and the next five fiscal years.
- g. The anticipated source of funds to make lease purchase or installment purchase payments.⁵⁹

Technology⁶⁰ acquisitions by lease-purchase agreement are authorized by article 11, section 166 of the State Finance Law in paragraph 1a, as set out in the preceding paragraphs. Extensive information and guidelines for state contracts for specific technologies are available at the Office of Technology website.⁶¹

The Division of Budget publishes guidelines to agencies for acquisition of technology equipment.⁶²

Statewide lease-purchase contracts are available through the Office of General Services.

The budget division has published policy item H-101 relating to installment purchase and lease-purchase financing supported by bonds and the Statewide Lease Purchase Agreement:

Purpose and Scope

This item provides instructions for financing installment- and lease-purchases of (1) real property and capital improvements and (2) personal property (equipment) for all State agencies, departments, the State University of New York (SUNY), the City University of New York (CUNY), and the Unified Court System. This item does not apply to purchases financed by State public authorities.

State agencies may, with Division of the Budget (DOB) approval, finance acquisitions through State-supported bonds (New York State Personal Income Tax Revenue Bonds or the Statewide Lease Purchase Agreement). Based on the availability of low cost tax-exempt financing through the Personal Income Tax Revenue Bond Program vendor financing requests will no longer be considered for approval.

The term "installment purchase" will be used hereafter and should be understood to include all purchases financed with State-supported bonds and the Statewide Lease Purchase Agreement. The method of financing will be based upon the lowest cost alternative, as determined by DOB.

The Statewide Lease Purchase Agreement includes financing by pre-qualified equipment vendor financing companies through a statewide equipment lease-purchase agreement. Agencies are responsible for the payments to the vendor for the life of the lease-purchase agreement. Beginning

⁵⁹*Id.* § 166 (McKinney 2002 & Supp. 2013). Paragraph 1b of this section provides differently for the state university and city university of New York. Refer to Higher Education section below. The division of the budget provides bulletins and a budget policy and reporting manual online at <http://www.budget.ny.gov/guide/bprm/index.html>.

⁶⁰Technology "means either a good or a service or a combination thereof, that results in a technical method of achieving a practical purpose or in improvements in productivity. Goods may be either new or used." N.Y. St. Fin. Law § 160(10).

⁶¹<http://www.ogs.state.ny.us/>; N. Y. St. Proc. Guidelines, prepared by the state procurement council, <http://ogs.ny.gov/BU/PC/Docs/Guidelines.pdf> May 2014. The Chief Information Officer has authority to oversee the acquisition of information technology resources for state government, including state universities. N.Y. Governor Executive Order 117.

⁶²Budget Pol'y & Reporting Man. H-300; <http://www.budget.ny.gov/guide/bprm/h/h300.html> (March 26, 2008).

in 2011-12, in order to comply with tax-exempt financing rules, any approved projects which have not started to spend within eighteen months of the sale of bonds may be reallocated by DOB. In addition, any unspent bond proceeds remaining after all debt service has been paid will be used at the discretion of DOB to retire outstanding debt.

This item: (1) defines equipment costs eligible for State-supported bonds and the Statewide Lease Purchase Agreement; (2) identifies the criteria and procedures for DOB approval of all installment-purchase financings; (3) outlines the procedures and debt service payment structure for State-supported bond financing; (4) provides information on the statutory requirements for lease-purchases; (5) provides for all of the mandatory clauses required to be included in lease-purchase contracts; (6) provides instructions for requesting DOB approval of State-supported bond financing (forms H-101, H-101B and H-101C); and (7) provides instructions for requesting DOB approval for Statewide Lease Purchase Agreement (forms H-101S and H-101B).

In addition to the guidance provided by this item, State agencies may find further guidance on installment purchase financing in the Manual of Procedures for Use of State Supported Bond Proceeds, issued by DOB and the Office of General Services (OGS).

1. Definition of Equipment Costs Eligible for Financing

The following equipment costs are eligible for financing through State-supported bonds or the Statewide Lease Purchase Agreement.

Equipment costs are all costs of payment of, or reimbursement for, acquisition, installation, customization and delivery of the equipment including software licensing fees, architectural, engineering, consultant and installment management costs, shipping costs, performance and payment bond costs and letters of credit, administrative costs and capital expenditures relating to installation and financing payments, costs of feasibility, environmental and other reports, inspection costs, permit fees, filing and recording costs, printing costs, reproduction and binding costs. However, equipment costs shall not include personal service expenses of agencies, or any annual fees or costs for vendor maintenance, with the exception of fees or costs for vendor maintenance of statewide, multi-year projects costing \$50 million or more, supplies, training, software support or prepaid upgrade of computer software and/or hardware. Please consult DOB for additional information on the types of equipment that may be eligible for financing.

2. Criteria for Installment Purchases

Equipment financed with State-supported bonds must have a useful life of three years or more, and an outright purchase price of \$1,000,000 or more. Real property projects must have an outright purchase price of \$1,000,000 or more and a useful life of 10 years or more.

Equipment financed through the Statewide Lease Purchase Agreement must have a useful life of three years or more, and the minimum and maximum dollar amounts which may be financed through the Agreement are \$1,000,000 and \$15,000,000 respectively. Real property projects are not eligible for financing under the Statewide Lease Purchase Agreement.

The following criteria apply to all installment purchase contracts entered into by State agencies, departments, SUNY, CUNY, and the Unified Court System.

All equipment acquisitions will be financed for a term of three years, unless approval for a term of more than three years is obtained in writing from the DOB. The justification for a longer term must include evidence that the equipment has a useful life of at least the longer financing term. The lease term of any financing arrangement cannot be greater than the useful life of the property. Agencies may not group unrelated items of equipment to reach the minimum outright purchase price eligible for installment purchase financing. However, multiple items of the same type of personal property, or related items of property acquired as the result of a single Request for Proposal (RFP), may be grouped under one or several contracts as part of a procurement package to reach the applicable minimum purchase price.

Consultant services for software improvements are only eligible for State-supported bonds and the Statewide Lease Purchase Agreement if they are an integral part of a hardware/software procurement package. The hardware/software component of the procurement package must have a value of at least \$250,000. Stand-alone consultant services may not be financed. Requests to finance eligible consultant services must be clearly defined on the H-101 or H-101S and H-101B submitted to DOB.

Before entering into new installment purchases, agencies should consider any Federal grant or aid conditions which could affect an agency's ability to make lease payments (e.g., debt service payments). Federal Funds cannot be used to directly finance agency lease payments to OGS to reimburse the State for debt service paid on State-supported bonds. State appropriations that can be reimbursed with Federal Funds must be appropriated to make lease payments to OGS. This is due to the uncertain timing of the receipt of Federal Funds as it relates to the time the equipment is purchased (i.e., Federal Funds cannot be definitively determined to be available when the debt service payments are due and debt service payments are due regardless of when the equipment is purchased). In addition, it is not possible to reimburse Federal Funds that were used to pay debt service on equipment that is not ultimately purchased.

Interest income on financings is ordinarily tax-exempt. Agencies should therefore be cognizant of potential private use issues regarding the equipment to be financed to ensure that the purchases meet Federal Tax Law requirements. If there is use or access by any non-State or local government entity to the asset intended to be financed, it must be indicated on the H-101B form.

Agencies should keep their contract files and those at the Comptroller's Office up to date for each installment-purchase contract. Amendments to contract documents, including revised installment-purchase payment schedules and assignment and reassignment documents, must be forwarded to DOB for review. DOB will then forward the revisions to the Comptroller.

3. Schedule of Required Installment/Debt Service Payments for State-Supported Bond Financing

Agencies which use State-supported bond financing are required to make installment payments to OGS. Agencies which receive approval to finance equipment through State-supported bonds will be required to make semi-annual debt service/installment payments to OGS 15 days prior to when debt service payments are due to State-supported bondholders. Beginning in 2011-12, in order to comply with tax-exempt financing rules, any approved projects which have not started to spend within eighteen months of the sale of bonds may be reallocated by DOB. In addition, any unspent bond proceeds remaining after all debt service has been paid will be used at the discretion of DOB to retire outstanding debt. The reallocation or use of proceeds to retire debt will not result in a refund of installment payments.

For example, agency lease/debt service payments on State-supported bonds, which are typically issued in the month of October, will begin in the following February. Agencies will be required to make semi-annual payments to OGS in February and August for three consecutive fiscal years (or longer depending on the term of the bonds). Agencies will be required to make installment/debt service payments to OGS on State-supported bonds issued on their behalf regardless of when the agency actually purchases the equipment. Agency installment/debt service payments due to OGS must be timely and paid in full. Requests for State-supported bond financing by agencies with past due State-supported bonds billings will not be approved.

4. State Law Regarding Installment and Lease-purchase Financings

State Finance Law requires the Budget Director to approve all new "financed equipment acquisitions" which includes State-supported bonds (e.g., State Personal Income Tax Revenue Bonds) and the Statewide Lease Purchase Agreement. In addition, the State Finance Law provides for the responsibilities of the Executive and the Legislature regarding the State's annual budget authorization and implementation process to finance equipment and real property projects with State-supported bonds.

Section 138 of the State Finance Law requires that any assignment or reassignment of an installment-purchase contract by a financing vendor through the Statewide Lease Purchase Agreement must have the prior written approval of the State agency involved. Agencies must notify the Comptroller of all changes in assignment. [Emphasis added.]

Section 66-a of the State Finance Law requires approval by the Comptroller of any assignment of rights under an installment-purchase contract if the assignment will result in the sale of COPs by an entity other than New York State. This section provides that all contracts must include language that prohibits any other State or private party from issuing COPs to finance New York State installment-purchases without the express

written approval of the State Comptroller. Section 66-a applies regardless of whether the contract contains this language. [Emphasis added.]

5. Mandatory Clauses for Installment- and Lease-purchase Financings of Consultant Services for Software Improvements

Consultant services for software improvements are only eligible for State-supported bonds or the Statewide Lease Purchase Agreement if they are an integral part of a hardware/software procurement package. The hardware/software component of the procurement package must have a value of at least \$250,000, and stand-alone consultant services may not be financed. Agencies financing consultant services for software improvements through the use of State-supported bonds or the Statewide Lease Purchase Agreement must include the following language in the contract documents between the State agency and the consultants. Using this contract language is essential for the financings to be considered tax-exempt which results in lower interest rate costs to the State.

The mandatory contract language is as follows:

It is anticipated the Project Deliverables under this [Agreement] may include “existing” and/or “custom” materials. “Existing Materials” include, without limitation, such things as: programs, program listings, programming tools, documentation, reports, drawings, data, modules, components, utilities, interfaces, templates, subroutines, algorithms, formulas and technical information, existing prior to or independently developed by [Vendor] or another Third Party other than as a result of this [Agreement]. “Custom Materials” include, without limitation, such things as: programs, programming tools, source codes, object codes, user or training manuals, programming, reports, drawings and any other materials, preliminary, final and otherwise, created, prepared, written or developed, whether jointly or individually, for the [Agency] under this [Agreement].

New York State shall have ownership and the perpetual rights to use, copy, modify, and prepare derivative works of the Custom Materials, developed in the course of the [Services] pursuant to this [Agreement], whether jointly or individually, subject to the terms of [specify any Articles or sections of Agreement related to confidentiality treatment of Existing Materials and Custom Materials]. All rights in the Custom Materials remain in the [Agency]. The parties will cooperate with each other and execute such other documents as may be appropriate to achieve the objectives of this [Article]. With respect to any third party software provided by the [Agency] to [Vendor] hereunder which [Vendor] modifies and/or enhances as provided for under this [Agreement], the [Agency] shall be responsible for obtaining from the third party licensors the necessary rights to such software, including the rights for [Vendor] to access, use and modify the software on behalf of the [Agency] to own such modifications and replacements thereto.

The [Agency] acknowledges that [Vendor] in performing hereunder may use any information, products and Existing Materials that are proprietary to the [Vendor]. The [Agency] will use reasonable efforts to preserve the proprietary character of Existing Materials. Other than those rights or interest in the Existing Materials specifically provided by this [Agreement], the [Agency] shall receive no rights or interest in such Existing Materials of the [Vendor] including any enhancements and improvements thereto which are not created as a result of this [Agreement], except pursuant to a separate written agreement. Furthermore, nothing herein shall preclude the [Vendor] from using the related or underlying general knowledge, skills and experience developed in the course of providing the deliverables and intellectual property under this [Agreement] in the course of [Vendor's] business.

The State retains the right to sell, or license on an exclusive or non-exclusive basis, the Custom Materials developed under this [Agreement]. The sale or licensure of such Custom Materials shall not occur until such Custom Materials are or become useable. The sale or licensure of such Custom Materials shall be at a fair market value. The fair market value of such Custom Materials shall be determined at the time of sale or licensure. In the event the [Vendor] wishes to purchase any Custom Materials developed under this [Agreement], such purchase shall be pursuant to a separate written agreement.

6. Other Mandatory Clauses for Installment –and Lease-purchase Financings

Installment-purchase contracts should include a “non-appropriation” or “executory” clause which states that installment-purchase contracts are not State debt as defined in Article VII of the State Constitution, nor are they a contractual obligation, except to the extent that money is appropriated to make installment-purchase payments. Additionally, the State has no continuing legal or moral obligation to appropriate funds to make installment-purchase payments or any other payments due under installment-purchase contracts.

Installment-purchase contracts for the Statewide Lease Purchase Agreement may contain a “non-substitution” clause. This prohibits an agency from acquiring substitute equipment to replace equipment for which installment payments were not appropriated. This type of

restriction would stipulate a time period during which substitution was prohibited. The intent of this clause is to prevent the State from arbitrarily using an event of non-appropriation to terminate an installment-purchase contract.⁶³

7. Instructions for Requesting Budget Approval of State-Supported Bonds to Finance Equipment [can be found in forms H-101, H-101B, and H101C]

Agencies, upon receipt of a Budget Bulletin announcing a planned State-supported bonds issuance, must submit an H-101, H-101B and H-101C request for prior approval by the Director of the Budget for all new equipment or real property installment-purchase obligations and all refinancings of such obligations. Form H-101 identifies basic information on the installment-purchase, form H-101B provides narrative justification, and form H-101C provides the anticipated schedule of proceeds expenditures. Requests for H-101, H-101B, and H-101C approval should be submitted to the agency's budget examiner.

a. Instructions for Completing Form H-101 – Request for Approval of Installment-Purchases – State-Supported Bonds

General Heading Entries

“H-101 Number ____”. This number will be assigned by DOB when it processes the agency request.

“FY 20__-20__”. Enter the fiscal year in which your agency will enter into an installment-purchase obligation for the items listed on the H-101.

Identify the agency, program, division/institution and agency code for which the item will be procured. Identify the fund type and the name and code numbers for the fund and account that will be used to make installment-purchase payments.

Column A – “Description of Equipment or Real Property”

Describe the item of equipment (e.g., computer mainframe) or real property (i.e., capital project or real property acquisition) to be financed.

Column B – “Acquisition Cost”

Identify the cost of the equipment or real property if it were paid for outright rather than financed over time. If a refinancing is involved, specify the prepayment amount required to buy out the existing installment-purchase contract.

Column C – “Date to Order Equipment/Property”

Identify the date the equipment purchase or real property project will be initiated through the execution of a contract, contract amendment, or purchase order. Contracts and purchase orders must be approved by the Office of the State Comptroller prior to ordering equipment or initiating a real property project, and if appropriate, reviewed by the State Office for Technology.

Column D – “Date(s) Financing Required”

Identify the date(s) when you expect to purchase the equipment/property from the vendor/contractor. If the contract for the equipment acquisition or real property project includes a provision for progress payments, agencies should identify the amounts of progress payments and payment dates on the H-101. Progress payments are used for real property projects where the contractor is paid as work is completed.

Column E – “Useful Life”

Identify the useful life of the equipment or real property to be financed. The useful life should generally be consistent with recognized industry or professional standards.

Column F – “Finance Term”

Agencies can only finance equipment for three years unless approval for a different term is obtained from DOB. In no event can a term of a lease exceed the useful life of the property being financed.

⁶³Query whether the nonsubstitution clause is enforceable and might even invalidate the contract.

In Column G – “Date of First Installment-Payment”

Enter the month of February and the calendar year following the October in which State-supported bonds are expected to be sold.

In Column H – “First Year Installment-Payments”

For the purpose of calculating first-year installment payments, agencies should assume that State-supported equipment finance bonds will be issued in October. Enter the total amount of installment/debt service payments to be made to OGS in February following the October in which the State-supported bonds are issued. Please refer to the most recently issued Budget Bulletin for Installment-Purchase Financing of Equipment for guidance on the interest rates to be used in calculating installment payments.

In Column I – “Total Installment-Payments”

Enter the total amount of installment/debt service payments to be made during the three (or term of the bonds) years following the October in which the State-supported bonds are issued. Please refer to the most recently issued Budget Bulletin for Installment-Purchase Financing of Equipment for guidance on the interest rates to be used in calculating installment payments.

Agencies which receive approval to finance equipment through State-supported bonds will be required to make semi-annual debt service/installment payments to OGS 15 days prior to when debt service payments are due to State-supported bondholders. Typically, the first payment will begin in February following the October in which State-supported bonds are issued and will be made for three years. Since State-supported bonds are typically sold annually in October, agencies will be required to make semi-annual debt service payments to OGS in February and August.

Agencies will be required to make installment/debt service payments to OGS on State-supported bonds issued on their behalf regardless of when the agency actually purchases the equipment.

Agency installment/debt service payments due to OGS must be timely and paid in full. Requests for State-supported bond financing by agencies with past due COPs or State-supported bonds billings will not be approved.

Column J – “Expenditure Object Code”

Identify the State Comptroller’s object code against which the contract will be charged.

Signatures for Agency Request and Division of the Budget Approvals

The H-101 must be signed by an agency representative, the examination unit, and the Expenditure/Debt Unit of the Division of the Budget. State-supported bond financing requests must be amended by the agency and approved by the Division of Budget.

b. Instructions for Form H-101B – Request for Approval of Installment- Purchase Contracts- Justification for State-Supported Bonds

This justification schedule should be completed for all items listed on Form H-101. If additional space is required, attach separate sheet(s) and be sure to identify the item which such material supplements.

General Heading Entries

“FY 20__-20_”. Enter the fiscal year in which your agency will enter into an installment-purchase obligation for the items listed on the H-101.

Identify the agency, agency contact person and phone number, program and division/institution for which the item will be procured. Identify the fund type and the name of the fund and account that will be used to make installment-purchase payments.

“Item of Equipment or Real Property”. Provide the same description of equipment or real property as shown on form H-101.

1. Description of the Installment-Purchase

Describe the equipment or real property to be procured in sufficient detail to explain its purpose and use. This description will be used as a basis for determining whether the proposed purchase is eligible for financing.

If multiple items of related equipment/property are grouped together under a general description to reach the program's minimum purchase price of \$250,000 (e.g., office equipment, vehicles, computer equipment), please provide a list describing each item and identifying the anticipated cost of each item.

2. Cost Estimate

For the item(s) of equipment and real property, provide a cost estimate for the hardware, software and consulting components (if applicable). Standalone consulting services are not eligible for installment-purchase financing. Consulting services may be financed if the services are part of an integrated system and the hardware and/or software component(s) total \$250,000. Indicate if there are progress payments.

3. Is it an Integrated System?

Explain if the equipment to be procured (i.e., hardware, software, consulting services) is part of an integrated system.

4. Private Use

Explain if the equipment or real property intended to be financed will be used or accessed by any non-State or local government person, including any non-employee position (e.g., SUNY Hospitals).

5. Contingent Factors

Explain if this purchase is contingent upon some other event, such as the major renovation of a building to install the equipment to be financed.

6. Related Procurement

Explain any planned equipment or real property procurements that would have a significant relationship to this purchase.

7. Source of Payment for Installment-Purchases

Explain the appropriation source (e.g., State Operations, Special Revenue Other) and the amount, by appropriation, planned for all installment-purchase payments for the current fiscal year.

8. Planned for Outright Purchase

If funds have been appropriated for the outright purchase of all or a portion of this equipment, identify the appropriation source (e.g., State Operations, Special Revenue Other) and the amount appropriated for outright purchase by appropriation source.

9. Technology Purchases

Budget Policy and Reporting Manual Item H-300A requires agencies to submit Annual Technology Plans (ATPs) to facilitate statewide planning and coordination of technology initiatives. Among other requirements, ATPs must include a detailed proposal for each new initiative summarizing the types of goods and services to be acquired and the planned method of acquisition. Please indicate whether the equipment was identified in an ATP and how it relates to an initiative identified in the ATP. In addition, please indicate whether the Office for Technology has approved an Intent to Purchase Technology in connection with this purchase.

10. Useful Life Justification

All equipment acquisitions will be financed for a term of three years, unless approval for a term of more than three years is obtained from the Division of the Budget. If a financing term greater than three years is requested, agencies must provide a thorough explanation of how the stated useful life of the equipment or real property was determined. The useful life justification should generally be consistent with recognized industry or professional standards.

c. Instructions for Form H-101C – Request for Approval of Installment Purchase Contracts- Schedule of Payments to Vendors

This schedule of anticipated payments to vendors should be completed for all items listed on Form H-101. If additional space is required, attach separate sheet(s) and be sure to identify the item which such material supplements.

General Heading Entries

“FY 20__-20__”. Enter the fiscal year in which your agency will enter into an installment-purchase obligation for the items listed on the H-101.

Identify the agency and program for which the item will be procured. Identify the fund type and the name for the fund and account that will be used to make installment-purchase payments.

“H-101 Description”

Describe the item of equipment (e.g., computer mainframe) or real property (i.e., capital project or real property acquisition) to be financed.

“Total Project Amount”

Estimate the total amount of the project cost to be financed.

“Dates”

Identify the dates the agency expects vendor payments to occur.

“Amounts”

Enter the amounts expected to be paid to the vendor for each of the dates listed above.

8. General Guidelines for Statewide Lease-purchase Agreements and Vendor Financing

Statewide Lease Purchase Agreements are a statewide vendor equipment financing program that pre-qualifies equipment vendor financing companies through a statewide equipment lease purchase agreement. Agencies requiring financing for equipment will conduct a mini-bid process using the pool of pre-qualified vendors. Agencies using the Statewide Lease Purchase Agreements will not need to draft, submit and review Requests for Proposals to finance equipment purchases. Agencies cannot finance more than \$15 million for a single purchase through the Statewide Lease Purchase Agreement.

Installment-purchase agreements must provide that title passes to the State at some point during the term of the payment period. If there is a purchase option price due at the close of the financing term, it must be a nominal cost (i.e., one dollar). In addition, installment-purchase agreements should allow for pre-payment of the agreement. If the contract requires a premium charge (i.e., penalty) for pre-payment of the agreement, the charge should not exceed two percent of the outstanding principal balance due, and should be considered in determining overall costs.

Agencies are responsible for the payments to the vendor for the life of the lease-purchase agreements.

9. Instructions for Requesting Budget Approval of statewide Lease-purchase Agreements and Vendor Financing [can be found in forms H-101S and H-101B]

Agencies must submit an H-101S and H-101B request for pre-approval and approval by the Director of the Budget for all new equipment or real property installment-purchase obligations. Form H-101S identifies basic information on the installment-purchase and form H-101B provides narrative justification. Requests for H-101S and H-101B approval should be submitted to the agency's budget examiner.

a. Instructions for Completing Form H-101S – Request for Approval of Installment-Purchases – Statewide Lease Purchase Agreements and Vendor Financing

General Heading Entries

“H-101S Number _____”. This number will be assigned by OSC when it processes the agency request.

“FY 20__-20__”. Enter the fiscal year in which your agency will enter into an installment purchase obligation for the items listed on the H-101S.

“Statewide Lease Purchase Agreement” or “Vendor Financing”. Indicate which type of installment purchase financing the agency is requesting.

“Pre-approval” or “Approval”. Indicate if this is a pre-approval for the agency to solicit bids or a final approval of a vendor and interest rate.

Identify the agency, program, division/institution and agency code for which the item will be procured. Identify the fund type and the name and code numbers for the fund and account that will be used to make installment purchase payments.

Column A – “Description of Equipment or Real Property”

Describe the item of equipment (e.g., computer mainframe) or real property (i.e., capital project or real property acquisition) to be financed.

Column B – “Acquisition Cost”

Identify the cost of the equipment or real property if it were paid for outright rather than financed over time.

Column C – “Date to Order Equipment/Property”

Identify the date the equipment purchase or real property project will be initiated through the execution of a contract, contract amendment, or purchase order. Contracts and purchase orders must be approved by the Office of the State Comptroller prior to ordering equipment or initiating a real property project, and if appropriate, reviewed by the State Office for Technology.

Column D – “Date(s) Financing Required”

Identify the date(s) when the vendor/contractor must be paid for the equipment acquisition or real property project. For most equipment purchases, the vendor payment date occurs after installation and acceptance of equipment. If the contract for the equipment acquisition or real property project includes a provision for progress payments, agencies should identify the amounts of progress payments and payment dates on the H-101S. Progress payments are used for real property projects where the contractor is paid as work is completed, and for some equipment acquisitions which require lengthy installation and testing periods (e.g., telecommunications systems).

Column E – “Useful Life”

Identify the useful life of the equipment or real property to be financed. The useful life should generally be consistent with recognized industry or professional standards.

Column F – “Lease Term”

Agencies can only finance equipment for 3 years unless approval for a different term is obtained from DOB. In no event can a term or a lease exceed the useful life of the property being financed.

Column G – “Date of First Installment-Payment”

Identify the date the agency will begin installment-purchase payments to the vendor. The first installment-payment normally occurs after the vendor is paid for an invoice, either for a progress payment or a payment-in-full.

Column H – “First Year Installment-Payments”

Estimate the agency’s total installment-purchase payments in the first year of the financing.

Column I – “Total Installment-Payments”

Estimate the total amount of all agency installment-purchase payments for the entire term of the installment-purchase.

Column J – “Expenditure Object Code”

Identify the State Comptroller’s object code against which the contract will be charged.

“Financing Institution”

Indicate the financing institution that has been chosen through the Statewide Lease Purchase Agreement mini-bid process or the RFP process for vendor financing. This must be included on the “Approval” H-101S form.

“Approved Interest Rate”

Indicate the approved interest rate of the financing institution. This must be included on the final approval H-101S form.

Signatures for Agency Request and Division of the Budget Approvals

The H-101S must be signed by an agency representative and the Division of the Budget. Vendor financing and Statewide Lease Purchase Agreement requests must be amended by the agency and approved by the Division of the Budget.

b. Instructions for Form H-101B – Request for Approval of Installment – Purchase Contracts –Justification

This justification schedule should be completed for all items listed on Form H-101S. If additional space is required, attach separate sheet(s) and be sure to identify the item which such material supplements.

General Heading Entries

“FY 20__-20__”. Enter the fiscal year in which your agency will enter into an installment-purchase obligation for the items listed on the H-101S.

Identify the agency, agency contact person and phone number, program and division/institution for which the item will be procured. Identify the fund type and the name for the fund and account that will be used to make installment-purchase payments.

“Item of Equipment or Real Property”. Provide the same description of equipment or real property as shown on form H-101S.

1. Description of the Installment-Purchase

Describe the equipment or real property to be procured in sufficient detail to explain its purpose and use. This description will be used as a basis for determining whether the proposed purchase is eligible for financing under the program.

2. Cost Estimate

For the item(s) of equipment and real property, provide a cost estimate for the hardware, software and consulting components. Stand-alone consulting services are not eligible for installment-purchase financing. Consulting services can be financed if the services are part of an integrated system and the hardware and/or software component(s) total \$250,000. Indicate if there are progress payments.

3. Is it an Integrated System?

Explain if the equipment to be procured (i.e., hardware, software, consulting services) is part of an integrated system.

4. Private Use

Explain if the equipment or real property intended to be financed will be used or accessed by any non-State or local government person, including any non-employee position (e.g., SUNY Hospitals).

5. Contingent Factors

Explain if this purchase is contingent upon some other event, such as the major renovation of a building to install the equipment to be financed.

6. Related Procurement

Explain any planned equipment or real property procurements that would have a significant relationship to this purchase.

7. Source of Payment for Installment-Purchases

Explain the appropriation source (e.g., State Operations, Special Revenue Other) and the amount, by appropriation, planned for all installment-purchase payments for the current fiscal year.

8. Planned for Outright Purchase

If funds have been appropriated for the outright purchase of all or a portion of this equipment, identify the appropriation source (e.g., State Operations, Special Revenue Other) and the amount appropriated for outright purchase by appropriation source.

9. Technology Purchases

Budget Policy and Reporting Manual Item H-300A requires agencies to submit Annual Technology Plans (ATPs) to facilitate statewide planning and coordination of technology initiatives. Among other requirements, ATPs must include a detailed proposal for each new initiative summarizing the types of goods and services to be acquired and the planned method of acquisition. Please indicate whether the equipment was identified in an ATP and how it relates to an initiative identified in the ATP. In addition, please indicate whether the Office for Technology has approved an Intent to Purchase Technology in connection with this purchase.

10. Useful Life Justification

All equipment acquisitions will be financed for a term of three years, unless approval for a term of more than three years is obtained from the Division of the Budget. If a financing term greater than three years is requested, agencies must provide a thorough explanation of how the stated useful life of the equipment or real property was determined. The useful life justification should generally be consistent with recognized industry or professional standards.⁶⁴

Standard clauses, known as “Appendix A,” must be inserted in state contracts.⁶⁵

Certain procurement contracts are exempt from advertisement requirements.⁶⁶

Contract terms may be subject to review by the state attorney general.⁶⁷ The Office of General Services is responsible for statewide purchase contracts relating to the acquisition of motor vehicles for all state agencies except the Division of State Police.⁶⁸ The Superintendent of the Division of State Police has statutory authority to enter lease-purchase agreements for equipment and real property.⁶⁹

Higher Education

There are two public university systems; the State University of New York (SUNY) and The City University of New York (CUNY).

The State University of New York (SUNY) is governed by a board of trustees.⁷⁰

⁶⁴*Id.* <http://www.budget.ny.gov/guide/bprm/h/h101.html> (10/8/2010) XI.11.G.⁶⁵Known as “Appendix A,” this document can be found at: <http://www.ogs.state.ny.us/procurecounc/pdfdoc/AppendixA.pdf> (Jan. 2014).

⁶⁵Known as “Appendix A,” this document can be found at: <http://www.ogs.state.ny.us/procurecounc/pdfdoc/AppendixA.pdf> (Jan. 2014).

⁶⁶N.Y. Econ. Dev. Law § 144.

⁶⁷N.Y. Exec. Law § 63.

⁶⁸Budget Pol’y & Rpt Man. D-750 (eff. 9/18/2009), <http://www.budget.ny.gov/guide/bprm/d/d750.html>.

⁶⁹N.Y. Exec. Law § 212 (equipment); § 213 (real property) (approval of the attorney general required).

⁷⁰N.Y. Educ. Law § 353. *See generally id.* tit. I, art. 8. The SUNY board of trustees has overall supervision of state-operated institutions of higher education and general supervision, including supervision over expenditures, of statutory or contract colleges in the state university [independent institutions operated on behalf of the state] and provides standards and regulations concerning community colleges and certain four year colleges [established under N.Y. Educ. Law art. 126, receiving funds from the state]. *Id.* §§ 350, 355(1)(c). The Chancellor acts as chief executive officer. *Id.* § 203. The City University of New York is an independent

State university trustees are authorized

[t]o take, hold and administer on behalf of the state university or any institution therein, real and personal property or any interest therein The trustees may acquire property . . . by purchase, appropriation or lease . . . within appropriations made therefor, may equip and furnish buildings and otherwise improve property owned, used or occupied by the state university or any institution therein Where real property is to be acquired by purchase or appropriation, such acquisition shall be in accordance with the provisions of section three hundred seven of this chapter [§ 307, eminent domain].⁷¹

The City University of New York (CUNY) is governed by a board of trustees empowered to acquire sites, and purchase materials, services, equipment and supplies.⁷² CUNY may acquire property by purchase, lease or appropriation in accordance with the provisions of the eminent domain law.⁷³

University trustees may purchase “equipment and supplies, including computer equipment and motor vehicles” and enter into construction contracts without prior approval by any other state officer or agency.⁷⁴ The Division of Budget will determine whether equipment acquisition shall be financed by certificates of participation.⁷⁵ The universities’ acquisition of equipment by lease-purchase may be regulated by the boards of trustees of SUNY and CUNY respectively.⁷⁶ They are permitted to participate in state contracts.⁷⁷

Installment purchases and lease-purchases of equipment, real property and capital improvements by SUNY and CUNY financed with state supported bonds and the Statewide Lease Purchase Agreement are covered by item H-101 of the Division of Budget Policy and Reporting Manual.⁷⁸

Within SUNY is a corporation known as the State University Construction Fund created for the purpose of assisting the university in capital planning and land acquisition.⁷⁹ It acts as the university’s agent for the acquisition of educational facilities, but does not appear to be involved with the financing of the projects.⁸⁰ A broad array of capital projects and equipment acquisitions (not limited to dormitories) are financed through the Dormitory Authority of New York (DASNY).⁸¹

Energy Performance Contracting

State agencies, not including the state university, have authority, subject to certain requirements, to enter into energy performance contracts for up to 35 years.⁸² Agencies are encouraged “to consult with and seek advice and assistance from the New York State Energy Research and Development Authority

system of higher education governed by its own board of trustees. *Id.* § 6201. The University of the State of New York (USNY) is a governmental umbrella corporation for all colleges and universities in the state. It is governed by a board of regents and coordinates master planning for education, but is not involved in the budget process. *See generally, Id.* tit. 1, art. 5.

⁷¹*Id.* § 355(2)(a).

⁷²*Id.* § 6206.

⁷³*Id.* § 6213.

⁷⁴*Id.* § 355 (5)(a) and (6) (SUNY). SUNY trustees may enter into contracts for state university health care facilities. *Id.* § 355(16). Similar provisions apply to CUNY. *Id.* § 6218.

⁷⁵N.Y. St. Fin. Law § 166.1b. *See, supra*, note 59 and accompanying text.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*See, supra*, note 66 and accompanying text.

⁷⁹*See* N.Y. Educ. Law tit. 1, art. 8-A.

⁸⁰*Id.* § 376.

⁸¹*See* N.Y. Pub. Auth. Law art. 8, title 4.

⁸²N.Y. Energy § 9-103(6), (7).

(NYSERDA) concerning energy performance contracts.”⁸³ Many conservation projects are financed through NYSERDA.⁸⁴

Debt Limitations

The state, counties, municipalities and school districts are constitutionally limited in the amount of debt which they can incur.⁸⁵ Statutory limitations are also imposed on the amount of debt that counties, municipalities, school districts, and fire districts may incur, including installment purchase contracts.⁸⁶ In addition, counties, municipalities and school districts “may not contract indebtedness for any object or purpose for a period longer than the period of probable usefulness set forth . . . for such object or purpose.”⁸⁷

*Smith v. Newburgh*⁸⁸ involved a suit for rent on a tract of land leased to the city for a term of twenty years, with an option in the city to purchase the property throughout the term. The court held that the city was not liable for the rental payments because the aggregate amount of the payments under the lease exceeded the city’s authority to incur debt. As to the amount of the debt, the court said, “[t]he whole liability was incurred upon the execution of the lease.”⁸⁹

This reasoning was followed in the more recent case of *Marine Midland Trust Co. v. Village of Waverly*⁹⁰ in which a village leased a public parking lot for a term of twenty years with an option at the end of the term to purchase the tract for \$1.00. The court looked to substance over form and held that the agreement was not a lease but a purchase agreement, and as such was beyond the village’s authority to incur debt and violated the constitutional debt limits.⁹¹ *Marine Midland*⁹² relied on the earlier case of *Gardner v. Town of Carmeron*⁹³ in which a town leased a steam roller for a term of five years with an option in the town to renew the lease each year and an option to purchase the property at the end of the term for \$1.00. The court said that this was simply a purchase agreement and beyond the authority of the town. In dicta, the court said that even had the contract been otherwise valid, it was invalid because the option to renew was automatic and required no affirmative act on the part of the town to renew for another term.⁹⁴

Two older cases hold that debt is not created when payments are made out of current revenues.⁹⁵

In *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corporation*,⁹⁶ the New York Supreme Court interpreted an executory clause similar to Section 109-b2(f)⁹⁷ in a lease agreement, which also included the obligation of the city to

⁸³ *Id* § 9-103(4).

⁸⁴ See N.Y. Pub. Auth. Law art. 8, titles 9, 9A.

⁸⁵ N.Y. Const. art. 7, § 11 (state); *id.* art. 8, § 4 (counties, municipalities, school districts). See generally N.Y. Const. art. 8.

⁸⁶ See generally N.Y. Local Fin. Law.

⁸⁷ *Id.* § 11 (periods of probable usefulness are set out in the statute)..

⁸⁸ 77 N.Y. 130 (1879).

⁸⁹ *Id.* at 133.

⁹⁰ 42 Misc.2d 704, 248 N.Y.S.2d 729 (1963), *aff’d*, 21 A.D.2d 753, 251 N.Y.S.2d 937 (1964).

⁹¹ 248 N.Y.S.2d at 731-32.

⁹² *Id.*

⁹³ 155 A.D. 750, 140 N.Y.S. 634 (1913), *aff’d*, 215 N.Y. 682, 109 N.E. 1074 (1915).

⁹⁴ 140 N.Y.S. at 640.

⁹⁵ *Utica Water-Works Co. v. City of Utica*, 31 Hun. 426, 430-431 (1884) (contract to furnish water upheld no debt created until services furnished); *O’Reilly v. City of Kingston*, 175 A.D. 207, 161 N.Y.S. 632, 634 (1916) (obligations payable from current funds are not prohibited by the constitution).

⁹⁶ 791 N.Y. S.2d 698 (2005).

⁹⁷ See, *supra*, note 6 and accompanying text for this statute.

include in its budget request for each Fiscal Year the Lease Payments to become due in such Fiscal Year, and [to] use all reasonable and lawful means at its disposal to ensure the appropriation of money for such Fiscal Year sufficient to pay the Lease Payments coming due therein.⁹⁸

The lease was for sludge equipment that was not operating properly. The city decided to not appropriate funds for the rental payments under the lease for the 1998 fiscal year. The city contended that the executory clause absolved the city of any liability under the lease. The court held that such executory clauses are enforceable only where it has been established that funds were not available “in the course of ordinary budgetary procedures.” The court went on to state

Available funds, however, are funds that are necessary to the proper administration of a particular municipal project. Hence, even though a municipality may possess sufficient funds to satisfy a particular obligation, such funds cannot be deemed “available” if the expenditures thereof would be improvident. On the other hand, “any availability of funds must not have been the result of an improper act or omission by the [municipality] inasmuch as it is bound by the same rules of honesty and justice as individuals when contracting.”⁹⁹

The court distinguished between (1) the possible permissibility of having the funds unavailable for the specific purpose because of the need for the city to use the funds on a facility that would function properly, and (2) an impermissible unavailability of funds because a new administration believed the contract to be financially ill-advised and that such administration could do better by constructing a new and better facility.¹⁰⁰ It should also be noted that the executory clause currently in Section 109-b2(f) also contains the following language to be inserted into contracts, which was not referenced by the court:

It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make moneys available for the purpose of the contract.¹⁰¹

The court also did not address how the constitutional debt limitations in New York might affect its interpretation of the executory clause.¹⁰²

Interest Rate Limitations

There are no interest rate limitations on lease-purchase agreements or installment sales agreements for equipment, machinery or apparatus entered into by counties, municipalities, school districts, and fire districts.

Miscellaneous

In *Ames Contracting Co., Inc. v. City University of New York*,¹⁰³ the university neglected to give the full 60-days prior written notice to exercise a \$1.00 purchase option at the end of a five year lease of a dining hall. Even so the court upheld the exercise of the option to prevent “intolerable forfeiture and an unwarranted windfall.”¹⁰⁴

In *Forelli v. State*,¹⁰⁵ the state, as lessee of office space, decided to terminate its lease by invoking an executory clause which allowed cancellation when money was “unavailable” to make payments. The

⁹⁸791 N.Y.S.2d at 699 n. 1.

⁹⁹*Id.* (citations omitted).

¹⁰⁰*See id.*

¹⁰¹*Id.* at 700.

¹⁰²*See, supra*, note 85 and accompanying text. The court did not note whether the obligation of the city under the lease was from the general fund or from a special fund payable from revenues of the sewerage system.

¹⁰³485 N.Y.S.2d 259 (N.Y. Sup. Ct. 1985).

¹⁰⁴*Id.* at 261.

¹⁰⁵577 N.Y.S.2d 844 (N.Y. App. Div. 1992).

appellate court found the state's purported termination of the lease at the department level ineffective. For the funds to be "unavailable" in order to terminate such a lease, a legislative or budgetary directive not to provide funds for the expenditure in question is required.

The office of state comptroller has issued an unpublished opinion providing that in a transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase:

- (i) the transaction does not constitute indebtedness under the state constitution of the local finance law if the lease has an executory clause making the obligation contingent on annual appropriations, although it is doubtful that the nonsubstitution clause therein would be enforceable;
- (ii) the purchase option based on the outstanding balance of principal, however, would cause the transaction to be an installment purchase contract, which municipalities lack authority to enter into for real property;
- (iii) the transaction violates competitive bidding requirements under state law if the total character of the transaction constitutes a contract for public work of the municipal corporations.¹⁰⁶

The State University of New York entered into a lease for building space for the college of optometry, which lease provided that "the lease shall be deemed executory only to the extent of money available to the State for the performance of the terms hereof" Prior to the expiration of the lease term, the General Assembly passed legislation that would prohibit an appropriation after a certain date and after relocation of the college to new space. The court held that the "statute was not reasonable and necessary to serve an important government purpose," and that the law violated the Contract Clause of the United States Constitution.¹⁰⁷

¹ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰⁶Op. State Compt., No. 91-13, 1991 N.Y. St. Comp. 33 (Aug. 30, 1990) (by Cornelius F. Realy).

¹⁰⁷TM Park Ave. Associates v. Pataki, 986 F.Supp. 96 (N.D.N.Y. 1997).

NORTH CAROLINA 2017

The Statutes and Constitution are current through Chapters 93, 95 to 101 of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes [Westlaw]ⁱ

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties “[m]ay acquire by gift, grant, devise, bequest, exchange, purchase, lease or any other lawful method, the fee or any lesser interest in real or personal property for the use by the county.”⁴ In addition, counties “may lease as lessee, with or without option to purchase, any real or personal property for any authorized public purpose.”⁵

Counties may “purchase or finance the purchase of real or personal property by installment contracts that create in the property purchased a security interest to secure payment of the purchase price.”⁶ Such installment contracts are prohibited from containing “a nonsubstitution clause that restricts the right of a . . . [county] . . . to: (1) Continue to provide a service or activity; or (2) Replace or provide a substitute for any fixture, improvement, project, or property financed or purchased pursuant to such contract.”⁷ The Local Government Commission charges various service fees for approval of installment purchase contracts and other obligations under section 160A-20.⁸ The statute authorizing such purchases by installment contract, and without voter approval, section 160A-20, was held constitutional by the Supreme Court of North Carolina in *Wayne County Citizens Association v. Wayne County Board of Commissioners*.⁹ In *Wayne County* taxpayers argued that section 160A-20 violated constitutional debt limitations and that the installment purchase contract entered into by Wayne County for the improvement of real property impermissibly required it to appropriate money in future years to make payments under the contract. The contract contained a nonappropriation clause. The court held that the plain language of the statute respected the terms of the constitution and the court found that the contract did not require the board to appropriate money. It held that even though the nonappropriation would constitute a default, the remedy was return of the property. The county is permissibly authorized by section 160A-20 to use county revenues to make payments where only the improved property is pledged, and not the taxing power of the government entity, which would be constitutionally impermissible. Taxpayers also argued that the county failed to follow statutory procedures. The court noted that installment contracts are subject to the rigorous scrutiny of the Local Government Commission.

In general, estimated expenditures of public money for construction or repair work in excess of \$500,000 or for equipment in excess of \$90,000 are subject to public bidding laws.¹⁰

¹N.C. Gen. Stat. § 153A-149.

²*Id.* § 40A-3(b).

³*Id.* § 153A-149 (. . .).

⁴*Id.* § 153A-158.

⁵*Id.* § 153A-165. Such leases are subject to public bidding provisions. *Id.* See *id.* § 143-128, *et seq.* for public bidding provisions.

⁶*Id.* § 160A-20 (this section applies equally to cities; to a local school administrative unit whose board is authorized to levy a school tax; to any other local school administrative unit but only for financing energy conservation measures; to community colleges for the purpose of financing energy conservation measures; and to certain water, sewer and other authorities). *Id.* No deficiency judgment may be rendered against the governmental unit. The taxing power of the unit may not be directly or indirectly pledged. *Id.* See generally Bell, *Lease-Purchase Agreements and North Carolina Local Governments*, 49 *Popular Gov't.*, Spring 1984 at 10. A contract entered into under section 160A-20 may be subject to approval by the Local Government Commission. *Id.* § 160A-20(e); N.C. Gen. Stat. Ch. 159, art. 8; see, *infra*, notes 119 to 125 and accompanying text.

⁷N.C. Gen. Stat. § 160A-20(d).

⁸N.C. Admin. Code tit. 20, § 3.0112.

⁹399 S.E.2d 311 (N.C. 1991).

¹⁰*Id.* § 143-129. Numerous exceptions apply.

Counties may dispose of any real or personal property according to procedures prescribed for municipalities.¹¹

A county may enter into continuing contracts, some portion or all of which are to be performed in ensuing fiscal years. In order to enter into such a contract, the county must have sufficient funds appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made. In each year, the board of commissioners shall appropriate sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into.¹²

Energy Performance Contracting

A county may enter into lease-purchase agreements for the acquisition, installation or maintenance of energy conservation measures, subject to numerous restrictions.¹³

Municipalities

Municipalities¹⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁵ eminent domain¹⁶ and police powers.¹⁷ Municipalities “may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the city.”¹⁸ In addition, municipalities are “authorized to lease as lessee, with or without option to purchase, any real or personal property for any authorized public purpose.”¹⁹ Municipalities may also “purchase or finance the purchase of real or personal property by installment contracts that create in the property purchased a security payment of the purchase price.”²⁰ Such installment contracts are prohibited from containing “a nonsubstitution clause that restricts the right of a city to: (1) Continue to provide a service or activity; or (2) Replace or provide a substitute for any fixture, improvement, project, or property financed or purchased pursuant to such contract.”²¹

Municipalities may dispose of real or personal property subject to certain restrictions.²²

A [municipality] is authorized to enter into continuing contracts, some portion or all of which are to be performed in ensuing fiscal years. Sufficient funds shall be appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made, and in each ensuing fiscal year, the council shall appropriate sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into.²³

Municipalities may acquire real or personal property, including existing hospital facilities, by . . . lease.”²⁴

In general, estimated expenditures of public money for construction or repair work in excess of \$500,000 or for equipment in excess of \$90,000 are subject to public bidding laws.²⁵

¹¹N.C. Gen. Stat. § 153A-176. *See, infra*, note 22 and accompanying text.

¹²*Id.* § 153A-13. Without a nonappropriation clause, it appears the contract would not comply with debt limitations.

¹³*Id.* § 143-64.17I (subject to the provisions of sections 160A-20).. *See generally, id.* §§ 143-64.17, -17K.

¹⁴Municipality for purposes of this discussion is a city, town or village. *Id.* §160A-1(2).

¹⁵*Id.* § 160A-209.

¹⁶*Id.* § 40A-3(b).

¹⁷*Id.* § 160A-174(a).

¹⁸*Id.* § 160A-240.1.

¹⁹*Id.* § 160A-19. Such leases are subject to public bidding provisions. *Id.* *See id.* § 143-128 *et seq.*

²⁰*Id.* § 160A-20. *See, supra*, notes 6-8 and accompanying text.

²¹*Id.*

²²*Id.* § 160A-11.

²³*Id.* § 160A-17. Without a nonappropriation clause, it appears the contract would not comply with debt limitations.

²⁴*Id.* § 131E-7(a)(5).

Energy Performance Contracting

Municipalities may enter into lease-purchase agreements for the acquisition, installation or maintenance of energy conservation measures, subject to numerous restrictions.²⁶

School Districts

School districts²⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁸ and eminent domain powers.²⁹ School districts are authorized to “acquire” suitable sites for schoolhouses or other school facilities.³⁰ School districts are authorized to provide “adequate school buildings equipped with suitable school furniture and apparatus.”³¹

Section 115C-528 of the General Statutes of North Carolina provides:

(a) [School districts] may purchase or finance the purchase of automobiles; school buses; mobile classroom units; food service equipment; photocopiers; athletic lighting; and computers, computer hardware, computer software, and related support services by lease purchase contracts and installment purchase contracts as provided in this section . . .³²

(b) A lease purchase contract under this section creates in the [school district] the right to possess and use the property for a specified period of time in exchange for periodic payments and shall include either an obligation or an option to purchase the property during the term of the contract. The contract may include an option to upgrade the property during the term. A local board may exercise an option to upgrade without rebidding the contract.

(c) An installment purchase contract under this section creates in the property purchased a security interest to secure payment of the purchase price to the seller or to an individual or entity advancing moneys or supplying financing for the purchase transaction.

(d) The term of a contract entered into under this section shall not exceed the useful life of the property purchased. An option to upgrade shall be considered in determining the useful life of the property.

(e) A contract entered into under this section shall be considered a continuing contract for capital outlay and subject to G.S. 115C-441(c1).³³

(f) A contract entered into under this section is subject to Article 8 of Chapter 159 of the General Statutes, except for G.S. 159-148(a)(4) and (b)(2).³⁴ For purposes of determining whether the standards set out in G.S. 159-148(a)(3) have been met, only the five hundred thousand dollar (\$500,000) threshold shall apply.

²⁵*Id.* § 143-129. Numerous exceptions apply.

²⁶*Id.* § 143-64.17I (subject to the provisions of section 160A-20). *See generally, id.* §§ 143-64.17, -17K.

²⁷School districts for purposes of this discussion are local boards of education. *Id.* § 115C-5(5).

²⁸*Id.* ch. 115C, art. 36. Not all school districts have the power to tax.

²⁹*Id.* § 115C-517.

³⁰*Id.*

³¹*Id.* § 115C-521(b). *See also id.* § 115C-522(a) (purchases or exchanges of all supplies, equipment and materials must be in accordance with contracts made by or with the approval of the Department of Administration); 51 Op. Att’y Gen. 111 (N.C. 1982) (lease-purchase by local board of education of personal property subject to requirements of public bidding if transfer of title to board at end of term).

³²Computers, computer hardware, computer software, and related support services purchased under section 115C-528 are required to meet the technical standards specified in the North Carolina Instructional Technology Plan. N.C. Gen. Stat. § 115C-528(a).

³³*See id.* § 115C-441(c 1). This statute requires the appropriation of a current year’s payments and an unencumbered balance to cover such payments during the current fiscal year. In addition, the board of county commissioners must approve the contract by resolution, which resolution, when adopted, binds the board of county commissioners to appropriate sufficient funds in subsequent fiscal years.

³⁴*See id.* §159-148, *et seq.*, discussed, *infra*, in notes 119 to 125 and accompanying text. This applies the Local Government Commission approval process to these transactions.

(g) Subsections (e) and (f) of this section shall not apply to contracts entered into under this section so long as the term of each contract does not exceed three years and the total amount financed during any three-year period is no greater than two hundred fifty thousand dollars (\$250,000) or is no greater than three times the local board's annual State allocation for classroom materials, equipment, and instructional supplies, whichever is less. The local board shall submit information, including the principal and interest paid and the amount of outstanding obligation, concerning these contracts as part of the annual budget it submits to its board of county commissioners under Article 31 of this Chapter.

(h) No contract entered into under this section may contain a nonsubstitution clause that restricts the right of a local board to:

- (1) Continue to provide a service or activity; or
- (2) Replace or provide a substitute for any property financed or purchased by the contract.

(i) No deficiency judgment may be rendered against any local board of education . . . in any action for breach of a contractual obligation authorized by this section, and the taxing power of a unit of local government is not and may not be pledged directly or indirectly to secure any moneys due under a contract authorized by this section.³⁵

The authority of local boards of education to enter into lease-purchase and installment purchase contracts as provided in section 115C-528, *supra*, is restated in section 115C-47(28).³⁶

School districts “shall make no contract for the erection of any school building unless the site upon which it is located is owned in fee simple.”³⁷

School districts may dispose of any real or personal property according to procedures prescribed for municipalities.³⁸

Energy Performance Contracting

School districts may enter into lease-purchase agreements for the acquisition, installation or maintenance of energy conservation measures, subject to numerous restrictions.³⁹

Fire Districts

Fire districts are taxing and service districts which do not appear to have powers independent of the local government establishing them.

Hospital Districts

Hospital districts⁴⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴¹ and eminent domain powers.⁴²

Hospital districts “may acquire any real or personal property.”⁴³ “A hospital district is vested with . . . [t]hose powers granted under the Municipal Hospital Act, Chapter 131E of the General Statutes,

³⁵N.C. Gen. Stat. § 115C-528.

³⁶*Id.* § 115C-47(28). See *supra* note 32 to 35 and accompanying text for the text of Section 115C-528.

³⁷N.C. Gen. Stat. § 115C-521(d).

³⁸*Id.* § 115C-518. See, *supra*, note 22.

³⁹*Id.* § 143-64.17I (subject to the provisions of sections 160A-20).

⁴⁰Hospital districts for purposes of this discussion are those created under *id.* chapter 131E, art. 2.

⁴¹*Id.* §§ 131E-44(b)(2), (b)(1)(incorporating power of municipalities under section 131E-7(2)); *id.* § 159-46, § 159-44.

⁴²*Id.* § 131E-44 (power incorporated by reference to section 131E-10).

⁴³*Id.* § 131E-44(a)(5).

Article 2, Part A⁴⁴ which includes the power to “acquire real or personal property, including existing hospital facilities, by purchase, . . . devise, [or] lease.”⁴⁵

A municipality [municipality is defined to mean hospital districts by section 131E-6(5)] . . . may permit or consent to the pledge of hospital land or leasehold estates in hospital land to facilitate the development, construction, and operation of medical office buildings and other health care or hospital facilities. A municipality . . . also may, as lessee, enter into master leases or agreements to fund for temporary vacancies relating to hospital land or hospital facilities for use in the provision of health care.⁴⁶

Hospital districts owning and operating a hospital organized under the provisions of Chapter 131E Part 1 or Part 3 “may erect, remodel, enlarge, purchase, finance, and operate branches and related facilities within this State but outside the boundaries of the county, subject to [numerous] limitations.”⁴⁷

State Entities

The Department of Administration has broad powers over purchasing and contracting for state agencies.⁴⁸ The department’s duties include repair of the halls of the Senate and House of Representatives and the rooms of the capitol.⁴⁹ The department has authority to acquire by lease and by exercise of the power of eminent domain all land, buildings and space in buildings for all state agencies, subject to the approval of the Governor and Council of State.⁵⁰ The department has authority:

To purchase or finance the purchase of buildings, utilities, structures, or other facilities or property developments, including streets and landscaping, the acquisition of land, equipment, machinery, and furnishings in connection therewith; additions, extensions, enlargements, renovations, and improvements to existing buildings, utilities, structures, or other facilities or property developments, including streets and landscaping; land or any interest in land; other infrastructure; furniture, fixtures, equipment, vehicles, machinery, and similar items; or any combination of the foregoing, through installment-purchase, lease-purchase, or other similar type installment financing agreements in the manner and to the extent provided in Article 9 of Chapter 142 of the General Statutes.⁵¹ Any contract entered into or any proceeding instituted contrary to the provisions of this paragraph is voidable in the discretion of the Council of State.⁵²

The State Capital Facilities⁵³ Finance Act provides that financing agreements are subject to the following:

(a) Security. -- In order to secure (i) lease or installment payments to be made to the lessor, seller, or other person advancing moneys or providing financing under a financing contract, (ii) payment of the principal of and interest on bonded indebtedness, or (iii) payment obligations of the State to the provider

⁴⁴*Id.* § 131E-44(b)(1).

⁴⁵*Id.* § 131E-7(a)(5).

⁴⁶*Id.* § 131E-13.

⁴⁷*Id.* § 131E-14.1.

⁴⁸*Id.* § 143-341. *See generally id.* Ch. 143, art. 3, Purchases and Contracts; art. 8, Pub. Contracts; art. 36, Dept. of Admin.; Ch. 146, State Lands. Agency means “every agency, institution, board, commission, bureau, council, department, division, officer, and employee of the State, but does not include counties, municipal corporations, political subdivisions, county and city boards of education, and other local public bodies.” *Id.* § 143-336. The judicial or legislative branches of the state are excluded from coverage by title 36. *Id.*

⁴⁹*Id.* § 143-341(8)(e).

⁵⁰*Id.* § 143-341(4)(d). The Council of State consists of executive officers established by N.C. Const. art. III.

⁵¹N.C. Gen. Stat., State Capital Facilities Finance Act, §§ 142-80 to -99.

⁵²N.C. Gen. Stat. § 143-341(4)(d2).

⁵³Capital facility means “any one or more of the following: a. Any one or more buildings, utilities, structures, or other facilities or property developments, including streets and landscaping, and the acquisition of equipment, machinery, and furnishings in connection with these items. b. Additions, extensions, enlargements, renovations, and improvements to existing buildings, utilities, structures, or other facilities or property developments, including streets and landscaping. c. Land or an interest in land. d. Other infrastructure. e. Furniture, fixtures, equipment, vehicles, machinery, and similar items.” *Id.* § 142.82.

of bond insurance, a credit facility, a liquidity facility, or a derivative agreement, special indebtedness may create any combination of the following:

- (1) A lien on or security interest in one or more, all, or any part of the capital facilities to be financed by the special indebtedness.
 - (2) If the special indebtedness is to finance construction of improvements on real property, a lien on or security interest in all or any part of the land on which the improvements are to be located.
 - (3) If the special indebtedness is to finance renovations or improvements to existing facilities or the installation of fixtures in existing facilities, a lien on or security interest in one or more, all, or any part of the facilities.
- (b) Value of Security; Multiple Liens. -- The estimated value of the property subject to the lien or security interest need not bear any particular relationship to the principal amount of the special indebtedness or other obligation it secures. This Article does not limit the right of the State to grant multiple liens or security interests in a capital facility or other property to the extent not otherwise limited by the terms of any special indebtedness.
- (c) Governor's Budget. -- Documentation relating to any special indebtedness may include provisions requesting the Governor to submit in the Governor's budget proposal or any amendments or supplements to the budget proposed appropriations necessary to make the payments required by the special indebtedness.
- (d) Source of Repayment. -- The payment of amounts payable by the State under special indebtedness⁵⁴ or any related documents during any fiscal period shall be limited to funds appropriated for that purpose by the General Assembly in its discretion.
- (e) No Deficiency Judgment or Pledge. -- No deficiency judgment may be rendered against the State in any action for breach of any obligation under special indebtedness or any related documents. The taxing power of the State is not and may not be pledged directly or indirectly to secure any moneys due under special indebtedness or any related documents. In the event that the General Assembly does not appropriate sums sufficient to make payments required under any special indebtedness or any related documents, the net proceeds received from the sale or other disposition of the property subject to the lien or security interest shall be applied to satisfy these payment obligations in accordance with the deed of trust, security agreement, or other documentation relating to the lien or security interest. These net proceeds are appropriated for the purpose of making these payments. Any net proceeds in excess of the amount required to satisfy the obligations of the State under any special indebtedness or any related documents shall be paid to the State Treasurer for deposit to the General Fund.
- (f) Nonsubstitution Clause. -- A financing contract, issue of bonded indebtedness, or other related document shall not contain a nonsubstitution clause that restricts the right of the State to (i) continue to provide a service or conduct an activity or (ii) replace or provide a substitute for any capital facility.
- (g) Protection of Lender. -- Special indebtedness may contain any provisions for protecting and enforcing the rights and remedies of the person advancing moneys or providing financing under a financing contract, the owners of bonded indebtedness, or others to whom the State is obligated under special indebtedness or any related documents as may be reasonable and proper and not in violation of law. These provisions may include covenants setting forth the duties of the State in respect of any of the following:

⁵⁴ Special indebtedness means "financing contract indebtedness" defined as "indebtedness incurred pursuant to a financing contract, including certificate of participation indebtedness." A financing contract is "[a] contract entered into pursuant to this Article to finance capital facilities and constituting a lease-purchase contract, installment-purchase contract, or other similar type installment financing contract. The term does not include, however, a contract that meets any one of the following conditions: a. It constitutes an operating lease under generally accepted accounting principles. b. It provides for the payment under the contract over its full term, including periods that may be added to the original term through the exercise of options to renew or extend, of an aggregate principal amount of not in excess of five thousand dollars (\$5,000) or any greater amount that may be established by the Council of State if the Council of State determines (i) the aggregate amount to be paid under these contracts will not have a significant impact on the State budgetary process or the economy of the State and (ii) the change will lessen the administrative burden on the State. c. It is executed and provides for the making of all payments under the contract, including payment to be made during any period that may be added to the original term through the exercise of options to renew or extend, in the same fiscal year." *Id.* § 142-82. Certificates of participation means "(c)ertificates or other instruments delivered by a special corporation evidencing the assignment of proportionate undivided interests in rights to receive payments pursuant to a financing contract." *Id.* Certificates of participation indebtedness means "(f)inancing contract indebtedness incurred by the State under a plan of finance in which a special corporation obtains funds to pay the cost of a capital facility to be financed through the delivery by the special corporation of certificates of participation." *Id.*

- (1) The purposes to which the proceeds of special indebtedness may be applied.
- (2) The disposition and application of the revenues of the State, including taxes.
- (3) Insuring, maintaining, and other duties with respect to the capital facilities financed.
- (4) The disposition of any charges and collection of any revenues and administrative charges.
- (5) The terms and conditions of the issuance of additional special indebtedness.
- (6) The custody, safeguarding, investment, and application of all moneys.

(h) State Property Law Exception. -- Chapter 146 of the General Statutes does not apply to any transfer of the State's interest in property authorized by this Article, whether to a deed of trust trustee or other secured party as security for special indebtedness, or to a purchaser of property in connection with a foreclosure or similar conveyance of property to realize upon the security for special indebtedness following the State's default on its obligations under the special indebtedness.⁵⁵

Lease or installment payments to be made to the lessor or other person providing financing under a financing contract for facilities or land may be secured by a lien or security interest.⁵⁶

Construction and repair work requiring the estimated expenditure of public funds in an amount of \$500,000 or more must follow the procedures for the letting of public contracts.⁵⁷

General provisions covering the power of the Department of Administration to acquire or lease land on behalf of the state or a state agency are in Chapter 146, Article 6 of the General Statutes.

Rules covering state real property are in Title 1, Chapter 6 of the administrative code.

The powers of the Department of Administration do not extend to highway rights of way.⁵⁸

The Secretary of Administration is authorized to “purchase, lease and lease-purchase . . . all goods required by the State government, or any of its departments, institutions or agencies.”⁵⁹ Statewide⁶⁰ and cooperative contracts⁶¹ are authorized. Contracts by constituent institutions of The University of North Carolina exceeding one million dollars must be reported to the Department of Administration.⁶² Contracts by state agencies exceeding five million dollars and contracts by the constituent institutions of the University of North Carolina exceeding one million dollars are subject to review, but not approval, by the attorney general.⁶³ The Secretary of Administration may prescribe conditions or allow lease-purchases to be made by means other than competitive bidding, and where a waiver is requested and the contract exceeds \$10,000 the lease is subject to prior review by the Secretary of Administration.⁶⁴ The state benchmark for competitive bidding is set by the Secretary.⁶⁵ Lease-purchase contracts for goods

⁵⁵*Id.* § 142.85.

⁵⁶*Id.*

⁵⁷*Id.* § 143-129.

⁵⁸*Id.* § 143-341(4)(k).

⁵⁹*Id.* § 143-49(1). Goods “includes, without limitation, all commodities, supplies, materials, equipment, and other tangible personal property.” *Id.* However, “purchase through the Secretary of Administration is not mandatory for information technology purchased in accordance with Article 14 of Chapter 143B.” *Id.* § 143-56. The department of administration has control over state vehicles. *Id.* § 143-341.

⁶⁰*Id.* § 143-49(10).

⁶¹*Id.* § 143-49(17).

⁶²*Id.* § 114.8.3(c).

⁶³*Id.* § 143-49 (12); § 114.8.3.

⁶⁴*Id.* § 143-53(a)(5).

⁶⁵*Id.* § 143-56; *id.* § 143-53.1. The benchmark for Univ. N. Carolina constituent institutions is different. Refer to higher education section, *infra*, notes 83 to 92 and accompanying text.

exceeding the benchmark shall be reviewed by the State Purchasing Officer prior to award.⁶⁶ A contract for the purchase of supplies or equipment in an amount of \$90,000 or more must follow the procedures provided for the letting of public contracts.⁶⁷ However, exceptions from these procedural requirements are provided for information technology, guaranteed energy savings contracts, and other situations.⁶⁸ Waiver of the requirements is permitted for previously bid contracts.⁶⁹

Contracts not in compliance with procurement laws shall be void.⁷⁰

There is a state electronic procurement system, from which certain entities are exempted.⁷¹

State purchases and contracts for goods and real property are covered by Title 1, chapters 5 and 6 of the North Carolina Administrative Code.

Information Technology

Information technology⁷² is controlled and procured for state agencies⁷³ by the Office of the State Chief Information Officer (CIO) and the Department of Information Technology Services.⁷⁴ The department must approve all technology purchases.⁷⁵ Contracts greater than twenty-five thousand dollars (\$25,000) must be submitted to the State CIO for approval.⁷⁶ Contract terms exceeding three years, including extensions and renewals, must have prior approval by the State CIO.⁷⁷ The office may authorize a state agency to deviate from statutory provisions.⁷⁸ Forms, terms and conditions and legal requirements shall be available to agencies on the State's IT procurement website.⁷⁹

The State CIO shall . . . (p)rovide for the establishment, management, and operation, through either State ownership, by contract, or through commercial leasing, of the following systems and services as they affect the internal management and operation of State agencies: a. Central telephone systems and telephone networks, including Voice over Internet Protocol and Commercial Mobile Radio Systems. b. Satellite services. c. Closed-circuit TV systems. d. Two-way radio systems. e. Microwave systems. f. Related systems based on telecommunication technologies. g. The "State Network," managed by the Department, which means any connectivity designed for the purpose of providing Internet Protocol transport of information for State agencies. h. Broadband.⁸⁰

⁶⁶*Id.* § 143-52.

⁶⁷*Id.* § 143-129(a).

⁶⁸*Id.* § 143-129(e).

⁶⁹*Id.* § 143-129(g).⁷⁰*Id.* § 143-58.

⁷⁰*Id.* § 143-58.

⁷¹*Id.* § 143-48.3; <http://eprocurement.nc.gov/>.

⁷²Information technology means "Set of tools, processes, and methodologies, including, but not limited to, coding and programming; data communications, data conversion, and data analysis; architecture; planning; storage and retrieval; systems analysis and design; systems control; mobile applications; and equipment and services employed to collect, process, and present information to support the operation of an organization. The term also includes office automation, multimedia, telecommunications, and any personnel and support personnel required for planning and operations." N.C. Gen. Stat. § *Id.* § 143B-1320. .

⁷³*Id.* § 143B-1320. State agency means "[a]ny agency, department, institution, commission, committee, board, division, bureau, office, unit, officer, or official of the State. The term does not include the legislative or judicial branches of government or The University of North Carolina" or its constituent institutions.

⁷⁴*Id.* § 143B-1350.

⁷⁵*Id.* § 143B-1350.

⁷⁶*Id.* § 143B-1355; *id.* § 143B-1356 (conditions required of multiyear contracts).

⁷⁷N.C. Admin Code tit. 9 § 6B.0301; <http://it.nc.gov/document/it-procurement-policies-and-procedures>.

⁷⁸N.C. Gen. Stat. § 143B-1320.

⁷⁹N.C. Admin. Code tit. 9 § 6A.0101.

⁸⁰N.C. Gen. Stat. § 143B-1370 (a)(5).

Energy Performance Contracting

State governmental units⁸¹ may enter into contracts to finance energy conservation measures, subject to numerous restrictions.⁸²

Higher Education

The University of North Carolina (UNC) system⁸³ Board of Governors may “purchase”⁸⁴ and “acquire”⁸⁵ real and personal property, however

(a) The power and authority granted to the Board of Governors with regard to the acquisition, operation, maintenance and disposition of real and personal property and services shall be subject to, and exercised in accordance with, the provisions of Chapters 143 and 146 of the General Statutes and related sections of the North Carolina Administrative Code, except when a purchase is being made that is not covered by a State term contract and either:

(1) The funds used to procure personal property or services are not moneys appropriated from the General Fund or received as tuition or, in the case of multiple fund sources, moneys appropriated from the General Fund or received as tuition do not exceed thirty percent (30%) of the total funds; or

(2) The funds used to procure personal property or services are contract and grant funds or, in the case of multiple fund sources, the contract and grant funds exceed fifty percent (50%) of the total funds.

When a special responsibility constituent institution⁸⁶ makes a purchase under subdivision (1) or (2) of this subsection, the requirements of Chapter 143, Article 3 shall apply, except the approval or oversight of the Secretary of Administration or the State Purchasing Officer is not required, regardless of dollar value.

(b) Special responsibility constituent institutions shall have the authority to purchase equipment, materials, supplies, and services from sources other than those certified by the Secretary of Administration on term contracts, subject to the following conditions:

(1) The purchase price, including the cost of delivery, is less than the cost under the State term contract;

(2) The items are the same or substantially similar in quality, service, and performance as items available under State term contracts;

(3) The cost of the purchase shall not exceed the benchmark established under G.S. 116-31.10; and

(4) The special responsibility constituent institution notifies the Department of Administration of purchases consistently being made under this provision so that State term contracts may be improved.⁸⁷

* * * *

(a) Notwithstanding G.S. 143-53.1 or G.S. 143-53(a)(2), the expenditure benchmark for a special responsibility constituent institution with regard to competitive bid procedures and the bid value benchmark shall be an amount not greater than five hundred thousand dollars (\$500,000). The Board shall set the benchmark for each institution from time to time. In setting an institution's benchmark in accordance with this section, the Board shall consider the institution's overall capabilities including staff resources, purchasing compliance reviews, and audit reports. The Board shall also consult with the Director of the Division of Purchase and Contract and the Director of the Budget prior to setting the benchmark.

⁸¹State governmental unit “means the State or a department, an agency, a board, or a commission of the State, including the Board of Governors of The University of North Carolina and its constituent institutions.” *Id.* § 143-64.17(7). Community colleges are authorized but are defined as “local government units.” *Id.* § 143-64.17(4).

⁸²*Id.* § 142-63; *id.* § 143-64.17B.

⁸³The UNC system, governed by the Board of Governors, consists of 16 constituent institutions individually managed by boards of trustees. *Id.* § 116-11. A chancellor is the administrative and executive head of each institution. *Id.* § 116-34.

⁸⁴*Id.* § 116-3.

⁸⁵*Id.* § 116-11.

⁸⁶*Id.* § 116-30.1.

⁸⁷*Id.* § 116-13. See UNC and the Dept. of Admin. Memorandum of Understanding (Nov 29, 2004) (interpreting this statute), <https://www.northcarolina.edu/budget-and-finance/unc-procurement>.

(b) Each institution with an expenditure benchmark greater than two hundred fifty thousand dollars (\$250,000) shall comply with this subsection for any purchase greater than the institution's benchmark set by the Board but not greater than five hundred thousand dollars (\$500,000). This institution shall submit to the Division of Purchase and Contract for that Division's approval or other action deemed necessary by the Division a copy of all offers received and the institution's recommendation of award or other action. Notice of the Division's decision shall be sent to that institution. The institution shall then proceed with the award of contract or other action recommended by the Division.⁸⁸

In regard to “construction, or renovation of buildings, utilities, and other property developments” involving estimated expenditures of two million dollars or less, the Board of Governors shall be the awarding authority and “develop procedures to perform the duties of the Department of Administration and the Director or Office of State Construction under G.S. 133-1.1(d) and G.S. 143-341(3).”⁸⁹

Notwithstanding G.S. 143-341(4), and in addition to the powers granted in G.S. 116-198.34(5), the Board of Governors may authorize the constituent institutions and the General Administration to acquire or dispose of real property by lease if the lease is for a term of not more than 10 years. The Board of Governors shall establish a policy for acquiring and disposing of an interest in real property for the use of The University of North Carolina and its constituent institutions by lease. This policy may delegate authorization of the acquisition or disposition of real property by lease to the boards of trustees of the constituent institutions or to the President of The University of North Carolina. The Board of Governors shall submit all initial policies adopted pursuant to this section to the State Property Office for review prior to adoption by the Board. Any subsequent changes to these policies adopted by the Board of Governors shall be submitted to the State Property Office for review. Any comments by the State Property Office shall be submitted to the President of The University of North Carolina. After the acquisition or disposition of an interest in real property by lease, The University of North Carolina shall promptly file a report concerning the acquisition or disposition to the Secretary of Administration. Acquisitions and dispositions of an interest in real property by lease pursuant to this section shall not be subject to the provisions of Article 36 of Chapter 143 of the General Statutes or to the provisions of Article 6 or 7 of Chapter 146 of the General Statutes.⁹⁰

A board of trustees of an individual institution may establish its own policies concerning the acquisition of information technology and telecommunications at the institution, subject to approval by the Department of Information Technology Services.⁹¹

Energy Performance Contracting for Higher Education

The University of North Carolina Board of Governors and constituent institutions may enter into contracts to finance the acquisition of energy conservation measures, subject to numerous requirements.⁹²

Community Colleges

The State Board of Community Colleges oversees community colleges.⁹³ Funding is provided by both the state and by the tax-levying authority⁹⁴ of each constituent institution.⁹⁵ The board of trustees of each institution constitutes a local administrative board.⁹⁶ Counties have the power to acquire property for community colleges by eminent domain upon the request of a board of trustees.⁹⁷ Boards have the

⁸⁸N.C. Gen. Stat. § 116-31.10.

⁸⁹*Id.* § 116-31.11.

⁹⁰*Id.* § 116-31.12.

⁹¹*Id.* § 116-40.22(d).

⁹²*Id.* § 143-64.17L; §§ 142-60 to 142-79.

⁹³*Id.* § 115D-5.

⁹⁴“The ‘tax-levying authority’ of an institution is the board of commissioners of the county or all of the boards of commissioners of the counties, jointly, which constitute the administrative area of the institution.” *Id.* § 115D-2.(6).

⁹⁵*Id.* § 115D-31 (State); *id.* § 115D-32 (tax-levying authority).

⁹⁶*Id.* § 115D-20.

⁹⁷*Id.* § 153A-158.2.

power of eminent domain subject to approval by the State Board of Community Colleges.⁹⁸ It appears that the constituent institutions do not qualify as tax-exempt issuers for purposes of federal income tax law, since they do not have independent powers of tax and condemnation. The boards have authority to “acquire” real and personal property.⁹⁹ The board has authority to enter into lease-purchase and installment purchase contracts for equipment or real property subject to particular requirements tied to the source of funding:

(b) Contract Approval. – Contracts for more than one hundred thousand dollars (\$100,000) or for a term of more than three years shall be subject to review and approval as provided in this subsection. If the source of funds for payment of the obligation by the community college is intended to be local funds, the contract must be approved by resolution of the tax-levying authority, and the authority must acknowledge in writing its understanding that the community college may require appropriations from the tax-levying authority in order to meet the college's obligations under the contract. The tax-levying authority may in each fiscal year appropriate sufficient funds to meet the amounts to be paid during the fiscal year under the contract. **The source of funds for lease purchase or installment purchase contracts for real property shall be local funds.** If the source of funds for payment of the obligation by the community college is intended to be State funds, the contract must be approved by resolution of the State Board of Community Colleges. The State Board may in each fiscal year allocate sufficient funds to meet the amounts to be paid during the fiscal year under the contract.

(c) Local Government Commission. – A contract that is subject to approval by the tax-levying authority also shall be subject to approval by the Local Government Commission as provided in Article 8 of Chapter 159 of the General Statutes if the contract:

- (1) Extends for five or more years from the date of the contract;
- (2) Obligates the board of trustees to pay sums of money to another, regardless of whether the payee is a party to the contract; and
- (3) Obligates the board of trustees to pay five hundred thousand dollars (\$500,000) or more over the full term of the contract.

(d) Application of Section. – When determining whether a contract is subject to approval under this section the total cost of exercising an option to upgrade property shall be taken into consideration. The term of a contract shall include periods that may be added to the original term through the exercise of an option to renew or extend.

(e) Nonsubstitution Clause. – No contract entered into under this section may contain a nonsubstitution clause that restricts the right of a board of trustees to:

- (1) Continue to provide a service or activity; or
 - (2) Replace or provide a substitute for any property financed or purchased by the contract.
- (f) Nonappropriations Clause. – No deficiency judgment may be rendered against any board of trustees, any tax-levying authority, the State Board of Community Colleges, or the State of North Carolina in any action for breach of a contractual obligation authorized by this section. The taxing power of a tax-levying authority and the State is not and may not be pledged directly or indirectly to secure any moneys due under a contract authorized by this section.¹⁰⁰

Separate rules apply for the acquisition of energy savings measures; community colleges are treated as local governments.¹⁰¹

Community colleges are not required to follow Department of Administration rules relating to service and lease contracts.¹⁰²

⁹⁸*Id.* § 115D-20(3).

⁹⁹*Id.* § 115D-14.

¹⁰⁰*Id.* § 115D-58.15.

¹⁰¹*Id.* § 143-64.17; *id.* § 143-64.17B; *id.* § 143-64.17I.

Debt Limitations

The State, counties, municipalities, special districts and other units of local government are constitutionally required to have voter approval of any contractual debt pledging its full faith and credit. A majority of the qualified electors of the unit is required.¹⁰³ “Debt” is defined as “incurred . . . when a county, city or town, special district, or other unit, authority or agency of local government borrows money”¹⁰⁴ or “when the State borrows money.”¹⁰⁵ A pledge of the State or local government’s full faith and credit is defined as “a pledge of the taxing power.”¹⁰⁶

In *Foster v. North Carolina Medical Care Commission*,¹⁰⁷ the court considered the constitutionality of an act that authorized counties and municipalities to enter into lease agreements to provide hospital facilities.¹⁰⁸ The act provided that the obligations under the lease would be payable solely from revenues from the hospital facility and would thus not be debt to the governmental unit.¹⁰⁹ The court said that these provisions were unconstitutional because the purpose of the debt (lease of hospital facility) was not one that the legislature could authorize without an affirmative majority vote.¹¹⁰ The incurring of the obligation in *Foster* predates the 1973 amendment to the North Carolina Constitution.¹¹¹ The 1973 amendment provided a distinction between debts pledging the full faith and credit that require voter approval and other debts that are subject to general laws enacted by the legislature.¹¹²

Statutory limitations are also imposed on the amount of bonded indebtedness that counties and municipalities may incur.¹¹³ However, “installment contracts” to purchase real and personal property are excluded from these statutory restrictions, if there is no pledge of the taxing power and they contain a nonappropriation clause.¹¹⁴

School districts may not incur obligations “unless the budget resolution includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year.”¹¹⁵

Interest Rate Limitations

No interest rate limitation applicable solely to lease-purchase agreements and installment contracts entered into by the State, counties, municipalities, school districts, or hospital districts was found.

¹⁰²N.C. Admin. Code Title 1 § 05B.1505. It is assumed that lease means operating lease.

¹⁰³N.C. Const. art. V, § 3(1) (State); *id.* § 4(2) (local government).

¹⁰⁴*Id.* § 4(5).

¹⁰⁵*Id.* § 3(3).

¹⁰⁶*Id.* (State); § 4(5) (local government).

¹⁰⁷195 S.E.2d 517 (N.C. 1973).

¹⁰⁸*Id.* at 525.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 526.

¹¹¹*See also* Vance County v. Royster, 155 S.E.2d 790 (N.C. 1967) (predating the 1973 amendment).

¹¹²*See* N.C. Const. art. V, § 4(1). *See also* United States v. 30.60 Acres of Land, 535 F. Supp. 33, 36 (E.D.N.C. 1981) (concluding that such amendment was intended to exclude most general contractual obligations from voter approval); Boneno v. State, 284 S.E.2d 170 (N.C. App. 1981) (similar constitutional provision applicable to the state did not restrict state’s power to enter into long-term maintenance and construction contracts).

¹¹³N.C. Gen. Stat. § 159-55(c) (when read in conjunction with definitions at *id.* § 159-44(4)).

¹¹⁴*Id.* § 160A-20. *See, supra*, notes 6 - 8 and accompanying text.

¹¹⁵*Id.* § 115C-44.1. *See also, supra*, note 33 and accompanying text.

Contracts involving less than \$25,000 and certain installment loans are limited to a rate of the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus 6 percent, subject to rounding off, or 16 percent, whichever is greater.¹¹⁶ On contracts over \$25,000 the parties may agree to any rate.¹¹⁷

Miscellaneous

Parties cannot waive the right to a jury trial, but they can enter into arbitration agreements:

Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.¹¹⁸

“[A]ny contract, agreement, memorandum of understanding, and any other transaction having the force and effect of a contract . . . made or entered into by a unit of local government . . . relating to the lease, acquisition, or construction of capital assets”¹¹⁹ must be approved by the Local Government Commission,¹²⁰ if the following four conditions are all met:

1. The contract extends for more than five years, including any renewal options or extensions;¹²¹
2. The contract obligates the unit of local government to pay sums of money to another, without regard to whether the payee is a party to the contract;¹²²
3. The contract obligates the unit over the full term to the extent of the lesser of \$500,000 or a sum equal to one tenth of one percent of the assessed value of property subject to taxation by the contracting unit (before application of any assessment action);¹²³ and
4. The contract obligates the unit, either expressly or by implication, to exercise its power to levy taxes either to make payments falling due under the contract, or to pay any judgment entered against the unit as a result of the unit’s breach of the contract.¹²⁴

After or at the time an application is filed under G.S. 159-149 [for approval by the Local Government Commission], the finance officer, or some other officer designated by the board, shall prepare, swear to, and file with the secretary and for public inspection in the office of the clerk to the board a statement of debt in the same form prescribed in G.S. 159-55 for statements of debt filed in connection with general obligation bond issues. The sums to be included in gross debt and the deductions therefrom to arrive at net debt shall be the same as prescribed in G.S. 159-55, except that sums to fall due under contracts subject to this Article shall be treated as if they were evidenced by general obligation bonds of the unit.

No contract subject to this Article may be executed if the net debt of the contracting unit, after execution of the contract, would exceed eight percent (8%) of the assessed value of property subject to taxation by the contracting unit.¹²⁵

¹¹⁶*Id.* §§ 24-1.1(a)(1), -1.2.

¹¹⁷*Id.* § 24-1.1(a)(2).

¹¹⁸*Id.* § 22B-10.

¹¹⁹*Id.* § 159-148. Unit of local government means counties and municipal corporations, including hospital districts. *Id.* § 159-7(b). Section 115C-528(f) applies this statute to contracts entered into with school districts. “Contracts for the purchase, lease, or lease with option to purchase of motor vehicles or voting machines” are excepted from these provisions. *Id.* § 159-148(b)(2). This exception is not applicable to school districts. *Id.* § 115C-528(f).

¹²⁰*Id.* § 159-149; *id.* § 159-153.

¹²¹*Id.* § 159-148(a)(1).

¹²²*Id.* § 159-148(a)(2).

¹²³*Id.* § 159-148(a)(3).

¹²⁴*Id.* § 159-148(a)(4). This condition need not be met for school districts. *Id.* § 115C-528(f).

The North Carolina Court of Appeals in *Data General Corporation v. County of Durham*,¹²⁶ held that a contractual obligation that failed to provide a preaudit certificate in accordance with the following statute was invalid and not enforceable.¹²⁷

If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form: "This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.
_____ (Signature of finance officer)." ¹²⁸

A similar requirement with similar harsh results exists for school districts and requires the certification signed by the finance officer of the district:

If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this section. The certificate, which shall be signed by the finance officer, shall take substantially the following form:

"This instrument has been preaudited in the manner required by the School Budget and Fiscal Control Act.
(Date) _____ (Signature of finance officer)" ¹²⁹

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

¹²⁵*Id.* § 159-150.

¹²⁶545 SE2d 243 (N.C. Ct. App. 2001); *see also* Cabarrus County v. Systel Business Equipment Company, Inc., 614 S.E.2d 596 N.C. Ct. App. 2005)(settlement agreement invalid without preaudit certification).

¹²⁷N.C. § 159-28(a) states "[a]n obligation incurred in violation of this subsection [159-28 'Budgetary accounting for appropriations'] is invalid and may not be enforced."

¹²⁸Under the Local Government and Fiscal Control Act this provision would be applicable to municipalities and counties. *Id.* § 159-7.

¹²⁹*Id.* § 115C-441(a), providing for similar invalidity and lack of enforceability.

NORTH DAKOTA 2018 REVISION

Current through the 2017 Regular Session of the 65th Legislative Assembly, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain,³ and police powers.⁴

The board of county commissioners may not enter into a rental contract or agreement for the use of road machinery and other articles for a longer period than twelve months from the date of such rental contract or agree to pay rental for the use of road machinery and other articles which would result in the lessor receiving rental at a rate in excess of twenty percent per year of the cash sale price. . . . Notwithstanding the provisions of this section relating to the duration of rental contracts, the board of county commissioners may enter into lease-purchase agreements under which the annual payments by the county do not exceed twenty thousand dollars for the road machinery and articles covered by this section, if those agreements provide for the complete performance and full payment of the purchase price of the machinery or articles within five years from the date of the execution of the lease-purchase agreement according to section 44-08-01.1.⁵

Counties may “purchase lands in lieu of those sold.”⁶ They may “acquire by lease [and] purchase . . . and . . . hold in [their] name for use and control as provided by law, both real and personal property . . . for all purposes authorized by law or necessary to the exercise of any power granted.”⁷ Counties may “contract and be contracted with.”⁸

County commissioners may also “dispose of any property, either real or personal.”⁹

Home rule counties have the power to “[a]cquire, hold, operate and dispose of property”¹⁰ and shall have all powers granted to counties by general law.¹¹

Counties and other political subdivisions may obtain financing through the North Dakota Public Finance Authority.¹²

Energy Performance Contracting

Counties may enter into contracts for energy conservation measures for a term not to exceed fifteen years, subject to numerous restrictions.¹³ “The governmental unit shall include in its annual appropriations measure for each later biennium or fiscal year any amounts payable under guaranteed energy savings contracts during the biennium or fiscal year.”¹⁴

¹Counties may adopt a home rule charter. N.D. Const. art. VII, § 6. Home rule counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain, and police powers. N.D. Cent. Code § 11-09.1-05.

²*Id.* § 57-15-05.

³*Id.* § 24-05-09.

⁴*Id.* § 11-33-01.

⁵*Id.* § 24-05-04. This section requires public bidding if the contract exceeds the sum of \$50,000. *Id.* § 44-08-01.1 (sets forth procedures for public bidding).

⁶*Id.* § 11-11-14(11).

⁷*Id.* § 11-11-14(20).

⁸*Id.* § 11-10-01.

⁹*Id.* § 11-27-01. Private sale is permitted if the value of the property is estimated to be less than \$1,000. *Id.*

¹⁰*Id.* § 11-09.1-05(1).

¹¹*Id.* § 11-09.1-11.

¹²*See generally, id.* chapter 6-09.4.

¹³*Id.* §§ 48-05-09 to -13.

¹⁴*Id.* § 48-05-13.

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸ “The governing body of a municipality shall have the power . . . [t]o acquire by lease, purchase . . . [or] other lawful means . . . both real and personal property and easements and rights of way”¹⁹ Municipalities, upon declaration that an emergency exists, may purchase firefighting apparatus and equipment pursuant to contracts payable in annual installments.²⁰ All moneys paid annually under such contracts shall be available and shall be paid from the authorized tax levy of the municipality.²¹ Contracts may not be entered into which will create aggregate future obligations of the municipality in an amount in excess of one percent of the value of all taxable property within the municipality and such contracts shall not be in excess of \$10,000.²²

Municipalities may also “convey, sell, dispose of, or lease personal and real property.”²³

Home rule cities have the power to “acquire, hold, operate, and dispose of property”²⁴ and all powers conferred upon cities of general law.²⁵

Energy Performance Contracting

Municipalities may enter into contracts for energy conservation measures for a term not to exceed fifteen years, subject to numerous restrictions.²⁶ “The governmental unit shall include in its annual appropriations measure for each later biennium or fiscal year any amounts payable under guaranteed energy savings contracts during the biennium or fiscal year.”²⁷

School Districts

School districts²⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁹ and eminent domain powers.³⁰

School districts may “acquire real property and construct school buildings and other facilities,” and may “purchase, sell, exchange, and improve real property.”³¹

¹⁵Municipalities are by definition cities. *Id.* § 40-01-01(4). They may be home rule. N.D. Const. art. VII, § 6; *see also* N.D. Cent. Code ch. 40-05.1.

¹⁶*Id.* § 57-15-07.

¹⁷*Id.* § 40-05-01(55).

¹⁸*Id.* § 40-05-01(33).

¹⁹*Id.* § 40-05-01(55).

²⁰*Id.* § 40-05-09.

²¹*Id.*

²²*Id.*

²³*Id.* § 40-05-01(56). Private sale is permitted if the value of the property is estimated to be less than \$2,500. *Id.* § 40-11-04 (subject to any applicable provisions of title 40).

²⁴*Id.* § 40-05.1-06(1).

²⁵*Id.* § 40-05.1-12.

²⁶*Id.* §§ 48-05-09 to -13.

²⁷*Id.* § 48-05-13.

²⁸Each school district is a public school district governed by the provisions of Title 15.1 (Elementary and Secondary Education). *Id.* § 15.1-07-01. The board of education of the City of Fargo is a body corporate.

²⁹*Id.* § 57-15-14.

³⁰*Id.* § 15.1-09-33(8).

³¹*Id.* § 15.1-09-33(4) and 15.1-09-33(6).

School districts are permitted to lease real property for a maximum of one year, however in the case of a career and technical education facility constructed in whole or in part with financing acquired under chapter 40-57,³² the lease may be for a period of up to twenty years.³³

School districts may “purchase, sell, exchange, improve and lease for up to one year school equipment, furniture, supplies, and textbooks.”³⁴ School districts, independently or jointly with other school districts, may purchase telecommunication equipment or lease a telecommunication system.³⁵ There is also authority to contract for used motor vehicles, including a school bus, motorbus, or van, intended primarily for the transportation of students.³⁶ Under this section, except for certain items and services, sealed bids must be received for contracts involving the expenditure of more than \$25,000.³⁷ “A board may purchase a bus body, a chassis, or a complete bus on an installment plan, provided the plan does not extend beyond six years.”³⁸

Energy Performance Contracting

School districts may enter into contracts for energy conservation measures for a term not to exceed fifteen years, subject to numerous restrictions.³⁹ “The governmental unit shall include in its annual appropriations measure for each later biennium or fiscal year any amounts payable under guaranteed energy savings contracts during the biennium or fiscal year.”⁴⁰

Fire Districts

Fire districts⁴¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.⁴² Fire districts may “purchase or lease such firefighting equipment, ambulances, or other emergency vehicles, supplies, and other real or personal property as is necessary and proper to carry out the general fire protection program of the district.”⁴³

Hospital Districts

Hospital districts⁴⁴ may qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax,⁴⁵ but it is not clear whether they have power to lease-purchase property.

State Entities

The State’s authority to lease-purchase property is as follows:

Notwithstanding any other provision of law, the state, or any agency or institution of the state, may enter agreements to lease all or part of, or an undivided or other interest in, any real or personal property belonging to the state, or any agency or institution of the state, to and, or, from any agency or institution of the state or

³²Municipal Industrial Development Act of 1955, *id.* §§ 40-57-01 to -20.

³³*Id.* § 15.1-09-33(7).

³⁴*Id.* § 15.1-09-33(9).

³⁵*Id.* § 15.1-09-33(13).

³⁶*Id.* § 15.1-09-34(1)(j).

³⁷*Id.* § 15.1-09-34(1).

³⁹ *Id.* § 15.1-09-43 (2003).

³⁹*Id.* §§ 48-05-09 to -13.

⁴⁰*Id.* § 48-05-13.

⁴¹Fire districts are rural fire protection districts created under *id.* Ch. 18-10 for purposes of this survey.

⁴²*Id.* § 18-10-07.

⁴³*Id.* § 18-10-06(6).

⁴⁴Hospital district means a hospital organized pursuant to *id.* § 23-30-02.

⁴⁵*Id.* § 57-15-26.4.

any person for such compensation and upon such terms and conditions as the parties under such agreement may stipulate. Such agreements must be authorized by the board, if any, or commissioner or other executive officer of the commission, agency, or institution holding, controlling, possessing, or owning the property or on whose behalf the property is held. For purposes of this section, the agreements include any lease, sublease, purchase agreement, lease-purchase agreement, installment purchase agreement, leaseback agreement, or other contract, agreement, instrument, or arrangement pursuant to which any rights, interests, or other property are transferred to, by, or from any party to, by, or from one or more parties, and any related documents entered or to be entered, including any operating agreement, service agreement, indemnity agreement, participation agreement, loan agreement, or payment undertaking agreement entered as part of a long-term lease and leaseback transaction. A lease obligation under this section may not exceed a term of ninety-nine years. A lease obligation entered into under this section is payable solely from revenues to be derived by the state, or any agency or institution of the state, from the ownership, sale, lease, disposition, and operation of the property; any funds or investments permitted under state law, and any earnings thereon, to the extent pledged therefor; revenues to be derived by the state, or any agency or institution of the state, from any support and operating agreement, service agreement, or any other agreement relating to the property; funds, if any, appropriated annually by the legislative assembly or received from federal sources; and income or proceeds from any collateral pledged or provided therefor. A lease obligation under this section does not constitute an indebtedness of the state, or any agency or institution of the state, or a pledge of the full faith and credit or unlimited taxing resources of the state, or any agency or institution of the state. Notwithstanding any other law, the state, or any agency or institution of the state, may solicit and accept one or more proposals for a lease transaction, including the arrangement thereof, under this section, and accept any proposal that is determined to be in the public interest. The public finance authority, on behalf of the state, or any agency or institution of the state, may do and perform any acts and things authorized by this section, including making, entering, and enforcing all contracts or agreements necessary, convenient, or desirable for the purposes of this section.⁴⁶

The Office of Management and Budget (OMB) is charged with supervision and administration of the State's fiscal affairs and procurement of commodities.⁴⁷ The OMB is generally required to "purchase or lease" commodities⁴⁸ for all state agencies and institutions in the executive branch of state government⁴⁹ except that the following items, among others, are excepted from the statutes relating to OMB purchasing practices: 1. land, buildings, space, or the rental thereof; 2. Department of Transportation materials and equipment;⁵⁰ 3. services for the maintenance of equipment; and 4. commodities and services costing less than the benchmark amount set by the Director of the OMB.⁵¹ The Director may delegate procurement authority but purchases must be made in accordance with code Chapter 54-44.4, and OMB rules and policies.⁵²

OMB regulations regarding lease-purchases provide:

1. Specifications for equipment leases and lease-purchases will include the total term of the lease, including all provisions for extensions or renewals of the lease agreement. If the purchasing agency will purchase insurance for the equipment being leased from the lessor, those requirements will be stated in the specifications.
2. The purchasing agency will prepare a written analysis documenting the decision to lease or lease-purchase, in accordance with North Dakota Century Code section 54-27-21.1.
3. The state agency or institution will notify the office of the insurance commissioner, fire and tornado fund division, if the equipment being leased or lease-purchased will be insured under that fund.
4. The purchasing agency must comply with the requirements of North Dakota Century Code section 54-27-21 related to fixed asset reporting when the equipment lease or lease-purchase is determined to be a fixed asset acquisition.⁵³

⁴⁶*Id.* § 54-01-27.

⁴⁷*Id.* § 54-44-02; § 54-44-04.

⁴⁸Commodities "means all property, including equipment, . . . and leases of equipment." *Id.* § 54-44.4-01.

⁴⁹*Id.* § 54-44.4-02.

⁵⁰Dept. of Transp. purchasing procedures are covered by *id.* chapter 24-02.

⁵¹*Id.* § 54-44.4-02.

⁵²*Id.* §§ 54-44.4-03; 54-44.4-02.

⁵³N.D. Admin. Code § 4-12-06-05 (eff. Aug 1, 2004). Section 54-27-21.1 requires that any state agency or institution that

OMB policies regarding lease-purchases provide:

Policy 312 - Leases and Lease-Purchase Agreements

Any state agency or institution that acquires the use of an asset, excluding real estate, as the result of a lease arrangement will prepare a written analysis documenting the decision to acquire the use of the asset. The agency or institution will make the analysis available to the auditor for review during the audit for the fiscal period during which the decision was made. An analysis worksheet is available on the OMB website <https://www.nd.gov/omb/agency/procurement/lease-vs-purchase-analysis>.

The agency should request that the vendor provide the following information for analysis of the lease commitment:

1. The name of the lessor.
2. The inception date of the lease is the date of the lease agreement or commitment, if earlier.
3. The term of the lease in number of months.
4. The monthly/annual payment amount.
5. The amount of executor costs by type. Types of executor costs include insurance, maintenance contracts, and taxes whether paid by the lessor or lessee that are included in the rental payments.
6. The estimated purchase price (i.e. fair value) of the leased property at the inception of the lease. This is the price for which the property could be sold in an arm's length transaction between unrelated parties.
 - a) If the lessor is a manufacturer or a dealer, the fair value of the asset at the inception of the lease will be its normal selling price reflecting any volume or trade discount as applicable. This price should consider prevailing market conditions for the asset and be reduced if there are unfavorable market conditions.
 - b) If the lessor is not a manufacturer or dealer, the fair value of the asset will normally be its cost reflecting any volume or trade discounts as applicable.
7. The purchase price at the termination of the lease. This is needed to determine if the lease contains a bargain purchase option. If this purchase price is considered by the vendor to be a price sufficiently lower than the expected fair value of the asset at the termination of the lease - the vendor should provide comments on this fact.
8. A comment from the vendor stating whether or not the lease transfers ownership of the leased property to the state at the end of the lease term.
9. The estimated economic life of the leased property. This is the estimated remaining period during which the property is expected to be economically usable by one or more users, with normal repairs and maintenance, for the purpose for which it was intended at the inception of the lease.
10. The interest rate (if applicable) used by the lessor to determine the rental payments.⁵⁴

acquires an asset as the result of a lease arrangement shall prepare a written analysis documenting the decision to acquire the asset.

⁵⁴OMB Policy 312 (August 1, 2017)(available on the OMB website at <http://www.nd.gov/fiscal/docs/fiscal>).

Any state entity leasing or renting office equipment may convert the agreement to a rental purchase type agreement with the approval of the OMB.⁵⁵

Procurement preference must be given to North Dakota sellers.⁵⁶

The OMB has control and management of the State office building, the executive mansion and associated lands.⁵⁷ It may contract for additional office space.⁵⁸ Leases of buildings or space by agencies other than institutions of higher education, the adjutant general and the Transportation Department must be approved by the OMB and reviewed by the office of the attorney general.⁵⁹

Public buildings and construction are covered by N.D. Cent. Code title 48. The threshold for bidding construction of a public improvement is \$150,000.⁶⁰

Motor Vehicles are purchased or leased for all state agencies, departments, institutions, boards, bureaus, and commissions by the Department of Transportation.⁶¹

The Department of Corrections warden may procure equipment according to the state procurement laws, chapter 54-44.4.⁶²

Information Technology

The Department of Information Technology (ITD) oversees information technology⁶³ and provides information technology to the executive, legislative and judicial branches, excluding institutions under control of the board of higher education.⁶⁴ ITD has authority to lease-purchase equipment, software, or implementation services for a period not to exceed five years.⁶⁵ Financing proposals exceeding one million dollars must be submitted for prior approval to the budget section of the legislative management or the legislative assembly.⁶⁶ “The department may finance the purchase of software, equipment, or implementation services only to the extent the purchase amount does not exceed seven and one-half percent of the amount appropriated to the department during that biennium.”⁶⁷ Information technology sought for purchase or lease by state agencies (except institutions of higher education) costing over \$25,000 and that is not on a state term contract must be submitted to ITD for prior approval in accordance with North Dakota Enterprise Architecture Standard STD-ITD-001.⁶⁸

Higher Education

⁵⁵N.D. Cent. Code § 54-06-17.

⁵⁶*Id.* § 44-08-01.

⁵⁷*Id.* §§ 54-21-18, -19.

⁵⁸*Id.* § 54-21-24.

⁵⁹*Id.* § 54-21-24.1.

⁶⁰*Id.* § 48-01.2-02.1.

⁶¹*Id.* § 24-02-03.3.

⁶²*Id.* § 12-48-07.

⁶³Information technology “means the use of hardware, software, services, and supporting infrastructure to manage and deliver information using voice, data, and video.” *Id.* § 54-59-01. There is a Division of Telecommunications within the department.

⁶⁴*Id.* § 54-59-05 (eff. through July 31, 2023). If the department is unable to fulfill a request for service from the legislative or judicial branch, the information technology may be procured by the legislative or judicial branch within the limits of legislative appropriations. *Id.*

⁶⁵*Id.* § 54-59-05.4.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.* § 54-59-05(5); Policy Code STD-ITD-001 (eff. Jan. 12, 2004, am. Feb. 23, 2016), available at the N.D. Info. Tech. Dept. website <https://www.nd.gov/itd/standards/information-technology-procurement-standard> (last accessed May, 2018).

The State Board of Higher Education (SBHE) “has full authority over the institutions under its control.”⁶⁹ “The consent of the legislative assembly is required for construction of any building financed by donations, gifts, grants, and bequests and for campus improvements or building maintenance financed by donations, gifts, grants, and bequests if the cost of the improvements or maintenance is more than seven hundred thousand dollars.”⁷⁰ Use of local funds in capital construction projects must be approved by the legislature.⁷¹ SBHE may determine the policy for purchasing by the university system in coordination with the office of management and budget.⁷² It manages information technology for all institutions in collaboration with the state’s Information Technology Department.⁷³

SBHE policies relating to lease-purchases provide:

1. All equipment and personal property leases shall be classified as either capital or operating leases. If at its inception, a lease meets one or more of the following criteria, the lease shall be classified as a capital lease by the lessee; otherwise, it shall be classified as an operating lease:
 - a. The lease transfers or permits transfer of ownership of the property to the lessee by the end of the lease term;
 - b. The lease contains a bargain purchase option;
 - c. The lease term is equal to seventy-five percent or more of the estimated economic life of the leased property. However, if the beginning of the lease term falls within the last twenty-five percent of the total estimated economic life of the leased property, including earlier years of use, this criterion may not be used for purposes of classifying the lease; or
 - d. The present value at the beginning of the lease term of the minimum lease payments, excluding that portion of the payments representing executor costs, such as insurance, maintenance, and taxes to be paid by the lessor, including any profit, equals or exceeds ninety percent of the excess of the fair value of the leased property to the lessor at the inception of the lease over any related investment tax credit retained by the lessor and expected to be realized by him. However, if the beginning of the lease term falls within the last twenty-five percent of the total estimated economic life of the leased property, including earlier years of use, this criterion may not be used for purposes of classifying the lease. A lessor shall compute the present value of the minimum lease payments using his incremental borrowing rate, unless:
 - i. It is practicable to learn the implicit rate computed by the lessor, and
 - ii. The implicit rate computed by the lessor is less than the lessee's incremental borrowing rate.

If both of those conditions are met, the lessee shall use the implicit rate.
2. Leases of equipment or personal property by an institution must be approved and executed by an officer delegated that authority pursuant to institution policy. Leases of equipment or personal property in the NDUS office must be approved and executed by the Chancellor or the chief financial officer. In addition to approval by an institution officer delegated such responsibility or the chief financial officer, a lease or lease renewal, including transactions under a master lease, requires Chancellor approval if:

⁶⁹N.D. Cent. Code § 15-10-11; N.D. Const. art VIII § 6.

⁷⁰N.D. Cent. Code § 15-10-12.1.

⁷¹*Id.* § 15-10-12.3.

⁷²*Id.* § 15-10-17(5).

⁷³*Id.* § 15-10-44.

- a. A lease entered into by NDSU or UND provides for total payments by the institution, including lease or rental, interest and all other payments over the lease term, of five hundred thousand dollars or more; or
- b. A lease entered into by the NDUS office or NDUS institution other than NDSU or UND provides for total payments by the NDUS or institution, including lease or rental, interest and all other payments over the lease term, of two hundred fifty thousand dollars or more.
- c. Leases required Chancellor approval under SBHE Policy 804(2)(a)-(b) shall be submitted in the form attached as equipment and personal property lease.

The Chancellor may, in the Chancellor's discretion, submit a lease to the SBHE for SBHE consideration and approval in lieu of Chancellor approval.

3. Master leases and tax-exempt financing agreements are governed by SBHE Policy 804.1 and must be approved by the SBHE pursuant to that policy. Real property leases are governed by SBHE Policy 909. Leases made without the required approval are not binding on the institution or SBHE.

4. Master leases and lease purchase agreements must also include:

- a. The purchase price at the termination of the lease;
- b. When and under what terms title to the property transfers to the state;
- c. In master leases and other leases under which interest rates are variable, the maximum rate; and
- d. In master leases, the maximum amount financed or total amount of all transactions.

5. Leases of equipment or personal property shall comply with applicable policies and procedures governing purchasing, including competitive bidding requirements.

6. Before acquisition of an asset as the result of a lease agreement or other debt financing arrangement, the responsible institution official shall, unless the decision is dictated by funding limitations, prepare a written analysis documenting the decision to acquire the use of the asset, which shall be filed with the lease agreement or other document setting forth the terms of the agreement. If the decision is dictated by funding limitations, the official shall document those limitations. Consistent with N.D.C.C. § 54-44.1-06, each institution shall provide to the state office of management and budget (OMB) as part of the biennial budget process a list of every individual leased asset, excluding real estate, with a value of at least fifty thousand dollars and every group of leased assets comprising a single system with a combined value of at least fifty thousand dollars acquired through a capital or operating lease arrangement.

7. The Chancellor shall adopt procedures defining required or recommended terms for lease agreements and defining the content and format for leases requiring Chancellor approval.

8. As part of the semi-annual budget status report to the SBHE's budget and finance committee, institutions shall disclose all equipment and personal property lease agreements in a format determined by the Chancellor.

9. Computer cloud hosting arrangements that meet the following criteria are accounted for as service contracts and are exempt from this policy:

- a. The NDUS office or NDUS institution does not have the contractual right to take possession of the software at any time during the hosting period without incurring significant costs or a significant reduction in utility or value; and

b. It is not feasible to run the software on the NDUS office or NDUS institution's hardware or contract with another party unrelated to the vendor to host the software.⁷⁴

SBHE Policy 804.1 additionally provides:

1. The Board must approve issuance of bonds pursuant to NDCC ch. 15-55 or acquisition of real or personal property by any institution for which the Board is responsible pursuant to any form of installment purchase (such as a Lease Purchase Agreement) wherein the interest component of the periodic payments is intended to be exempt from state and federal income tax.
2. In order to take advantage of the lowest interest rates for tax exempt borrowings authorized by the Internal Revenue Code of 1986, as amended, the Board shall designate tax exempt obligations of the Board as "Qualified Tax-Exempt Obligations" under Section 265 of the Code if the Board intends to issue less than \$10,000,000.00 in principal amount of tax exempt obligations in the calendar year in which bonds are issued pursuant to N.D.C.C. Chapter 15-55 and principal obligation amounts are incurred under tax exempt installment purchase transactions.
3. The issuance of tax exempt obligations by the Board shall be coordinated by the institutions with the Chancellor's Office.
4. The Chancellor shall adopt procedures to coordinate institution requests for tax exempt financing.
5. Institutions shall cooperatively utilize master lease agreements and other cooperative efforts to minimize costs.
6. Institutions shall submit copies of all bond rating reviews and updates to the NDUS office as they are issued and received by the institutions.⁷⁵

North Dakota University System (NDUS) procedures relating to lease-purchases provide:

1. The Chief Financial Officer shall at the end of each year survey the institutions, requesting from each institution information concerning the principal amount of tax exempt obligations they anticipate requesting the Board to incur in the next calendar year. Institutions shall amend the annual survey at such time as a determination is made to pursue tax exempt financing in the calendar year other than what was reported on the annual survey.
2. Each institution shall coordinate the filing of Internal Revenue Service Form 8038-G or Form GC, which shall be in the name of the Board and bear the Board's tax identification number (45-030-9764), with the Chief Financial Officer in order to assign a report number. Forms shall generally be filed within two weeks of the incurring of the tax exempt obligation.
3. A request for advance approval of a bond issue shall be submitted to the Board in the form of a general authorization resolution. Such general authorization resolutions must provide (i) the maximum dollar amount of obligation to be incurred, (ii) the maximum average annual interest rate on such obligation or obligations and (iii) the final date upon which principal amounts of the obligation will mature or become payable. A single general authorization resolution may approve multiple transactions, as contemplated in so called "Master Lease" transactions without further Board approval so long as the maximum dollar amount, interest rate and maturity provisions authorized by the general authorization resolution are not exceeded.
4. Compliance with the provisions of this procedure are in addition to and do not waive any of the other policies of the Board with regard to purchasing procedures, leasing policies or the issuance of self liquidating bond issues.

⁷⁴SBHE Policy § 804 (eff. Apr. 26, 2018).

⁷⁵*Id.* § 804.1 (Apr. 12, 2012).

5. Institutions shall cooperatively utilize master lease agreements and other cooperative efforts to minimize costs.⁷⁶

Energy Performance Contracting

State entities may enter into guaranteed energy savings contracts for a term of 15 years, subject to numerous restrictions.⁷⁷ “The governmental unit shall include in its annual appropriations measure for each later biennium or fiscal year any amounts payable under guaranteed energy savings contracts during the biennium or fiscal year.”⁷⁸

Debt Limitations

The State, counties, municipalities, school districts and fire districts are constitutionally limited in the amount of debt they may incur.⁷⁹ Fire districts are statutorily limited in the amount of debt they may incur.⁸⁰ In *Schieber v. City of Hohall*,⁸¹ the court defined “debt” as “the pecuniary obligation imposed by contract, except the obligations to be satisfied out of the current revenues.”⁸² The court further stated that the constitutional provision limiting debt is “intended as a limit on general taxation; a protection to the taxpayers . . . enacted for the purpose of curbing the taxing power and of restraining excessive expenditures, that entail tax burdens.”⁸³

In *Haugland v. City of Bismarck*,⁸⁴ the court approved a sale-leaseback financing for the city. The financing was for improvements to its civic center, memorial library and a water main. Various tax revenues, but not ad valorem taxes, would be used to make payments. None of the tax revenues were pledged, but the city covenanted that it would not pledge those revenues toward any purpose other than payment of lease rentals during the term of the agreement.⁸⁵ The court held that the city had statutory authority to do the sale leaseback transaction and that the non-appropriation provision prevented the agreement from being general obligation debt under article X, section 16 of the state constitution.⁸⁶ The court did not reach the issue of whether the obligations were nevertheless debt under article X, section 15 of the state constitution, since the city’s total debt limit under section 15 would not be exceeded even if the total principal amount of the lease were treated as debt.⁸⁷

The North Dakota attorney general followed the *Haugland* approach in advising that the Fargo Public School District may make lease payments to a separate non-profit corporation building authority from the general fund of the district where the general fund levy is not pledged and the obligation to pay rent is subject to annual appropriation by the school board.⁸⁸

⁷⁶NDUS Procedures § 804.1 (eff. Oct. 23, 2015).

⁷⁷N.D. Cent. Code §§ 48-05-09 to -13.

⁷⁸*Id.* § 48-05-13.

⁷⁹N.D. Const. art. X, §13 (State); *id.* § 15 (local government).

⁸⁰N.D. Cent. Code § 18-10-08.

⁸¹268 N.W. 445 (N.D. 1936) (at issue in this decision was whether obligations of the city payable from special assessments created debt).

⁸²*Id.* at 449.

⁸³*Id.* at 450.

⁸⁴429 N.W.2d 449 (N.D. 1988).

⁸⁵*Id.* at 451.

⁸⁶*Id.* at 455, 466.

⁸⁷*Id.* at 455.

⁸⁸Op. Att’y Gen. L-05 (N.D. April 23, 2008), 2008 WL 1859882.

In *Red River Human Services Foundation v. State of North Dakota*,⁸⁹ the court approved the state's non-appropriation of rent under its office lease.

It is unlawful for any city, county or township officer, or for the officers of any school district, unless specially and expressly authorized by law, to contract any debt or incur any pecuniary liability, for the payment of either the principal or interest, for which, during the current year, or any subsequent year, it is necessary to levy on the taxable property of such county . . . city or school district, a higher rate of tax than the maximum rate prescribed by law, and every contract made in contravention of the provisions of this section is null and void in regard to any obligation thereby imposed on the corporation on behalf of which such contract purports to be made, but every commissioner, officer, agent, supervisor, or member of any municipal corporation which makes or participates in making, or authorizes the making, of any such contract, must be held individually liable for its performance, and every commissioner, supervisor, director, or member of any city governing body, or other officer or agent of any such municipal corporation, present when any such unlawful contract was made or authorized to be made, must be deemed to have made, or to have participated in making, or to have authorized the making of, the same, as the case may be, unless, if present, he dissented therefrom and entered or caused such dissent to be entered on the records of such municipal corporation.⁹⁰

In addition, "[n]o contract shall be made by the governing body of a municipality . . . unless there shall have been a previous appropriation providing for such expense."⁹¹

Interest Rate Limitations

Limitations on interest rates are established by statute:

Except as otherwise provided by the laws of this state, a person, either directly or indirectly, may not take or receive, or agree to take or receive, in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of money, goods, or things in action than five and one-half percent per annum higher than the current cost of money as reflected by the average rate of interest payable on United States treasury bills maturing in six months in effect for North Dakota for the six months immediately preceding the month in which the transaction occurs, as computed and declared on the last day of each month by the state banking commissioner, but that in any event the maximum allowable interest rate ceiling may not be less than seven percent, and in the computation of interest the same may not be compounded; provided, however, that a minimum interest charge of fifteen dollars may be made. A contract may not provide for the payment of interest on interest overdue, but this section does not apply to a contract to pay interest at a lawful rate on interest that is overdue at the time such contract is made. Any violation of this section is deemed usury⁹²

No bonds issued under the provisions of this chapter [by counties, cities and public school districts] may bear interest at a rate . . . and be sold privately at a price resulting in an average net interest cost higher than twelve percent per annum. There is no interest rate ceiling on those issues sold at public sale . . .⁹³

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent**

⁸⁹477 N.W.2d 225 (N.D. 1991). The Attorney General has opined that the analysis of *Haugland* with respect to a nonappropriation lease not creating debt under the constitutional limitations for political subdivisions would be applicable to the constitutional debt limitations for the State. 1997 N.D. Op. Atty. Gen. L-108 (N.D.A.G.), 1997 WL 930122.

⁹⁰N.D. Cent. Code § 57-45-07.

⁹¹*Id.* § 40-40-20. Contracts for water or fire protection are excepted from this provision except for the appropriations needed for the first year of the contract.

⁹²*Id.* § 47-14-09.

⁹³*Id.* § 21-03-08. It does not appear that this provision would be applicable to lease-purchase financings.

research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

OHIO 2017

Updated through File 124 of the 131st Gen. Assembly (2015-2016)ⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse, county offices,”⁵ and other necessary buildings. The county may lease for a period not to exceed forty years pursuant to a contract providing for the construction thereof under a lease-purchase plan any said improvements.⁶ “Such lease-purchase plan shall provide that at the end of the lease period such buildings . . . together with the land on which they are situated, shall become the property of the county without cost.”⁷ Counties may enter into leases, including leases with an option to purchase, for correctional facilities subject to certain notice requirements and other provisions.⁸ Counties can lease certain capital facilities from the state.⁹ Counties may “purchase or lease” motor vehicles¹⁰ and may “purchase, lease or otherwise acquire” automatic data processing equipment.¹¹ A county, as a “public hospital agency,” may lease any “hospital facility” to one or more “hospital agencies.”¹²

If the interests of the county so require, the board of county commissioners may sell any real property belonging to the county and not needed for public use, including all portions of buildings acquired by the board to house county offices, or may lease or rent the same, but no such lease shall be for a longer term than five years, unless such lease is part of a lease-purchase agreement, in which case the lease may be for a period not exceeding twenty-five years¹³

The attorney general has advised that lease-purchase agreements for the acquisition of full county service jails cannot contain provisions for the operation and management of the county jails by private, for-profit corporations. Only ministerial duties can be contracted for in the agreement.¹⁴

Counties may purchase “machinery, tools, trucks, and other equipment for use in constructing, maintaining, and repairing roads,” provided that “not less than one-fourth of the purchase price shall be paid in cash, and the remainder of the purchase price shall be paid in not more than five equal annual installments, except that if the board [of county commissioners] sells, as authorized by law, used vehicles,

¹Counties may adopt charters. Ohio Const. art. X, § 3.

²Baldwin’s Ohio Rev. Code Ann. ch. 323.

³*Id.* § 303.38.

⁴*Id.* § 307.37.

⁵*Id.* § 307.02. The attorney general has opined that authority to acquire property by purchase or lease does not include the authority to acquire property by a lease with an option to purchase; such authority must be expressly provided. Section 307.02 expressly provides such authority for a board of county commissioners of a county solid waste management district to enter into an agreement with a private company to acquire recycling carts and trucks from a vendor. The attorney general also opined that the board had no authority to borrow money from a private for-profit company to purchase the recycling carts and trucks. 2015--019 Op. Att’y Gen. (Ohio 2015). Such lease-purchases are subject to public bidding. *Id.* See, also, 66-128 Op. Att’y Gen. (Ohio 1966) (mentions this section).

⁶Baldwin’s Ohio Rev. Code Ann. § 307.02.

⁷*Id.*

⁸*Id.* § 307.022.

⁹*Id.* § 307.021.

¹⁰*Id.* § 307.41.

¹¹*Id.* § 307.843.

¹²Baldwin’s Ohio Revised Code Ann § 140.05(A). (Ohio Revised Code Ann. § 140.05(D) states that such lease may provide for the sale or transfer of title of the leased facilities pursuant to a lease-purchase.)

¹³*Id.* § 307.09.

¹⁴85-008 Op. Att’y Gen. (Ohio 1985).

machinery, tools, or equipment owned by the county to the person or other entity from whom it is to make the purchase, the one-fourth cash down payment or any installments, or both, may be reduced by the amount of the selling price of the used vehicles, machinery, tools, or equipment. Each installment shall be not less than one-fifth of the balance due and shall be secured by a note which may contain a clause permitting prepayment at the option of the board.”¹⁵

Counties may also “enter into leases which include an option to purchase machinery, tools, trucks, and other equipment for use in constructing, maintaining, and repairing roads. Any such contract to lease with an option to purchase shall require the board to pay at least three twentieths of the total cost of the lease with an option to purchase in cash. If the board sells used equipment as part of any such contract, the three-twentieths cash down payment may be reduced by the amount of the selling price of the used equipment. Such leases with options to purchase shall be made from the lowest responsible bidder offering the equipment after advertisement as provided in section 5575.01 of the revised code”¹⁶

Energy Performance Contracting

Counties may acquire energy conservation improvements by installment payment contract pursuant to a comprehensive statute.¹⁷ The Ohio Air Quality Development Authority provides financing to local governments for energy efficient upgrades in buildings and facilities.¹⁸

Municipalities

Municipalities¹⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²⁰ eminent domain²¹ and police powers.²² Municipalities may “acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase . . . and make any rules and regulations, by ordinance or resolution, required to fully carry out . . . the provisions of any lease by which property may be acquired.”²³ Municipalities may “[a]cquire by purchase, gift, devise, bequest, lease, condemnation proceedings, or otherwise, real or personal property.”²⁴ Municipalities “may lease for a period not to exceed forty years, pursuant to a contract providing for the construction thereof under a lease-purchase plan, buildings, structures, and other improvements.”²⁵ The lease shall provide that at the “end of the lease period the buildings, structures, and related improvements together with the land on which they are situate shall become the property of the municipal corporation without cost.”²⁶

¹⁵*Id.* § 5549.02 (A). *See id.* for additional requirements with respect to the issuance of notes in connection with such purchases.

¹⁶*Id.* § 5549.02(C).

¹⁷*Id.* § 307.041.

¹⁸*Id.* § 3706.04; <http://ohioairquality.org/>.

¹⁹Municipalities for purposes of this discussion are cities and villages. Baldwin’s Ohio Rev. Code Ann. § 703.01. Municipalities may adopt home rule. Ohio Const. art. XVIII, § 7.

²⁰Baldwin’s Ohio Rev. Code Ann. § 5705.03 (when read in conjunction with definitions at *id.* § 5705.01).

²¹*Id.* § 717.01(A).

²²*See generally id.* ch. 715.

²³*Id.* § 715.01. *See* 66-128 Op. Att’y Gen. (Ohio 1966) (construing this provision).

²⁴ Baldwin’s Ohio Rev. Code Ann. § 717.01(V).

²⁵*Id.* § 715.011. Such lease-purchase financings are subject to competitive bidding. *Id.* *See* 66-128 Op. Att’y Gen. (Ohio 1966) (construing this provision).

²⁶Baldwin’s Ohio Rev. Code Ann. § 715.011.

Municipalities may “sell or lease real estate” and “sell personal property” when such property is not needed for any municipal purpose.²⁷ A municipality as a “public hospital agency” may lease any “hospital facility” to one or more “hospital agencies.”²⁸

The legislative authority of any municipal corporation may purchase, lease, or lease with an option to purchase necessary fire-fighting equipment.²⁹

Energy Performance Contracting

Municipalities acquire energy conservation improvements by installment contract pursuant to a comprehensive statute.³⁰ The Ohio Air Quality Development Authority provides financing to local governments for energy efficient upgrades in buildings and facilities.³¹

School Districts

School districts³² qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³³ and eminent domain powers.³⁴ School districts may “build, enlarge, repair, and furnish the necessary schoolhouses, [and] purchase or lease sites therefor, or rights-of-way thereto, or purchase or lease real estate to be used for playgrounds for children or rent suitable schoolrooms . . . and provide the necessary apparatus and make all other necessary provisions for the schools under its control.”³⁵ School districts may acquire land by purchase. Such purchase may be “for cash, by installment payments, with or without a mortgage, by entering into lease-purchase agreements, or by lease with an option to purchase.”³⁶

The board of education of a city, local, exempted village, or joint vocational school district, the governing board of an educational service center, or the governing authority of a community school may enter into a lease-purchase agreement providing for construction; enlarging or other improvement, furnishing, and equipping; lease; and eventual acquisition of facilities or improvements to facilities, including but not limited to buildings, playgrounds, parking lots, athletic facilities, and safety enhancements for any school district, educational service center, or community school purpose. The agreement shall provide for a lease for a series of one-year renewable lease terms totaling not more than the number of years equivalent to the useful life of the asset and in no event more than thirty years. The agreement shall provide that at the end of the series of lease terms provided for in the agreement the title to the leased property shall be vested in the school district or educational service center, if all obligations of the school district, educational service center, or community school provided for in the agreement have been satisfied. The agreement may, in addition to the rental payments, require the school district, educational service center, or community school to pay the lessor a lump-sum amount as a condition of obtaining title to the leased property. In conjunction with the agreement, a school district board of education, an educational service center governing board, or a governing authority of a community school may grant leases, easements, or licenses for underlying land or facilities under the board's control for terms not exceeding five years beyond the final renewal term of the lease-purchase agreement entered into pursuant to this section. Payments under the agreement may be deemed to be, and paid as, current operating expenses.

²⁷*Id.* § 721.01. Such power is subject to the provisions of chapter 721. *Id.*

²⁸Baldwin's Ohio Rev. Code Ann. § 140.05(A) (when read in conjunction with definitions at *id.* § 140.01). . (Section 140.05(D) states that such lease may provide for the sale or transfer of title of the leased facilities pursuant to a lease-purchase agreement.

²⁹*Id.* § 505.37 (D).

³⁰*Id.* § 717.02(C).

³¹*Id.* § 3706.04; <http://ohioairquality.org>.

³²School districts, as used for purposes of this discussion, refer to boards of education.

³³Baldwin's Ohio Rev. Code Ann. § 5705.03 (when read in conjunction with definitions at *id.* § 5705.01).

³⁴*Id.* § 3313.39.

³⁵*Id.* § 3313.37(A). Competitive bidding is usually required if the cost exceeds \$25,000. *Id.* § 3313.46.

³⁶*Id.* § 3313.37(B)(1). This provision is not applicable to county school districts and requires voter approval of a tax levy. *Id.* It also requires that the term not exceed five years. *Id.*

The obligations under a lease-purchase agreement entered into pursuant to this section shall not be considered to be net indebtedness of a school district under section 133.06 of the Revised Code.³⁷

Office equipment and computer hardware and software for instructional purposes³⁸ may be acquired “by purchase, by lease, by installment payments, by entering into lease-purchase agreements, or by lease with an option to purchase.”³⁹

An amendment to the Revised Code passed in 1997 allows the lease or lease-purchase of school buses. “The board of education of any city, exempted village, local, or joint vocational school district and the governing board of any educational service center may expend funds to obtain one or more motor vehicles, as defined in section 4501.01 of the Revised Code, by purchase, lease, or lease purchase. Except as provided in section 3327.14 of the Revised Code, any motor vehicle so obtained shall be used solely for school purposes.”⁴⁰

School districts are capable of “contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property.”⁴¹ School districts may dispose of real or personal property.⁴²

Energy Performance Contracting

The board of education of a city, exempted village, local, or joint vocational school district “. . . may enter into an installment payment contract for the purchase and installation of energy conservation measures.”⁴³ The statute provides that not less than one-fifteenth of the cost shall be paid within two years from the date of purchase and the balance within fifteen years. The Ohio Air Quality Development Authority provides financing to local governments for energy efficient upgrades in buildings and facilities.⁴⁴

Fire Districts

Fire districts⁴⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.⁴⁶ Joint fire districts “may purchase, lease, or lease with an option to purchase the necessary fire-fighting equipment, buildings, and sites for the . . . fire district . . . and issue securities for that purpose.” Fire and ambulance districts may “[p]urchase, lease, lease with an option to purchase, maintain, and use all materials, equipment, vehicles, buildings, and land necessary to perform its duties.”⁴⁷

(A) As used in this section:

(1) ‘Lease-purchase agreement’ has the same meaning as a lease with an option to purchase. (2) ‘Public obligation’ has the same meaning as in section 133.01 of the Revised Code. (B) For any purpose for which a . . . a township fire district, a joint fire district, or a fire and ambulance district is authorized to acquire real or personal property, that board may enter into a lease-purchase agreement in accordance with

³⁷*Id.* § 3313.375.

³⁸*Id.* § 3313.37(B)(4). “[O]ffice equipment includes but is not limited to typewriters, copying and duplicating equipment, and computer and data processing equipment.” *Id.* This section appears to apply to county school districts. *Id.*

³⁹*Id.* This provision requires that the term not exceed five years. *Id.*

⁴⁰*Id.* § 3313.172.

⁴¹*Id.* § 3313.17.

⁴²*Id.* § 3313.41. If the property’s value exceeds \$10,000 a public sale is required, subject to limited exceptions. *Id.*

⁴³*Id.* § 3313.372(B).

⁴⁴*Id.* § 3706.04; <http://ohioairquality.org>.

⁴⁵Fire districts are districts created under *id.* §§ 505.371 (joint fire districts) and 505.375 (fire and ambulance district) for purposes of this survey.

⁴⁶*Id.* § 505.371(B) (joint fire district); *id.* § 505.375(C) (fire and ambulance district).

⁴⁷*Id.* § 505.375(C)(6).

this section to acquire the property. The board's resolution authorizing the lease-purchase agreement may provide for the issuance of certificates of participation or other evidences of fractionalized interests in the lease-purchase agreement, for the purpose of financing, or refinancing or refunding, any public obligation that financed or refinanced the acquisition of the property. Sections 9.94, 133.03, and 133.30 of the Revised Code shall apply to any such fractionalized interests. The lease-purchase agreement shall provide for a series of terms in which no term extends beyond the end of the fiscal year of the township or district in which that term commences. In total, the terms provided for in the agreement shall be for not more than the useful life of the real or personal property that is the subject of the agreement. A property's useful life shall be determined either by the maximum number of installment payments permitted under the statute that authorizes the board to acquire the property or, if there is no such provision, by the maximum number of years to maturity provided for the issuance of bonds in division (B) of section 133.20 of the Revised Code for that property. If the useful life cannot be determined under either of those statutes, it shall be estimated as provided in division (C) of section 133.20 of the Revised Code. The lease-purchase agreement shall provide that, at the end of the final term in the agreement, if all obligations of the township or district have been satisfied, the title to the leased property shall vest in the township or district executing the lease-purchase agreement, if that title has not vested in the township or district before or during the lease terms; except that the lease-purchase agreement may require the township or district to pay an additional lump sum payment as a condition of obtaining that title. (C) A board of trustees that enters into a lease-purchase agreement under this section may do any of the following with the property that is the subject of the agreement: (1) If the property is personal property, assign the board's rights to that property; (2) Grant the lessor a security interest in the property; (3) If the property is real property, grant leases, easements, or licenses for underlying land or facilities under the board's control for terms not exceeding five years beyond the final term of the lease-purchase agreement. (D) The authority granted in this section is in addition to, and not in derogation of, any other financing authority provided by law.⁴⁸

Hospital Districts

Stand-alone hospital districts do not appear to exist in the State of Ohio. There are joint township hospital districts and other types of hospital entities which are beyond the scope of this survey.

State Entities

Personal Property

The Department of Administrative Services (DAS) through the Office of Procurement Services (OPS) is generally responsible for establishing contracts for supplies⁴⁹ and services, including telephone, telecommunications and computer services, for the use of state agencies.⁵⁰ Preferences are given to Ohio products.⁵¹ Generally, DAS shall determine what supplies and services are purchased⁵² by or for state agencies.⁵³ Purchases by state elected officials (the attorney general, auditor, secretary, and treasurer) are not "limited."⁵⁴ A state agency may purchase supplies or services that cost fifty thousand dollars without

⁴⁸*Id.* § 505.267. Section 133.20 provides for a term of ten years for "Fire department apparatus and equipment."

⁴⁹Supplies "means all property, including, but not limited to, equipment, materials, other tangible assets, and insurance, but excluding real property or an interest in real property." *Id.* § 125.01(H).

⁵⁰*Id.* § 125.02. State institutions of higher education, the adjutant general for military supplies and services, the capital square review and advisory board, the general assembly, the judicial branch, and institutions administered by boards of trustees are excepted from purchasing through the DAS. *Id.* "State agency" generally means "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government." *Id.* § 1.60. *See also* Ohio Admin. Code chapter 123:5-1.

⁵¹*Id.* § 125.11.

⁵²Purchase "means to buy, rent, lease, lease purchase, or otherwise acquire supplies or services. "Purchase" also includes all functions that pertain to the obtaining of supplies or services, including description of requirements, selection and solicitation of sources, preparation and award of contracts, all phases of contract administration, and receipt and acceptance of the supplies and services and payment for them." *Id.* § 125.01(F).

⁵³*Id.* § 125.04

⁵⁴*Id.* § 125.041. "Nothing in sections 125.02, 125.03 to 125.08, 125.12 to 125.16, 125.18, 125.31 to 125.76, or 125.831 of the Revised Code shall be construed as limiting the attorney general, auditor of state, secretary of state, or treasurer of state in any of the following: (A) Purchases for less than the dollar amounts for the purchase of supplies or services determined under section

competitive bidding, subject to compliance with the agency's requisite procurement program described in section 125.035.⁵⁵ If a purchase exceeds \$50,000 when combined with other purchases made from the supplier during the fiscal year, the agency may be required to seek approval from the Controlling Board to purchase supplies without competitive selection.⁵⁶

A "certification of balance" is required in contracts:

Except as provided in division (B) of section 126.21 of the Revised Code, no contract, agreement, or obligation involving the expenditure of money chargeable to an appropriation, nor any resolution or order for the expenditure of money chargeable to an appropriation, shall be valid and enforceable unless the director of budget and management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations, in an amount at least equal to the portion of the contract, agreement, obligation, resolution, or order to be performed in the current fiscal year. Any written contract or agreement entered into by the state shall contain a clause stating that the obligations of the state are subject to this section.

The chief administrative officer of a state agency is responsible for the preaudit and approval of expenditures and other transactions of the agency. In order to initiate the making of a payment from the state treasury, the person in a state agency who requests that the payment be made shall first submit to the chief administrative officer of the agency all invoices, claims, vouchers, and other documentation related to the payment. The chief administrative officer shall examine each voucher and all other documentation required to support the voucher and determine whether they meet all the requirements established by the director of budget and management for making the payment. If they do meet those requirements, the chief administrative officer shall certify to the director the approval of the chief administrative officer for payment.

Prior to drawing a warrant as provided in section 126.35 of the Revised Code, the director may review and audit the voucher, any documentation accompanying the voucher, and any other documentation related to the transaction that the director may require to determine if the transaction is in accordance with law. The director shall not approve payment to be made if the director finds that there is not an unobligated balance in the appropriation for the payment, that the payment is not for a valid claim against the state that is legally due, or that insufficient documentation has been submitted. If the director does not approve payment, the director shall notify the agency of the reasons the director has not given approval.

In approving payments to be made under this section, the director, upon receipt of certification from the director of job and family services pursuant to section 4141.231 of the Revised Code, shall withhold from amounts otherwise payable to a person who is the subject of the director of jobs and family services' certification, the amount certified to be due and unpaid to the director of job and family services, and shall approve for payment to the director of job and family services, the amount withheld.

As used in this section and in section 126.21 of the Revised Code, 'chief administrative officer' means either of the following:

(A) The director of the agency or, in the case of a state agency without a director, the equivalent officer of that agency;

125.05 of the Revised Code; (B) Purchases that equal or exceed the dollar amounts for the purchase of supplies or services determined under section 125.05 of the Revised Code with the approval of the controlling board, if that approval is required by section 127.16 of the Revised Code; (C) The final determination of the nature or quantity of any purchase of supplies or services under section 125.02 or under division (G) of section 125.035 of the Revised Code; (D) The final determination and disposal of excess and surplus supplies; (E) The inventory of state property; (F) The purchase of printing; (G) Activities related to information technology development and use; (H) The fleet management program." *Id.*

⁵⁵*Id.* § 125.05; Dept. of Admin. Serv. Directive No. GS-D-12 (eff. date: 09-01-2008); *id.* § 127.1 (numerous exceptions apply including exception for motor vehicles and institutions of higher education).

⁵⁶*Id.* § 127.16; Dept. of Admin Serv. Directive No. GS-D-12 (Eff. Date: 09-01-2008). The Controlling Board is composed of members of the office of budget and management and certain members of the legislature. Baldwin's Ohio Rev. Code Ann. § 127.12.

(B) The designee of the chief administrative officer for the purposes of such sections.⁵⁷

As to motor vehicles used by state agencies, DAS will approve the purchase or lease and will decide if the vehicle will be purchase or leased.⁵⁸ Passenger motor vehicle acquisitions are generally made through the DAS master leasing program.⁵⁹

Information Technology

As stated above, DAS may contract for telecommunication and computer services for state agencies. The Office of Information Technology within DAS is charged with establishing policies and standards for the acquisition and use of “common information technology by state agencies.”⁶⁰ The chief information officer may review and reject requests to purchase information technology supplies or services.⁶¹

Real Estate

In general, DAS is authorized to acquire by purchase or lease all real estate required by a state agency and to exercise the power of eminent domain.⁶² DAS is responsible for leasing space for the use of state agencies.⁶³ DAS has power:

To lease for a period not to exceed forty years, pursuant to a contract providing for the construction thereof under a lease-purchase plan, buildings, structures, and other improvements for any public purpose, and, in conjunction therewith, to grant leases, easements, or licenses for lands under the control of a state agency for a period not to exceed forty years. The lease-purchase plan shall provide that at the end of the lease period, the buildings, structures, and related improvements, together with the land on which they are situated, shall become the property of the state without cost. (a) Whenever any building, structure, or other improvement is to be so leased by a state agency, the department shall retain either basic plans, specifications, bills of materials, and estimates of cost with sufficient detail to afford bidders all needed information or, alternatively, all of the following plans, details, bills of materials, and specifications: (i) Full and accurate plans suitable for the use of mechanics and other builders in the improvement; (ii) Details to scale and full sized, so drawn and represented as to be easily understood; (iii) Accurate bills showing the exact quantity of different kinds of material necessary to the construction; (iv) Definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needed information; (v) A full and accurate estimate of each item of

⁵⁷*Id.* § 126.07.

⁵⁸*Id.* § 125.832.

⁵⁹*Id.*

⁶⁰*Id.* § 125.18(I). For purposes of the office of information technology statute, “state agency” “means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government, other than any state-supported institution of higher education, the office of the auditor of state, treasurer of state, secretary of state, or attorney general, the adjutant general’s department, the bureau of workers’ compensation, the industrial commission, the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, the general assembly or any legislative agency, the capitol square review advisory board, or the courts or any judicial agency.”

⁶¹*Id.* § 125.18(D). Prior approval by the chief information officer is required for telecommunication services or equipment; facsimile; copiers and duplicators; information technology (IT) solutions; data processing (DP) equipment/services; software. St. of Ohio Procurement Hdbk. for Supplies and Serv. § 8.1 (last retrieved Nov. 2014).

⁶²*Id.* § 123.01(A). The following are not subject to the control and jurisdiction of DAS: buildings of educational and benevolent institutions under the management and control of boards of trustees; buildings under management of the capitol square review and advisory board, the bureau of workers’ compensation, or the departments of public safety, job and family services, mental health, developmental disabilities, and rehabilitation and correction; the joint legislative ethics committee. *Id.* § 123.01(C). Certain functions of the following governmental entities are not subject to the control of DAS: adjutant general, director of transportation, director of public safety and the registrar of motor vehicles, division of liquor control, director of development, director of environmental protection. *Id.* § 123.01(B). Agencies have the power to appropriate property under chapter 163.

⁶³*Id.* § 123.01(A)(6). See also *id.* § 152.24 (leasing capital facilities from the Ohio Building Authority).

expense and of the aggregate cost thereof. (b) The department shall give public notice, in such newspaper, in such form, and with such phraseology as the director of administrative services prescribes, published once each week for four consecutive weeks, of the time when and place where bids will be received for entering into an agreement to lease to a state agency a building, structure, or other improvement. The last publication shall be at least eight days preceding the day for opening the bids. The bids shall contain the terms upon which the builder would propose to lease the building, structure, or other improvement to the state agency. The form of the bid approved by the department shall be used, and a bid is invalid and shall not be considered unless that form is used without change, alteration, or addition. Before submitting bids pursuant to this section, any builder shall comply with Chapter 153. of the Revised Code. (c) On the day and at the place named for receiving bids for entering into lease agreements with a state agency, the director of administrative services shall open the bids and shall publicly proceed immediately to tabulate the bids upon duplicate sheets. No lease agreement shall be entered into until the bureau of workers' compensation has certified that the person to be awarded the lease agreement has complied with Chapter 4123. of the Revised Code, until, if the builder submitting the lowest and best bid is a foreign corporation, the secretary of state has certified that the corporation is authorized to do business in this state, until, if the builder submitting the lowest and best bid is a person nonresident of this state, the person has filed with the secretary of state a power of attorney designating the secretary of state as its agent for the purpose of accepting service of summons in any action brought under Chapter 4123 of the Revised Code, and until the agreement is submitted to the attorney general and the attorney general's approval is certified thereon. Within thirty days after the day on which the bids are received, the department shall investigate the bids received and shall determine that the bureau and the secretary of state have made the certifications required by this section of the builder who has submitted the lowest and best bid. Within ten days of the completion of the investigation of the bids, the department shall award the lease agreement to the builder who has submitted the lowest and best bid and who has been certified by the bureau and secretary of state as required by this section. If bidding for the lease agreement has been conducted upon the basis of basic plans, specifications, bills of materials, and estimates of costs, upon the award to the builder the department, or the builder with the approval of the department, shall appoint an architect or engineer licensed in this state to prepare such further detailed plans, specifications, and bills of materials as are required to construct the building, structure, or improvement. The department shall adopt such rules as are necessary to give effect to this section. The department may reject any bid. Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected.⁶⁴

Leases of real estate from the same supplier in excess of \$75,000 during the fiscal year are subject to competitive bidding or approval by the Controlling Board.⁶⁵ With certain exceptions the Controlling Board is required to approve the release of appropriations for the purchase of real estate or other capital projects.⁶⁶

Instruments of conveyance shall identify the agency of the state that has the use and benefit of real property involved in the transaction.⁶⁷

The director of DAS oversees public works and may purchase real or personal property in connection therewith subject to approval by the governor.⁶⁸

Higher Education

Institutions of higher education⁶⁹ are overseen by the Chancellor of Higher Education⁷⁰ which is responsible for reviewing appropriation requests by individual institutions and submitting

⁶⁴*Id.* § 123.01(A)(10).

⁶⁵*Id.* § 127.16(B) (numerous restrictions and exceptions apply).

⁶⁶*Id.* § 126.14.

⁶⁷*Id.* § 123.01(D); *id.* § 5301.012.

⁶⁸*Id.* § 123.04. Public improvements are subject to Chapter 153.

⁶⁹Institutions in the University System of Ohio include: Univ. of Akron, Bowling Green State Univ., Central State Univ., Univ. of Cincinnati, Cleveland State Univ., Kent State Univ., Miami Univ., Ohio Univ., Ohio State Univ., Shawnee State Univ., Univ. of Toledo, Wright State Univ., and Youngstown State Univ.. *Id.* § 3345.011.

⁷⁰*See generally id.* ch. 3333. Any statutory or regulatory references to "Ohio Board of Education" shall be read to mean the Chancellor of Higher Education. *Id.* §§ 3333.03, 3333.012.

recommendations for appropriations to the legislature and the office of budget and management.⁷¹ Individual institutions of higher education may apply to the Chancellor of Education for the right to appropriate property by eminent domain.⁷² Individual institutions may acquire by “lease-purchase, lease with option to purchase, or otherwise, construct, equip, furnish, reconstruct, alter, enlarge, remodel, renovate, rehabilitate, improve, maintain, repair, and operate, and lease to or from others, housing and dining facilities, and may pay for the same out of available receipts of such state university or college.”⁷³ Individual institutions may do likewise for auxiliary facilities or education facilities.⁷⁴

Institutions of higher education may be able to enter into lease purchase agreements in connection with the development of “entrepreneurial projects.”⁷⁵

Boards of trustees of state institutions of higher education may enter into financing agreements with conduit entities and independent funding sources for auxiliary facilities:⁷⁶

A) As used in this section:

(1) ‘Auxiliary facilities’ has the same meaning as in section 3345.12 of the Revised Code.

(2) ‘Conduit entity’ means an organization described in section 501(c)(3) of the Internal Revenue Code qualified as a public charity under section 509(a)(2) or 509(a)(3) of the Internal Revenue Code, or any other appropriate legal entity selected by the state institution, whose corporate purpose allows it to perform the functions and obligations of a conduit entity pursuant to the terms of a financing agreement.

(3) ‘Conveyed property’ means auxiliary facilities conveyed by a state institution to a conduit entity pursuant to a financing agreement.

(4) ‘Financing agreement’ means a contract described in division (C) of this section.

(5) ‘Independent funding source’ means a private entity that enters into a financing agreement with a conduit entity and a state institution.

(6) ‘State institution’ means a state institution of higher education as defined in section 3345.011 of the Revised Code.

(B) The board of trustees of a state institution, with the approval of the chancellor of the Ohio board of regents and the controlling board, may enter into a financing agreement with a conduit entity and an independent funding source selected either through a competitive selection process or by direct negotiations, and may convey to the conduit entity title to any auxiliary facilities owned by the state institution pursuant to the terms of a financing agreement.

(C) A financing agreement under this section is a written contract entered into among a state institution, a conduit entity, and an independent funding source that provides for:

(1) The conveyance of auxiliary facilities owned by a state institution to the conduit entity for consideration deemed adequate by the state institution;

⁷¹*Id.* § 3333.04 (J).

⁷²*Id.* § 3333.08.

⁷³*Id.* § 3345.07.

⁷⁴*Id.* § 3345.11.

⁷⁵*Id.* § 3345.36. “Entrepreneurial project” means an effort to develop or commercialize technology through research or technology transfer or investment of real or personal property, or both, including undivided and other interests therein, acquired by gift or purchase, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination thereof, by an institution of higher education or by others. *Id.*

⁷⁶Auxiliary facilities means “buildings, structures, and other improvements, and equipment, real estate, and interests in real estate therefor, to be used for or in connection with student activity or student service facilities, housing and dining facilities, dining halls, and other food service and preparation facilities, vehicular parking facilities, bookstores, athletic and recreational facilities, faculty centers, auditoriums, assembly and exhibition halls, hospitals, infirmaries and other medical and health facilities, research, and continuing education facilities.” *Id.* § 3345.12(4).

(2) The lease of the conveyed property by the conduit entity to the independent funding source and leaseback of the conveyed property to the conduit entity for a term not to exceed ninety-nine years;

(3) Such other terms and conditions that may be negotiated and agreed upon by the parties, including, but not limited to, terms regarding:

(a) Payment to the state institution by the conduit entity of revenues received by it from the operations of the conveyed property in excess of the payments it is required to make to the independent funding source under the lease-leaseback arrangement described in division (C)(2) of this section;

(b) Pledge, assignment, or creation of a lien in favor of the independent funding source by the conduit entity of any revenues derived from the conveyed property;

(c) Reverter or conveyance of title to the conveyed property to the state institution when the conveyed property is no longer subject to a lease with the independent funding source.

(4) Terms and conditions required by the chancellor or the controlling board as a condition of approval of the financing agreement.

(D) The state institution and the conduit entity may enter into such other management agreements or other contracts regarding the conveyed property the parties deem appropriate, including agreements pursuant to which the state institution may maintain or administer the conveyed property and collect and disburse revenues from the conveyed property on behalf of the conduit entity.

(E) The parties may modify or extend the term of the financing agreement with the approval of the chancellor and the controlling board.

(F) The conveyed property shall retain its exemption from property taxes and assessments as though title to the conveyed property were held by the state institution during any part of a tax year that title is held by the state institution or the conduit entity and, if held by the conduit entity, remains subject to the lease-leaseback arrangement described in division (C)(2) of this section. However, as a condition of the continued exemption of the conveyed property during the term of the lease-leaseback arrangement the conduit entity shall apply for and maintain the exemption as provided by law.

(G) Nothing in this section is intended to abrogate, amend, limit, or replace any existing authority state institutions may have with respect to the conveyance, lease, lease-leaseback, finance, or acquisition of auxiliary facilities including, but not limited to, authority granted under sections 3345.07, 3345.11, and 3345.12 of the Revised Code.⁷⁷

All contracts must be reviewed and approved prior to final execution by each institution's office of contract compliance.⁷⁸

Individual universities establish their own policies regarding the purchase of supplies and equipment and are generally not subject to the provisions of Chapter 125 relating to Department of Administration purchasing for state agencies.⁷⁹ Institutions of higher education may participate in Department of Transportation contracts for machinery, supplies or other articles.⁸⁰

State community colleges boards of trustees shall "do all things necessary for the creation, proper maintenance, and successful and continuous operation of a state community college, and may adopt and

⁷⁷*Id.* § 3345.54.

⁷⁸*Id.* § 3345.29.

⁷⁹*Id.* § 125.04; *id.* § 125.18 (information technology). The following universities have broad statutory grants of authority over property; Ohio State University ("The board of trustees . . . shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly." *Id.* § 3335.10); Bowling Green State University and Kent State University ("The boards shall do all things necessary for the proper maintenance and successful and continuous operation of such universities." *Id.* § 3341.04); Central State University (similar *id.* § 3343.03); Cleveland State University (similar *id.* § 3343.03). Such provisions were not found for the other institutions listed in note 75.

⁸⁰*Id.* § 5513.01.

at any time amend bylaws and rules for the conduct of the board and the government and conduct of the college.”⁸¹

Energy Performance Contracting

The Director of Administrative Services may enter into installment payment contracts for the implementation of energy or water saving measures, generally for a term not to exceed fifteen years, subject to numerous restrictions.⁸²

The several boards of trustees of state institutions of higher education may enter into installment payment contracts for the implementation of one or more energy or water saving measures, subject to numerous restrictions, generally for a fifteen year term.⁸³

Debt Limitations

The constitution provides that no bonded indebtedness shall be incurred or renewed by the State or its political subdivisions without provision being made for the levying and collection of an annual tax to cover debt service.⁸⁴ It also provides that the legislature may limit the debt of municipalities.⁸⁵ Counties, municipalities, school districts, and fire districts are statutorily limited in the amount of debt they may incur.⁸⁶

While these statutory provisions when read with the constitutional grant would seem to apply only to bonded indebtedness,⁸⁷ in *State ex rel. Kitchen v. Christman*,⁸⁸ the court held that they applied to a lease agreement.⁸⁹ The court first considered whether the lease agreement was in fact a bona fide lease which would obligate the municipality only for the individual rental payments as they came due and thus not be subject to the debt limitations, or whether it was in fact an installment purchase contract which would obligate the municipality for the entire contract price as a present indebtedness and thus would be subject to the statutory limits on indebtedness.⁹⁰ The court said the contract was a purchase, not a lease, because the municipality was unconditionally bound to pay specific future rentals and the title to the property vested in the city at the end of the term.⁹¹ In finding that the agreement was not a lease the court brought it under the statutory debt limitations. The court said, “Literally speaking, a lease is not bonded indebtedness. However, . . . such a written agreement, obligating the city unconditionally to make such specific future payments constitutes a ‘bond’ of the city, and thus creates a ‘bonded indebtedness.’”⁹²

It would seem to follow from this opinion that the use of a nonappropriation clause would prevent a lease-purchase agreement from being classified as indebtedness. The court pointed out that “the city’s

⁸¹*Id.* § 3358.04.

⁸²*Id.* §§ 156.01 to 156.05.

⁸³*Id.*; *Id.* §§ 3345.61 to 3345.66.

⁸⁴Ohio Const. art. XII, § 11.

⁸⁵*Id.* art. XVIII, § 13.

⁸⁶Ohio Rev. Code Ann. § 133.07 (counties); *id.* § 307.041(F) (energy conservation contracts for counties) *id.* § 133.05 (municipalities); *id.* § 717.02(F) (energy conservation contracts for municipalities); *id.* § 133.06 (school districts); *id.* § 3313.372(C) (energy conservation contracts for school districts); *id.* § 505.40.

⁸⁷The case considers only that section of the constitution which applies to bonded indebtedness.

⁸⁸285 N.E.2d 362 (Ohio 1972). *See also* *State ex rel. Pub. Inst. Building Auth. v. Griffith*, 22 N.E.2d 200 (Ohio 1939) (striking down a revenue bond financing by an authority with a lease of facilities to the state).

⁸⁹285 N.E.2d at 365-66.

⁹⁰*Id.* at 365-66, 368 n.7.

⁹¹*Id.* at 366, 368.

⁹²*Id.* at 368.

obligation under the contract is a continuing one, and no succeeding city council can refuse to appropriate funds . . . for payment.”⁹³

No subdivision or taxing unit shall . . . [m]ake any expenditure of money unless it has been appropriated as provided in [chapter 5705]⁹⁴ . . . [or] make any contract . . . unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances.⁹⁵

Unfortunately, court dicta in a 1990 case denying the constitutionality of legislation creating the Ohio Funds Management Board and providing for the issuance of revenue anticipation notes sheds doubt on the viability of using lease-purchase mechanisms to avoid debt. The court stated: “merely because a debt does not extend beyond the biennium does not magically transform it into a nondebt”⁹⁶

On the other hand, in *Celebrezze v. Tele-Communications, Inc.*,⁹⁷ the Court of Claims of Ohio noted that the use of a nonappropriation clause prevented the obligation from exceeding current appropriation authority. The court held that the state’s lease of a telephone system was a true lease, binding upon the state. It found no option to purchase and it found that title was with the lessor. The court allowed the vendor to raise the defense of estoppel against the state.⁹⁸ The state’s legal counsel had opined that “the agreement has been duly authorized, executed and delivered” and “the agreement is a legal, valid and binding obligation of the state auditor’s office enforceable in accordance with its terms.”⁹⁹ The lease contained a clause entitled “*Authority and Authorization*” by which “lessee represents, covenants and warrants . . . that . . . (i) the execution, delivery and performance by the lessee of this agreement have been duly authorized by all necessary action on the part of the lessee Lessee agrees that . . . (ii) it has complied with all bidding requirements where necessary and by due notification has presented this agreement for approval and adoption as a valid obligation on its part”¹⁰⁰

In *Butler County Transportation Improvement District v. Tracy*,¹⁰¹ the District issued revenue bonds for the construction of a highway, which was leased, pursuant to a lease agreement, to the state Department of Transportation. The agreement obligated the Department to pay the principal of and interest on the bonds subject to the state’s biennial limitation, which limited the state to a two year obligation. The lease agreement included a non-appropriation clause. The court noted “[t]he Ohio Supreme Court has held that the obligations authorized by the General Assembly for which no corresponding appropriations are made and obligations that will extend beyond a fiscal biennium of the state are debt of the state of Ohio which are subject to the constitutional debt limitation This constitutional provision, however, does not limit or prevent a state agency such as the ODOT from entering into a lease agreement that by its terms is conditioned upon the appropriation of funds.”

⁹³*Id.* at 367. The court also stated, “It unconditionally binds each succeeding city council to appropriate annually . . . to pay the indebtedness even if the succeeding council should determine that the money was spent unwisely.” *Id.* at 368; *see also id.* at 368 n.8; 85-008 Op. Att’y Gen. (Ohio 1985) (following *Kitchen* stating that a county lease-purchase plan that unconditionally obligates the county would require a tax levy to retire the debt created by the plan).

⁹⁴Ohio Rev. Code Ann. § 5705.41(B).

⁹⁵*Id.* § 5705.41(D).

⁹⁶*State v. Walker*, 561 N.E.2d 927, 933 (Ohio 1990).

⁹⁷601 N.E.2d 234 (Ohio Ct. Claims 1990).

⁹⁸*Id.* at 252-254.

⁹⁹*Id.* at 252.

¹⁰⁰*Id.*

¹⁰¹*Butler County Transportation Improvement District v. Tracy*, 697 N.E.2d 1089 (Ohio App. 12 Dist. 1997).

Interest Rate Limitations

The legal rate of interest is 8 percent per annum.¹⁰²

Parties may agree in writing to exceed this rate if the contract amount is greater than \$100,000,¹⁰³ or if the contract involves an interest in real estate secured by a mortgage, deed of trust or land installment contract, in which case the rate may not exceed 8 percent over the federal discount rate.¹⁰⁴

Section 9.95 of the Ohio Revised Code provides:

Securities to which this section applies shall bear interest at not to exceed the maximum or maximum average annual interest rate per annum determined in or pursuant to the proceedings for the securities by the legislative authority, taxing authority, subdivision, governing body, officer, or other issuer, board, authority, commission, district, agency, body, or entity that is the issuer, or governing body or officer of the issuer, of those securities.¹⁰⁵

Miscellaneous

Third parties are prohibited from issuing and selling or publicly underwriting fractionalized interests in any one or more public obligations without the knowledge and express written approval or authorization of each public issuer that is the obligor on such public obligations.¹⁰⁶ A provision to such effect must be included in each such public obligation in which fractionalized interests are not initially issued with the knowledge and authorization of that obligor.¹⁰⁷

The Ohio Attorney General has opined that open-ended indemnification clauses are void; counties may indemnify other public or private parties to a contract only when a specific maximum dollar amount has been appropriated and certified as available under Ohio Rev. Code § 5705.41(D)(1) to meet the obligations of the contract.¹⁰⁸

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰²Ohio Rev. Code Ann. § 1343.01(A).

¹⁰³*Id.* § 1343.01(B)(1).

¹⁰⁴*Id.* § 1343.01(B)(4). Other exceptions are set forth in section 1343.01.

¹⁰⁵*Id.* § 9.95 (West 2004).

¹⁰⁶*Id.* § 9.94.

¹⁰⁷*Id.*

¹⁰⁸2-67 Op.Att’y Gen. (Ohio 2005), 2005 Ohio Op. Atty. Gen. No. 2005-007, 2005 WL 526809.

OKLAHOMA 2017

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Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³

[A]ny county . . . is authorized to rent on a monthly basis real or personal property . . . and to pay the rental charges thereon for usage during any fiscal period, or portion thereof, out of appropriations made and approved for such purposes for, or during, such fiscal year. Any such rental contract extending beyond June 30 of the fiscal year shall contain provisions for mutual ratification of renewal under the conditions provided in [title 62, section 430.1] Any agreement to lease and purchase real or personal property, where title is to be acquired by the municipal or governmental subdivision, shall state the purchase price of the real or personal property so leased and in no event shall the lease be extended so as to cause payment of more than the stated purchase price of the real or personal property plus interest not to exceed 10% simple interest on the unpaid balance due as of each payment date. When the purchase price plus interest has been paid the property shall belong to the lessee and the lessor shall deliver a bill of sale to the property When any real or personal property has been leased or rented during any fiscal year under any contract which permits continuance of such rental for the remainder of the fiscal year, the renting or leasing thereof shall be continued for the remainder of the fiscal year unless the governing body renting or leasing the same . . . shall certify that the continuance of such rental is unnecessary and contrary to the public interest.⁴ [Emphasis added.]

County commissioners may “lease-purchase uniforms, safety devices and equipment for the officers and employees of the county.”⁵ Counties may “purchase and hold real and personal estate” and may “sell and convey any real or personal estate owned by the county.”⁶ “[T]he requisition, purchase, lease-purchase, rental, and receipt of supplies, materials, and equipment for the maintenance, operation, and capital expenditures of county government” must comply with detailed statutory procedures.⁷

Counties must lease and lease-purchase road machinery and equipment from the State Department of Transportation or pursuant to provisions relating to the powers of the county purchasing agent.⁸

A county may enter into a **full warranty lease contract** for road machinery and equipment if the county has adequate funds appropriated during any fiscal year for such purpose. Whenever a county desires to enter into a full warranty lease contract for road machinery or equipment, the county must notify the State

¹Okla. Stat. Ann. tit. 68, § 3014.

²*Id.* tit. 27, § 5.

³*Id.* tit. 74, § 324.11.

⁴*Id.* tit. 62, § 430.1. This provision is also applicable to “the governing board of any county, city or town, or school district.” *Id.* “It is the purpose of this act to authorize [municipal or governmental subdivisions] to enter into . . . lease-purchase contracts but not to incur any obligation . . . in excess of the income and revenue thereof [set aside] for such purposes for the fiscal year in which the lease contract is effectively operative.” *Id.* “The payment for the lease or rental of real property, machinery and equipment shall be made only from annual and supplemental appropriations specifically designated for such purpose, and no appropriation for the purpose of paying rentals on real property, machinery and equipment shall be transferred or diverted to any other purpose, except as may be authorized by the terms of the agreement or by law.” *Id.* For a discussion of the mutual ratification provision, *see, infra*, note 31 and accompanying text.

⁵*Id.* tit. 19, § 339(A)(10).

⁶*Id.* tit. 19, § 1.

⁷*Id.* tit. 19, § 1505 (includes public bidding requirements). Bidding procedures for lease-purchases of personal property need not be followed if the total payments do not exceed \$15,000. *Id.* § 1501. The purchasing procedures enumerated in sections 1500 to 1507 apply to personal property, but not real property. Op. Atty. Gen. No. 83-65 (Aug. 10, 1983). Bidding procedures for public construction exceeding \$50,000.00 in amount must be followed. *Id.* tit. 61, § 101.

⁸*Id.* tit. 19, § 1501(A)(5). The Attorney General issued an opinion that a county cannot lease or lease-purchase road machinery or equipment, if the county possesses sufficient funds for a purchase of such equipment, except in cases of emergency, or where the equipment is required for a short period and is unavailable from the Department of Transportation. Op. Atty. Gen. No. 83-212 (March 30, 1984).

Auditor and Inspector of its intent and must provide the State Auditor and Inspector with its requirements and specifications along with the proper documentation to be advertised for bids. Upon receiving the notification and documentation from a county, the State Auditor and Inspector shall review the documentation and, upon approval, shall forward the documentation and specifications to the State Purchasing Division of the Office of Management and Enterprise Services. The Purchasing Director of the Office of Management and Enterprise Services shall solicit bids to lease the requested road machinery or equipment according to the documentation and specifications of the county as approved by the State Auditor and Inspector. The term of any full warranty lease contract authorized pursuant to this subsection may be for any period up to one (1) year, provided the term shall not extend beyond the end of any fiscal year, with an option to renew such lease subject to the requirement that adequate funds are appropriated during the fiscal year by the county for such purpose. The State Auditor and Inspector shall prescribe the lease forms and other documentation necessary for implementing the provisions of this subsection.⁹ [Emphasis added.]

Counties may sell and lease back courthouses:

The board of county commissioners of any county may sell the courthouse of the county together with the real property upon which the courthouse is located if the contract price for such sale equals or exceeds the appraised value of the courthouse and real property upon which the courthouse is located. Such appraisal shall be made by the county assessor of the applicable county. The sale authorized by this section may only be made if, as part of the contract for sale, the purchaser agrees to lease the conveyed premises to the county until the county provides new courthouse facilities, whether by purchase, construction, remodeling, lease or some combination thereof. Such new facilities shall be provided within three years from the date of the conveyance of the existing courthouse to the purchaser. The new facilities may be provided in whole or in part from proceeds of the sale of the existing county courthouse, including principal and interest.¹⁰

Counties and other local governmental entities must submit proposed issuance of obligations in conjunction with a “State Governmental Entity Financing” for approval by the Council of Bond Oversight.¹¹ These would be financings where the project is leased by a local government entity to a state government entity or in which the state government entity is paying debt service directly or indirectly.

It appears that use of public trusts in lease, leaseback and sale, leaseback transactions are prevalent in Oklahoma as an alternative financing mechanism.¹²

Energy Performance Contracting

Counties have authority to lease-purchase energy conservation measures under a comprehensive statute.¹³ Counties may enter into a lease-purchase agreement for purposes of financing a guaranteed performance-based efficiency contract with a qualified provider for a term not to exceed twenty years or the useful life of the project, subject to numerous restrictions.¹⁴

⁹*Id.* tit. 69, § 636.3. The term “full warranty lease contract” replaced the term “lease-purchase agreement” in this statute. It is not clear what is meant by this change.

¹⁰*Id.* tit. 19, § 745 (West 2000).

¹¹*Id.* tit. 62, §§ 695.8, 695.9. “Local Governmental Entity” means “counties, cities and towns, school districts, public trust of which a county, city or town or school district is the beneficiary or other political subdivision of the state.” *Id.* § 695.3 “State Governmental Entity Financing” “shall include local governmental transactions where the project is leased by a State Governmental Entity or debt service is paid directly or indirectly by a State Governmental Entity or where the project or improvement is in direct support of or administered by a State Governmental Entity.” *Id.* Substantial information and applicable forms are available at the council’s website. http://www.ok.gov/bondadvisor/Bond_Oversight/index.html.

¹²*Id.* tit. 60, §§ 176 to 180.3.

¹³*Id.* tit. 19, § 458 (applies to “political subdivisions”).

¹⁴*Id.* tit. 62, § 318.

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸ Municipalities have the same powers to lease-purchase as counties under title 62, section 430.1.¹⁹ Municipalities may “purchase and hold real and personal property” and may “sell and convey any real or personal property . . . as may be conducive to the best interests of the municipality.”²⁰

“Any contract between a [municipality] and private prison contractor, whereby the contractor provides for the housing, care, and control of inmates in a facility owned and operated by the contractor, shall contain provisions granting the [municipality] the option at the beginning of each fiscal year to purchase, at a predetermined price any such facility.”²¹

Municipalities must submit proposed issuance of obligations in conjunction with a “State Governmental Entity Financing” for approval by the Council of Bond Oversight.²²

It appears that use of public trusts in lease, leaseback and sale, leaseback transactions are prevalent in Oklahoma as an alternative financing mechanism.²³

Public bidding laws apply.²⁴

Purchase orders and contracts, unless otherwise provided by ordinance, must be signed and approved by the purchasing officer and certified by the officer or clerk charged with keeping the appropriation and expenditure records.²⁵

Energy Performance Contracting

Municipalities have authority to lease-purchase energy conservation measures under a comprehensive statute.²⁶ Municipalities may enter into a lease-purchase agreement for purposes of financing a guaranteed performance-based efficiency contract with a qualified provider for a term not to exceed twenty years or the useful life of the project, subject to numerous restrictions.²⁷

¹⁵Municipalities for purposes of this discussion are any incorporated cities or towns. *Id.* tit. 11, § 1-102.5. Cities with populations of more than 2,000 may adopt a charter. Okla. Const. art. XVIII, § 3(a).

¹⁶Okla. Stat. Ann. tit. 68, § 2701.

¹⁷*Id.* tit. 27, § 5.

¹⁸*Id.* tit. 11, § 22-112.1.

¹⁹*Id.* tit. 62, § 430.1. *See, supra*, note 4 and accompanying text.

²⁰*Id.* tit. 11, § 22-101.

²¹*Id.* tit. 11, § 34-105(B).

²²*Id.* tit. 62-§§ 695.8, 695.9. *See, supra*, note 11 and accompanying text.

²³*Id.* tit. 60, §§ 176 to 180.3.

²⁴*Id.* tit. 61, §§ 101 to 138 (construction over \$50,000).

²⁵*Id.* tit. 62, § 310.1.

²⁶*Id.* tit. 19, § 458.

²⁷*Id.* tit. 62, § 318 (.

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁸ and eminent domain powers.²⁹ School districts have the same powers to lease-purchase as counties under title 62, section 430.1.³⁰

The board of education of any school district may rent, on a monthly basis, real and personal property, if such items are necessary for the operation of the school, and pay the rental charges for said usage during any fiscal year, or portion thereof, out of appropriations made and approved for current expense purposes during the fiscal year. Any such rental contract extending beyond June 30 of such fiscal year shall be void unless it contains provisions for mutual ratification of renewal pursuant to the conditions provided for in [title 70, section 5-117.B] Any [such] lease or lease-purchase agreement . . . shall state the purchase price of real or personal property so leased. The lease or lease-purchase shall not be extended so as to cause payment of more than the original purchase price of the real or personal property, plus interest not to exceed the legal rate. When the purchase price plus interest has been paid, the property shall belong to the lessee and the lessor shall deliver a deed or bill of sale to the property to the lessee. When any real or personal property has been leased or rented during any fiscal year pursuant to the provisions of any contract which permits continuance of such rental for the remainder of said fiscal year, the renting or leasing thereof must be continued for the remainder of such fiscal year unless the board . . . renting or leasing the same certifies . . . that the continuance of such rental is unnecessary and contrary to the public interest.³¹

School districts may “purchase, construct or rent . . . classrooms, libraries, auditoriums, gymnasiums, stadiums, recreation places and playgrounds, teacherages, school bus garages, laboratories, administration buildings, and other school houses and school buildings, and acquire sites and equipment for the operation of public schools”³² School districts may also “dispose of personal or real property no longer needed by the district by sale, exchange, lease, lease-purchase, sale and partial leaseback, or otherwise.”³³

School districts may lease pupil-transportation equipment units from the State Board of Education.³⁴

School Districts must submit proposed issuance of obligations in conjunction with a “State Governmental Entity Financing” for approval by the Council of Bond Oversight.³⁵

²⁸*Id.* tit. 70, § 15-104.

²⁹*Id.* tit. 27, § 5.

³⁰*Id.* tit. 62, § 430.1. *See, supra*, note 4 and accompanying text.

³¹*Id.* tit. 70, § 5-117(B). “It is the intent of this subsection to authorize boards of education to enter into lease contracts but not to incur any obligation against the school district in excess of the income and revenue provided for such purposes for the fiscal year in which such lease contract is operative.” *Id.* The Oklahoma Attorney General has opined that the requirement for mutual ratification of renewal for school districts in this statute is a broader grant of power to the school district than a nonappropriation clause. A nonappropriation clause would only allow termination for failure to appropriate funds. A mutual ratification of renewal clause allows the school district not to renew for any reason. 2005 WL 1142208 (Okla.A.G.). It appears that this clause should be used in lieu of a nonappropriation clause. The Attorney General is of the opinion that without this clause, the lease is void. It is required that the clause must be mutual, which would appear to require the lessor to have the same right not to renew. Would such a contract qualify as a tax-exempt lease? In *G.E. Capital Information Technology Solutions, Inc. v. Oklahoma City Public Schools*, 173 P.2d 114 (Ok Ct. App. 2007), this unique requirement for Oklahoma school district leases that the lessor and lessee have to annually ratify the lease was missing from the lease. The lease only had a nonappropriation right in the lessee. The court upheld the ratification for years that had been performed, but once the lease was terminated by nonappropriation by the lessee, the contract terminated.

³²*Id.* tit. 70, § 5-117(A)(7). Contracts involving the expenditures of more than \$500 must be made in accordance with the provisions of a written contract or purchase order. *Id.* tit. 70, § 5-123.

³³*Id.* tit. 70, § 5-117(A)(11) (subject to certain restrictions).

³⁴*Id.* tit. 70, § 9-112.

³⁵*Id.* tit. 62 §§ 695.8, 695.9 *See, supra*, note 11 and accompanying text.

Public bidding laws apply.³⁶

Energy Performance Contracting

School districts have authority to enter into lease-purchase agreements for energy conservation measures under a comprehensive statute.³⁷ School districts may enter into a lease-purchase agreement for purposes of financing a guaranteed performance-based efficiency contract with a qualified provider for a term not to exceed twenty years or the useful life of the project, subject to numerous restrictions.³⁸

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁹ and eminent domain powers.⁴⁰ Fire districts have the power to purchase or lease “real or personal property of every kind necessary for the operation of the district”⁴¹ and to “[p]urchase or lease-purchase and maintain all necessary and convenient engines, hoses, hose carts or other appliances and supplies for the full equipment of a fire company or department.”⁴²

Fire districts must submit proposed issuance of obligations in conjunction with a “State Governmental Entity Financing” for approval by the Council of Bond Oversight.⁴³ Public bidding laws apply.⁴⁴

Energy Performance Contracting

Political subdivisions of the state may enter into a lease-purchase agreement for purposes of financing a guaranteed performance-based efficiency contract with a qualified provider for a term not to exceed twenty years or the useful life of the project, subject to numerous restrictions.⁴⁵

Hospital Districts

Hospital districts are created and governed by hospital public trust authorities and do not appear to be political subdivisions in their own right.⁴⁶

State Entities

Generally, all State property is managed and controlled by the Office of Management and Enterprise Services (OMES).⁴⁷ The Capitol building and grounds, except for legislative spaces, are

³⁶*Id.* tit. 61 §§ 101 - 138((construction over \$50,000).

³⁷*Id.* tit. 70, § 5-131.2.

³⁸*Id.* tit. 62, § 318.

³⁹*Id.* tit. 19, § 901.19.

⁴⁰*Id.* tit. 19, § 901.7(A)(5).

⁴¹*Id.*

⁴²*Id.* tit. 19, § 901.7(A)(3).

⁴³*Id.* tit. 62 §§ 695.8, 695.9. *See, supra*, note 11 and accompanying text.

⁴⁴*Id.* tit. 61 §§ 101 - 138 (construction over \$50,000).

⁴⁵*Id.* tit. 62, § 318 .

⁴⁶*Id.* tit. 63 § 3250.3. Such districts appear to be geographic designations without sovereign powers and thus do not qualify as tax-exempt issuers for purposes of federal income tax law. Hospital public trust authorities are beyond the scope of this survey. Public trusts are found in *id.* tit. 60, §§ 176 to 180.3.

⁴⁷*Id.* tit. 74, § 63. Exceptions include military stores, State Banking Dept. property, State Legislature property, University Hospital Authority property, and CompSource Oklahoma property. *Id.*

supervised and controlled by OMES.⁴⁸ Public construction contracts exceeding \$50,000.00 are subject to the Public Competitive Bidding Act of 1974.⁴⁹ Leases of office space are controlled by OMES.⁵⁰

The Purchasing Division within OMES generally directs all activities of any state agency⁵¹ related to purchasing.⁵² All acquisitions⁵³ by state agencies must be made in accordance with the Central Purchasing Act 74 O.S. §85.1 et seq⁵⁴ except that “the Chief Information Officer shall have sole and exclusive authority and responsibility for all acquisitions of information and telecommunications technology, equipment, software, products and related peripherals and services used or consumed by state agencies.”⁵⁵ All state agencies are generally required to make all acquisitions by the presentation of requisitions to the Purchasing Division.⁵⁶ The Purchasing Director may deny requisitions found to be “unnecessary, excessive or not justified.”⁵⁷ Mandatory and non-mandatory statewide contracts are available through the Purchasing Division.⁵⁸

Lease-purchase agreements are allowed pursuant to the following purchasing statute only for acquisitions costing \$50,000 or more:

- I. 1. No state agency shall enter into a lease-purchase agreement if title is acquired to tangible property of any class or nature by making lease, rental, or any other type payments, except as specifically authorized by law and except insofar as data processing equipment or other equipment is concerned; provided, however, the lease-purchase of data processing or other equipment by any state agency shall be processed by competitive bids through the Purchasing Division of the Office of Management and Enterprise Services.
2. The Council of Legislative Bond Oversight shall have the authority to determine the most cost-effective method for obtaining financing for lease-purchase agreements,⁵⁹ which may be financed by either negotiated sale or competitive bid. If the Council of Legislative Bond Oversight determines that the lease-purchase of personal or real property should be financed through negotiated sale, the financing shall be subject to the provisions of the Oklahoma Bond Oversight and Reform Act. Unless the Council determines that the sale should be executed on a negotiated basis, such financing shall be processed by competitive bids through the Purchasing Division of the Office of Management and Enterprise Services.
3. Regardless of the method of financing, the acquisition price of personal property subject to a lease-purchase agreement shall be processed by competitive bids through the Purchasing Division of the Office of Management and Enterprise Services.

⁴⁸*Id.*; *id.* tit. 73, §§ 15; 15.1.

⁴⁹*Id.* tit. 61, § 101 et seq.

⁵⁰*Id.* tit. 74, § 63(c).

⁵¹“State agencies” or “agencies” means “any office, officer, bureau, board, counsel, court, commission, institution, unit, division, body or house of the executive or judicial branches of the state government, whether elected or appointed, excluding only political subdivisions of the state” *Id.* tit. 74, § 85.2(34). Exceptions from applicability of the purchasing act include the Department of Transportation and numerous authorities and other miscellaneous state entities *Id.* tit. 74, § 85.12.

⁵²*Id.* tit. 74, § 85.3(D).

⁵³“Acquisition” means “items, products, materials, supplies, services, and equipment a state agency acquires by purchase, lease-purchase, lease with option to purchase, or rental pursuant to The Oklahoma Central Purchasing Act unless the items, products, supplies, services, or equipment are exempt pursuant to The Oklahoma Central Purchasing Act.” *Id.* tit. 74, § 85.2. Motor vehicle acquisitions are controlled by the Fleet Management Division within OMES. *Id.* tit. 74, § 78(The Department of Transportation, the Oklahoma State System of Higher Education and other entities are excluded from the application of this statute.)

⁵⁴*Id.* tit. 74, § 85.5; Okla. Admin. Code tit. 260, ch. 115..

⁵⁵Okla. Stat. Ann. tit. 74, § 85.5 (A). *See, infra*, notes 66-71 and accompanying text.

⁵⁶*Id.* tit. 74, § 85.4.

⁵⁷*Id.* subsection H.

⁵⁸*Id.* tit. 74, § 85.5(G)(5) (certain information technology contracts). “Statewide contract” means a contract for specific acquisitions for a specified period with a provision allowing the agencies and local governmental entities to place orders as the acquisitions are needed for delivery during the period specified; Okla. Stat. Ann tit. 74, § 85.2(37).

⁵⁹The Council of Bond Oversight reviews and approves the issuance of lease-purchase obligations for State and local governmental entities. *Id.* tit. 62, § 695.9. Substantial information and applicable forms are available at the council’s website. [http://www.ok.gov/bondadvisor/Bond Oversight/index.html](http://www.ok.gov/bondadvisor/Bond%20Oversight/index.html).

4. The State Purchasing Director may permit lease-purchasing of equipment by the Oklahoma Tourism and Recreation Commission if such leasing is determined by the State Purchasing Director to be in the best interest of the state; provided, that such leasing must be processed by competitive bids through the State Purchasing Director except as to those acquisitions exempt under Section 85.12 of this title.

J. No state agency shall enter into a lease-purchase contract between the state agency as lessee and a private party as lessor if the contract is not capable of complete performance within the current fiscal year in which the contract was entered into unless a valid nonappropriation clause is included in the contract. Such contracts shall contain the following or substantially similar language:

Lessee shall have the right to terminate the lease, in whole but not in part, at the end of any fiscal year of lessee, if the Legislature fails to allocate sufficient funds to lessee for the rental payments required under the lease.

K. 1. No change order or addendum shall be made to a lease-purchase agreement which extends the term or life of the original bid contract. Any lease-purchase agreement requiring such extensions or refinancing shall be readvertised and processed in accordance with the provisions of The Oklahoma Central Purchasing Act.

2. Every state agency, whether or not subject to the provisions of The Oklahoma Central Purchasing Act, shall maintain a list of all tangible personal property which it is acquiring by a lease-purchase method and, prior to the renewal of a lease-purchase agreement, shall evaluate the rate being paid under the current lease-purchase agreement against rates currently being received by the Purchasing Division of the Office of Management and Enterprise Services on a competitive bid basis to determine whether or not refinancing of the property will benefit the state. Any state agency which elects not to submit a requisition for a possible refinancing when the existing rates are at least one percent (1%) above rates being currently bid, and when the total sum to be paid for the property including principal and interest will be reduced, shall submit a written justification to the State Purchasing Director stating the reasons for not attempting to refinance the property. The State Purchasing Director shall forward all such justifications to the Chair of the Appropriations Committee of the Senate and the Chair of the Committee on Appropriations and Budget of the House of Representatives no later than February 1 of each year.

3. Unless otherwise provided by law, no state agency shall enter into a lease-purchase agreement for real or personal property costing less than Fifty Thousand Dollars (\$50,000.00).

4. a. Unless otherwise provided by law, the maximum term of a state agency lease-purchase agreement shall be the lesser of the useful life of real or personal property subject to a lease-purchase agreement as determined by the State Purchasing Director, or three (3) years for personal property and ten (10) years for real property, respectively.

b. The Council of Legislative Bond Oversight shall have the authority to extend the term of a lease-purchase agreement beyond three (3) years for personal property and ten (10) years for real property if the State Purchasing Director determines that the useful life of the property exceeds the terms and the Oklahoma State Bond Advisor recommends the extension as being in the best interests of this state.

5. Unless otherwise provided by law, state agency real property acquisitions subject to lease-purchase agreements shall be explicitly authorized by the Legislature. Acquisitions of real property authorized by the Legislature, unless otherwise exempted by the Legislature, shall be subject to the competitive bid provisions of The Oklahoma Central Purchasing Act. If a state agency is authorized to enter into a lease-purchase agreement for real property, the financing of the acquisition, including acquisitions deemed desirable for executing a lease-purchase, certificate of participation, or similar agreement or obligation, shall be obtained in accordance with the provisions of The Oklahoma Central Purchasing Act. The State Purchasing Director shall consult with the Oklahoma State Bond Advisor on the preparation, evaluation, and negotiation of such financing. Legislative authorization shall constitute legal authorization for this state or state agencies to enter into such lease-purchase agreements.

L. The State Purchasing Director may permit leasing of products by state agencies if such leasing is determined by the State Purchasing Director to be in the best interest of the state, provided that such leasing must be processed by competitive bids through the State Purchasing Director except as to those acquisitions exempt pursuant to Section 85.12 of this title.

M. 1. Before reoffering or remarketing an obligation, a state agency shall obtain written approval from the Oklahoma State Bond Advisor. Should a remarketing of a lease-purchase agreement be proposed that includes the remarketing of securities or obligations to more than a single investor, any disclosure language

prepared in connection with such remarketing that describes the state's liability under the lease-purchase agreement shall be approved in advance and in writing by the Oklahoma State Bond Advisor.

2. In no event shall a state agency enter into a lease-purchase agreement unless that agreement states that the State of Oklahoma reserves the right to approve any reoffering of this obligation to another investor either through private placement, issuance of certificates of participation, or any other mechanism.⁶⁰

Some agencies, depending upon a determination by the State Purchasing Director, may be granted authority for acquisitions over \$50,000 and not exceeding \$100,000 without going through the purchasing division for approval.⁶¹ Acquisitions are subject to statutory competitive bidding requirements.⁶² Administrative rules provide:

(a) Lease-purchase agreements shall be competitively bid through the Purchasing Department of the Office of Management and Enterprise Services unless determined by the Executive and Legislative Bond Oversight Commissions to be more cost effective if financed through negotiated sales.

(1) If the sale is to be executed on a negotiated basis, such financing shall be subject to the provisions of the Oklahoma Bond Oversight and Reform Act, 62 O.S. 1991, §695.1 et seq.

(2) If the sale is to be competitively bid, such financing shall be processed through the Purchasing Department of the Office of Management and Enterprise Services. [74 O.S. Supplement 1993, Section 85.4(G.2)]

(b) The term of the lease purchasing financing shall be in conformance with and governed by 74 O.S. Section 85.4(I)(4).⁶³

Council of Bond Oversight rules provide the following:

(a) State governmental entities requesting approval of a lease purchase obligation must complete and submit the Lease Purchase Request for Approval form provided by the State Bond Advisor to the Council. The Request for Provisional Approval form and Request for Final Approval form are not applicable to lease purchase agreement applications. Such a submission shall be governed by the filing periods and procedures at 90:10-3-2. The Lease Purchase Request for Approval form is comprised of:

(1) Proposed lease purchase agreement. The applicant must provide information regarding the anticipated amount, financing terms, equipment or real property description and budget implications of the proposed lease purchase. An analysis of the method of financing must be obtained from the State Bond Advisor if the amount of the financing is \$1 million or greater, or if determined by the State Bond Advisor and Director of Central Purchasing to be in the best interest of the issuer. Requests for negotiated sale of such lease obligations must be approved by the State Bond Advisor. [Title 74 O.S., Sections 85.4(G) and 85.4(I)]

(2) User information. The applicant must provide a description of the purpose, nature and need for the lease purchase.

(3) Attachments. The attachments requested include:

(A) Letter from body approving lease purchase agreement. (Examples: Regents, Regents for Higher Education, Commission, Board, etc.)

(B) Letter indicating whether litigation is pending or threatened concerning the applicant's outstanding and/or proposed obligations.

(C) If the applicant is a College or University, it must complete the Outstanding Lease Purchase Information form provided by the State Bond Advisor.

(D) Where applicable, each applicant must provide a completed Department of Central Services Central Purchasing or Construction & Properties Requisition, Justification, etc.

⁶⁰*Id.* tit. 74, § 85.4.

⁶¹*Id.* tit. 74, § 85.5(T).

⁶²Okla. Stat. Ann tit. 74, § 85.7.

⁶³Okla. Admin. Code § 260:65-15-10 (eff. 9-12-14).

(E) If lease purchasing computer or telecommunications equipment, the application must include a letter from Office of State Finance Information Services Division stating compliance with budget request; as well as the provisions of Title 62 O.S., Sections 41.5(m) and 41.5(j).

(F) For lease purchase requests of equipment related to an energy savings program (including those done through the Oklahoma Development Finance Authority's Master Lease Program), the following documentation must be provided with an application.

(i) Any proposed Master Agreement; including, but not limited to, Guaranteed Savings Contract, Construction Draw Schedule, and Maintenance Agreement.

(ii) Any performance-based energy contract relating to the proposed lease obligation. Any such contract should be structured to allow the State adequate remedies in the event of an Energy Services Company's (Vendor's) default under the terms of the contract(s).

(iii) Any other bonds or guarantees to be entered into by the applicant in connection with the proposed lease obligation.

(b) Refer to 74 O.S., Section 85.4 for statutory limitations and requirements of State Governmental Entities entering into lease purchase agreements. The provisions of (a)(1) of this section do not exempt any application for lease purchase financing from the provisions of the statutes referenced.

(c) Applicants proposing to lease purchase equipment or real property with a cost of \$1 million or more, must consult with the State Bond Advisor as to the most cost-effective method of financing. Title 74 O.S., Section 85.4 authorizes negotiated financings when determined by the Council of Bond Oversight to be more cost-effective than competitive bidding through the Department of Central Services Central Purchasing Division. All provisions of the Bond Oversight and Reform Act apply to such negotiated financings. Prior to submitting an application for approval of a lease purchase of \$1 million or greater cost, an applicant should send notification to the State Bond Advisor. This notification shall include the following information, in order to determine the method of financing:

(1) Description of equipment and/or real property;

(2) Desired term of financing;

(3) Cost of equipment and/or real property;

(4) Source of funding of lease payments; and

(5) If equipment, letter from Director of Central Purchasing quoting interest rates which could be obtained through competitive bidding. The Director of Central Purchasing will contact at least three (3) certified leasing companies for interest rate quotations. The State Bond Advisor shall notify the issuer of the recommended method of financing. Issuers should give the State Bond Advisor at least two weeks to perform such analysis.⁶⁴

It appears that use of public trusts in lease, leaseback and sale, leaseback transactions are prevalent in Oklahoma as an alternative financing mechanism.⁶⁵

Information Technology

The Chief Information Officer or designee must approve lease-purchases, leases with option to purchase and other procurements of information technology assets in writing.⁶⁶

Unless otherwise provided by law, state agencies shall acquire information technology products and services in accordance with the Oklahoma Central Purchasing Act [74 O.S. §§85.1 et seq.], the Oklahoma State Finance Act [62 O.S. §§34 et seq.] the rules of this chapter, and requirements established by the Information Services Division of the Office of Management and Enterprise Services.⁶⁷

⁶⁴*Id.* § 90:10-3-7. (last am. 07/11/03).

⁶⁵Okla. Stat. Ann. tit. 60, §§ 176 to 180.3.

⁶⁶*Id.* tit. 62 § 35.4, § 34.12(B) (exempting The Oklahoma State System of Higher Education and public elementary and secondary schools).

⁶⁷Okla. Admin. Code § 260:115-7-52. "Information technology" or "IT" means any electronic information equipment or

The Chief Information Officer shall act as the Information Technology and Telecommunications Purchasing Director for all state agencies⁶⁸ and shall be responsible for the establishment of procedures for the lease-purchase, lease with option to purchase, lease and rental of all information technology and telecommunications software, hardware, equipment, peripheral devices, maintenance, consulting services, high technology systems, and other related information technology, data processing, telecommunication and related peripherals and services.⁶⁹ The lease, lease-purchase, lease with option to purchase rental or other procurement of communication or telecommunication systems by agencies of the executive branch must be approved by the Chief Information Officer; Planned acquisitions must be included in the statewide communications plan of the Information Services Division of the Office of State Finance; Public safety communication system acquisitions must be approved as consistent with the Statewide Communications Interoperability Plan and the public safety communications standards issued by the Oklahoma Office of Homeland Security.⁷⁰ State and local public agencies may be allowed to use state technology contracts in lieu of bidding procedures.⁷¹

Energy Performance Contracting

The Office of Management and Enterprise Services may enter into an installment contract, lease-purchase agreement or other contractual obligation for the purpose of financing performance-based efficiency projects for a term not to exceed twenty (20) years or the useful life of the project, subject to numerous restrictions.⁷²

Higher Education

The various public institutions of higher education are members of the Oklahoma State System of Higher Education.⁷³ The State Regents for Higher Education are a coordinating board of control for all state educational institutions.⁷⁴ Individual institutions are respectively governed by the Board of Regents of the University of Oklahoma,⁷⁵ the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, acting for Oklahoma State University,⁷⁶ and the Board of Regents of Oklahoma Colleges, for the Regional University System of Oklahoma.⁷⁷ These boards of regents, acting for their constituent

interconnected system that is used in the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information, including audio, graphic, and text. [62 O.S. §34.29]. Okla. Admin. Code § 260:115-1-2.

⁶⁸“For purposes of the Oklahoma Information Services Act, unless otherwise provided for, ‘state agencies’ shall include any office, officer, bureau, board, commission, counsel, unit, division, body, authority or institution of the executive branch of state government, whether elected or appointed; provided, except with respect to the provisions of subsection D of this section, the term ‘state agencies’ shall not include institutions within The Oklahoma State System of Higher Education, the Oklahoma State Regents for Higher Education and the telecommunications network known as OneNet.” Okla. Stat. Ann. tit. 62, § 34.11.1(N).

⁶⁹*Id.* tit. 62, § 34.11.1(H).

⁷⁰*Id.* tit. 62, § 34.21.

⁷¹*Id.* tit. 62, § 34.31.2.

⁷²Okla. Stat. Ann. tit. 27A, § 3-4-106.1(G); tit. 62, § 318.

⁷³Ohio Const. § XIII-A-1.

⁷⁴Okla. Stat. Ann. tit. 70, § 3206.

⁷⁵The University of Oklahoma includes Cameron University and Rogers State University. *Id.* tit. 70, § 3305.

⁷⁶The board of regents for the Oklahoma Agricultural and Mechanical Colleges has supervision over Oklahoma State University, Panhandle State University, Langston University, Connors State University, and Northeastern Oklahoma Agricultural and Mechanical College. *Id.* tit. 70, § 3412.

⁷⁷The Board of Regents of Oklahoma Colleges has supervision of the Univ. Central Okla., East Central Univ., Northeastern State Univ., Northwestern State Univ., Southeastern Okla. State Univ. and Southwestern Okla. State Univ. *Id.* tit. 70, § 3510.

institutions, have the power of eminent domain⁷⁸ and the power to “acquire and take title to real and personal property.”⁷⁹

The Oklahoma State Regents for Higher Education are authorized to operate master programs for the acquisition of real and personal property:

The Oklahoma State Regents for Higher Education may establish a master lease program to finance the acquisition of items of personal property, or refinance or restructure outstanding equipment lease obligations as may be required by or useful to institutions and entities within The Oklahoma State System of Higher Education in order to achieve cost-saving efficiencies. The funds used by the Regents for the purposes authorized by this section shall be available for lease transactions having a minimum value of Fifty Thousand Dollars (\$50,000.00) and a maximum value of Ten Million Dollars (\$10,000,000.00). Such leases shall have a term that is no more than the useful life of the personal property acquired by institutions pursuant to the provisions of this section, and, in no event, more than twenty (20) years. The amount of transactions financed in a calendar year through the personal property master lease program shall not exceed Fifty Million Dollars (\$50,000,000.00).⁸⁰

A. The Oklahoma State Regents for Higher Education may finance acquisition of or improvements to, or refinance or restructure outstanding obligations for real property pursuant to the master lease program. The funds used by the Regents for the purposes authorized by this section shall be available for lease transactions having a term that is no more than the useful life of any real property or improvements acquired by institutions pursuant to the provisions of this section, and in no event, more than thirty (30) years.

B. After May 24, 2005, any bonds issued pursuant to this section shall be subject to the approval of the Legislature as provided by this subsection. The Oklahoma State Regents for Higher Education shall submit an itemized list of the proposed projects and the terms of the financing to the Governor, the Speaker of the House of Representatives, the President Pro Tempore of the State Senate and all members of the legislature within the first seven (7) legislative days of an annual legislative session and prior to the time any such obligations are sold. The submission to such elected officials shall occur upon the same date for purposes of computing the time within which action must be taken as further prescribed by this subsection. The Legislature shall have a period of forty-five (45) calendar days from the date on which the information is submitted to pass a concurrent resolution disapproving all or part of the proposed issuance. If the Legislature does not disapprove the proposed issuance by concurrent resolution by the end of the forty-fifth day following the date upon which the proposed issuance is submitted, the proposed issuance shall be deemed to have been approved by the Legislature.

C. The amount of transactions financed in a calendar year through the real property master lease program authorized by this section shall not exceed the combined total of:

1. The submission described in subsection B of this section, or portion thereof, approved by the Legislature;
2. Any issuance for additional proposed individual projects submitted by institutions under the coordination of the Oklahoma State Regents for Higher Education and approved by the Legislature; and
3. Any projects approved by the Legislature in a prior calendar year for which no financing action was taken in the prior calendar year.⁸¹

The Oklahoma State Regents for Higher Education, the Board of Regents of the University of Oklahoma, the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges acting for Oklahoma State University, and the Oklahoma Capitol Improvement Authority may issue obligations⁸² for

⁷⁸*Id.* tit. 70, § 4001 (in connection with the issuance of bonds by the Okla. Capitol Improvement Authority).

⁷⁹*Id.* tit. 70, § 3305 (Univ. of Okla.); *id.* § 3412 (Okla. Ag. And Mech. Colleges); *id.* § 3510 (Okla. Colleges) (similar provisions).

⁸⁰*Id.* tit. 70, § 3206.6.

⁸¹*Id.* tit. 70, § 3206.6a.

⁸²The term “obligations” is not defined. The term “bonds” is defined to include lease-purchase agreements, so it appears that all the provisions of the act apply to lease-purchase agreements as well as bonds. *Id.* tit. 70, § 3980.3.

capital projects under the Oklahoma Higher Education Promise of Excellence Act of 2005.⁸³ Numerous requirements apply, including:

All obligations except refunding or defeasance obligations proposed to be issued by an authorized issuer pursuant to the Oklahoma Higher Education Promise of Excellence Act of 2005 shall be subject to final approval by the Legislature as provided by this subsection. The authorized issuer shall communicate the proposed projects and the terms of the financing to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the State Senate prior to the time any such obligations are sold. The communication required by this subsection shall be made not later than April 1 each year. The communication to such elected officials shall occur upon the same date for purposes of computing the time within which action must be taken as further prescribed by this subsection. The Legislature shall have a period of forty-five calendar days from the date as of which the information is communicated to the presiding officers of both chambers in order to pass a Concurrent Resolution disapproving the proposed issuance. If the Concurrent Resolution has not received a majority of votes of those elected to and constituting both the Oklahoma House of Representatives and the Oklahoma State Senate by the end of the forty-fifth day following the date upon which the proposed issuance is communicated to the presiding officers of both chambers, the proposed issuance shall be deemed to have been approved by the Legislature.⁸⁴

Boards of regents of institutions of higher education may enter into contractual agreements with public trusts created pursuant to Section 176 et seq. of Title 60 of the Oklahoma Statutes.⁸⁵ Boards may enter into agreements with nonprofit corporations organized for the benefit of the college or university affected.⁸⁶

The various boards have issued policies regarding purchasing and contracts, including the following.

The University of Oklahoma Board of Regents requires the board to approve the acquisition or disposition of real property;⁸⁷ Purchases over \$1,000,000 must be submitted to the board for prior approval⁸⁸ except that the benchmark for Cameron University and Rogers State University is \$250,000;⁸⁹ leases must be processed through the university purchasing department;⁹⁰ the presidents of the universities or their designees have signing authority;⁹¹ all contracts must be reviewed by the Office of Legal Counsel.⁹²

The Board of Regents for the Oklahoma Agricultural and Mechanical Colleges requires prior board approval of leases of more than five years duration;⁹³ prior board approval is required for any expenditure exceeding \$250,000;⁹⁴ presidents of constituent institutions have signing power;⁹⁵ extensive information on debt policy is available in the board of regents' policy manual.⁹⁶

⁸³*Id.* tit. 70, §§ 3980.1 to 3980.10.

⁸⁴*Id.* tit. 70, § 3980.4(E).

⁸⁵*Id.* tit. 70, §§ 4017 (West 2005), 4018.

⁸⁶*Id.* tit. 70, § 4018.

⁸⁷Regents Pol'y Manual for the Univ. Okla. § 4.15 (last retrieved 10/10/16).

⁸⁸*Id.* § 4.11.7.

⁸⁹CU/RSU Pol'y Manual § 4.10.8.

⁹⁰Regents Pol'y Manual for the Univ. Okla. § 4.11.3.

⁹¹*Id.* § 4.10.

⁹²*Id.*

⁹³Bd of Regents for the Okla. Ag. & Mech. Colleges Pol'y Manual § 30:10-1-2(4) (Am. 2016).

⁹⁴*Id.* § 30:10-1-2(3). Other restrictions apply.

⁹⁵*Id.* § 2.08.

⁹⁶http://regents.okstate.edu/policy_manual.html.

The Board of Regents of Oklahoma Colleges requires that purchases in excess of \$150,000 receive prior board approval.⁹⁷ The president or his designee has signing authority.⁹⁸ The board will review real estate purchases and leases in excess of \$50,000 per year. .⁹⁹

Energy Performance Contracting for Higher Education

Institutions of higher education within the Oklahoma State System of Higher Education may enter into a lease-purchase agreement for purposes of financing a guaranteed performance-based efficiency contract with a qualified provider for a term not to exceed twenty years or for the useful life of the project, subject to numerous restrictions.¹⁰⁰

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.¹⁰¹ Counties, municipalities, school districts and fire districts are constitutionally limited in the amount of debt they may incur.¹⁰² In *Halstead v. McHendry*,¹⁰³ a lease-purchase agreement involving realty with an annual option to renew in the county was upheld. The court said the lease-purchase agreement did not violate the constitutional debt limitation because such a provision prevented the county's revenue from being obligated beyond a one-year term.¹⁰⁴

In *Indiana National Bank v. State Department of Human Services*,¹⁰⁵ the court approved a non-appropriation by a state agency for computer equipment. The court held that the non-substitution clause was invalid because it was inserted in an amendment which was not approved by the Office of Public Affairs.

The Oklahoma Supreme Court upheld the proposed issuance of bonds by the Oklahoma Capitol Improvement Authority¹⁰⁶ in an action to determine the validity of bonds to be issued for the purpose of constructing improvements to the state transportation system. It was anticipated that the bonds would be paid from funds appropriated by the legislature each year to the State Transportation Fund, which would include pre-paid user fees, such as those imposed on gasoline and motor fuel sales. The Department of Transportation was expected to enter into a multi-year lease agreement with the Authority, although the statutory authority for the issuance of bonds provided that the payments on the bonds would be made subject to annual appropriations to the Fund by the legislature. Any payment to the bond owners would depend on what the legislature would do in later years. The court held that the issuance of the proposed bonds would not contravene the constitutional provision on debt, since there would not be anything to bind future legislative bodies to make the anticipated payments. The court also held that the present expressed intent by the legislature to continue the funding of a revenue raising project is not a "debt" within the meaning of the constitution.¹⁰⁷ The court followed the decisions in several prior cases in Oklahoma. It should be noted

⁹⁷Regional Univ. Sys. Of Okla. Pol'y Manual § 2.3.4 (April 2015Feb. 2009).

⁹⁸*Id.*

⁹⁹*Id.* § 1.12.3.

¹⁰⁰*Id.* tit. 62, § 318.

¹⁰¹Okla. Const. art. X.

¹⁰²Okla. Const. art. X, § 26.

¹⁰³566 P.2d 134 (Okla. 1977). The court also stated that assuming a "moral obligation" on the county to continue the lease, such an obligation would constitute no legal impediment to the validity of the lease agreement. *Id.* at 138.

¹⁰⁴*Id.* at 138. *Cf.* U.S. Leasing, Inc. v. State of Oklahoma, 737 P.2d 1191 (Okla. 1987) (the court held that a nonappropriation type lease-purchase agreement with the state was valid and that the state defaulted thereunder and therefore granted the plaintiff the remedy of acceleration under the contract).

¹⁰⁵857 P.2d 54 (Okla. 1993).

¹⁰⁶Application of Oklahoma Capitol Improvement Authority, 958 P.2d 759 (Okla. 1998); *cert. denied*, 525 U.S. 874 (1998).

¹⁰⁷*Id.* at 768.

that the vote in this case was a 5-4 decision. The court reaffirmed its holding in *Oklahoma Capital Improvement*, in a 6-3 decision,¹⁰⁸ and again in *In re Oklahoma Development Finance Authority for Approval of Oklahoma State System of Higher Education Master Real Property Lease Revenue Refunding Bonds*.¹⁰⁹

Oklahoma school districts often enter into lease-purchase financings for property paid for from the proceeds of general obligation bonds which are issued for the purpose of using the taxes levied to pay the lease-purchase payments. The Oklahoma attorney general is of the opinion that the proceeds of the annually issued general obligation bonds cannot be used to pay interest on the lease-purchase agreement; however, such interest can be paid from either the general fund or the capital improvement fund. In addition, increasing the principal amount in lieu of interest would not be permissible to avoid the prohibition on spending general obligation bond proceeds on interest. In this same opinion the attorney general stated that a public trust created by a municipality could not facilitate a lease-purchase financing for a school district that is located outside the geographic limits of said municipality and where the only benefit to the municipality would be the receipt of fees for providing said financing.¹¹⁰

Interest Rate Limitations

The interest rate on lease-purchase agreements of real property or equipment entered into by counties, municipalities and school districts pursuant to title 62, section 430.1, may not “exceed ten percent simple interest on the unpaid balance due as of each payment date.”¹¹¹

“The legal rate of interest shall be six percent in the absence of any contract as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted.”¹¹²

Miscellaneous

Property acquired by the state, counties, school districts and municipalities pursuant to lease-purchase agreements that provide for the passage of title or release of a security interest, if applicable, upon payment of all rental payments and an additional nominal amount is exempt from taxation and ad valorem taxation.¹¹³ Sales of tangible personal property or services to a municipality, county or school district pursuant to a lease-purchase agreement are exempt from sales tax.¹¹⁴

¹⁰⁸Fent v. Oklahoma Capitol Improvement Authority, 984 P.2d 200 (Okla. 1999).

¹⁰⁹312 P.3d 926 (Okla. 2013).

¹¹⁰07-42 Op. Att’y Gen. (Okla. 2007), 2007 WL 4699716.

¹¹¹Okla. Stat. Ann. tit. 62, § 430.1. The interest rate on lease-purchase agreements for real and personal property entered into by school districts may not “exceed the legal rate.” *Id.* tit. 70, § 5-117(B). In connection with a since-amended version of tit. 62, § 430.1, the attorney general advised that the interest payable under a lease-purchase agreement could be paid only at the end of the lease-purchase contract after the governmental unit involved had paid all the required monthly payments. 71 Op. Att’y Gen. 403 (Okla. 1971). Subsequent opinions of the attorney general have not referred to this opinion or this issue. However, the attorney general also advised that there is no legal basis upon which the state could agree to pay interest under the terms of a one-year lease of equipment, funded by a current appropriation. Because interest is the “rental” paid for the use of money owed but unpaid, no interest becomes due from the state unless the state is in default under the lease. 83-120 Op. Att’y Gen. (Okla. 1983). The opinion advised that the state could not lawfully enter into a lease calling for advance payments because such an arrangement would constitute a loan of the credit of the state in violation of Okla. Const. art. X, § 15.

¹¹²Okla. Stat. Ann. tit. 15, § 266. The attorney general has advised that in lease-purchase agreements where no express provision fixes the interest rate, the applicable rate is six percent per annum pursuant to tit. 15, § 266. 76 Op. Att’y Gen. 324 (Okla. 1976).

¹¹³Okla. Stat. Ann. tit. 68, § 2887(2).

¹¹⁴*Id.* § 1356 (31).

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

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Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Counties may “purchase and hold . . . lands . . . and any personal estate . . . [and] make all necessary contracts.”⁵

(1) A county may enter into a contract for the purchase or for the lease with option to purchase of real or personal property when:

- (a) The period of time allowed for payment under the contract does not exceed 30 years; and
- (b) The county is not obligated to make payments under the contract in any fiscal year unless the county governing body includes such payments in the county’s budget for that fiscal year and makes an appropriation therefor.

(2) The powers granted to counties by this section are in addition to any other powers possessed by counties in this state, and this section may not be construed to limit such powers.⁶

Most lease-purchasing by local government bodies in Oregon is done under the following statute:

A public body . . . may enter into contracts for the leasing, rental or financing of any real or personal property that the governing body determines is needed, including contracts for rental, long term leases under an optional contract for purchase, financing agreements with vendors, financing institutions or others, or for purchase of any property. Contracts made by a public body . . . are subject to the terms of its charter . . . or other organizing document, if applicable. If authorized by the governing body, the contracts may:

- (a) Provide that the obligations of the public body . . . under the contract shall be secured by a mortgage on or other security interest in the property to be leased, rented, purchased or financed under the contract.
- (b) Provide that the obligations of the public body . . . under the contract shall be payable out of all or any designated portion of the lawfully available funds of the public body and lawfully available funds may be pledged to the payment of those obligations.
- (c) If authorized by the charter . . . or other organizing document of the public body . . . contain a covenant on the part of the public body to budget and appropriate in each fiscal year, in accordance with law, sums sufficient to pay when due the amounts owing under the contract.
- (d) Provide for the issuance of certificates of participation in the payment obligations of the public body . . . under the contract and contain other covenants, agreements and provisions determined to be necessary or appropriate in order to better secure the obligations of the public body

(3) The lien of the pledge, mortgage or security interest is valid and binding from the time of entering into the contract. The revenue or property is immediately subject to the lien without physical delivery, filing or other act, and the lien is superior to all other claims and liens of any kind whatsoever. Subject to the terms, provisions and limitations of the contract, the lien may be foreclosed by a proceeding brought in the circuit court of the county in which the public body, or the greater part thereof . . . is located, and any tangible real or personal property subject to the lien may be sold upon the order of the court. The

¹Any county may adopt a home rule charter. Or. Rev. Stat. § 203.720.

²*Id.* § 310.020.

³*Id.* § 203.135.

⁴*Id.* § 215.605.

⁵*Id.* § 203.010.

⁶*Id.* § 203.015.

proceeds of the sale must be applied first to the payment of the costs of foreclosure and then to the amounts owing under the contract, with any balance being paid to the public body The authority granted by this section is in addition to, and not in lieu of, any other statutory or charter authority.

(4) A public body . . . that has entered into a lease purchase or installment purchase agreement may enter into a financing agreement to refinance the obligations of the public body . . . under the lease purchase or installment purchase agreement.

(5) The estimated weighted average life of a financing contract executed under this section may not exceed the estimated dollar weighted average life of the real or personal property that is financed with the contract.⁷

“[A] political subdivision may sell, exchange, convey or lease for any period not exceeding 99 years” real property not needed for public use.⁸

Counties have authority to lease-purchase "pollution control facilities."⁹

Counties can enter into binding full faith and credit financing agreements, if structured as a pledge of general fund revenues. The constitutional debt limitation for counties found in section 10, article XI of the Oregon Constitution provides in part: “...however, counties may incur bonded indebtedness in excess of such \$5,000 limitation to carry out purposes authorized by statute. . . .” Code section 287A.105 (formerly ORS 287.053 which was enacted in 1999) authorizes a county to incur bonded indebtedness by issuing revenue bonds when authorized to do so by a law other than ORS 287A.105, provided such indebtedness does not exceed the lesser of (1) one percent of the real market value of the taxable property in the county or (2) a lesser charter limitation. The authority to issue the revenue bonds is section 287A.150. By complying with the procedures for issuing such revenue bonds, which usually does not require voter approval unless enough signatures are collected to refer the proposition to the voters, and identifying general, non-restricted revenues of the county and other funds which may be available, including taxed levied within the restrictions of sections 11 and 11b, article XI of the Oregon Constitution, a county will then have the authority to issue a financing agreement with said pledge of revenues, so long as the outstanding bonded indebtedness of the county does not exceed two percent of the real market value of the taxable property in the county. A county would also be able to pledge revenues of a special fund in addition or as an alternative to the general fund revenues.

Energy Performance Contracting

Counties¹⁰ may apply for funding or refinancing of qualified lease-purchase agreements for “small scale local energy projects.”¹¹

There is no particular statute enumerating the requirements of an energy savings contract. The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with local government.¹² Counties and other public

⁷*Id.* § 271.390. “Public body” has the meaning given that term in Or. Rev. Stat. § 287A.001. Under Section 287A.001, a “public body” is defined as a unit of local government including, but not limited to, cities, counties, school districts, and special districts. *See, infra*, notes 129-135 and accompanying text for a discussion of a financing under this statute that was approved by the court. Real or personal property means “land, improvements to land, structures, fixtures, personal property, including furnishings, equipment and computer software purchases and licenses, and any costs that may be capitalized under generally accepted accounting principles and treated as costs of personal property.” *Id.* § 271.390(1)(c).

⁸*Id.* § 271.310. *See, infra*, note 129 and accompanying text relating to this provision. “Political Subdivision” includes counties, cities, and districts that have “power to levy and collect taxes.” *Id.* § 271.005(3).

⁹*Id.* § 468.265(1).

¹⁰The statute is authority for any “municipal corporation” which includes city, county, or special district. *Id.* § 297.405.

¹¹*Id.* §§ 470.050 to .210.

¹²*Id.* § 276.915.

bodies may follow the methods provided in the Oregon Administrative Rules¹³ to contract for energy savings measures outside competitive bidding requirements.¹⁴

Municipalities

Municipalities¹⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁶ eminent domain¹⁷ and police powers.¹⁸

The extensive powers to lease-purchase real and personal property under Or. Rev. Stat. § 271.390 are available to municipalities.¹⁹

Municipalities have the same powers as counties to sell or lease real property.²⁰

Energy Performance Contracting

Municipalities may apply for funding or refinancing of qualified lease-purchase agreements for “small scale local energy projects.”²¹

There is no particular statute enumerating the requirements of an energy savings contract. The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with a local government.²² Municipalities and other public bodies may follow the methods provided in the Oregon Administrative Rules²³ to contract for energy savings measures outside competitive bidding requirements.²⁴

School Districts

School districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷

The extensive powers relating to the lease-purchase of real and personal property under Or. Rev. Stat. § 271.390 are available to school districts.²⁸

School districts “may purchase real property upon a contractual basis when the period of time allowed for payment under the contract does not exceed 30 years.”²⁹ School districts “[m]ay furnish,

¹³Or. Admin. R. 137-049-0600 to 137-049-0690.

¹⁴Or. Rev. Stat. § 279C.335(f).

¹⁵Municipalities for purposes of this discussion are incorporated cities, towns and villages. *Id.* § 174.100(2). Municipalities may adopt a charter form of government. Or. Const. art. XI, § 2.

¹⁶Or. Rev. Stat. § 287A.140.

¹⁷*Id.* § 223.005.

¹⁸*Id.* § 221.410.

¹⁹*Id.* § 271.390. *See, supra*, note 7 and accompanying text.

²⁰*Id.* § 271.310. *See, supra*, note 7 and accompanying text. The sale of real estate or any interest therein by a city requires notice and a public hearing. *Id.* § 221.725. This provision is also applicable to a lease-purchase of real estate by the city as lessor. *Id.* § 221.727.

²¹*Id.* §§ 470.050 to .210.

²²*Id.* § 276.915.

²³Or. Admin. R. 137-049-0600 to 137-049-0690.

²⁴Or. Rev. Stat. § 279C.335(f).

²⁵School districts for purposes of this discussion are common school districts or union high school districts. *Id.* § 332.002.

²⁶Or. Const. art. XI, §§ 11; 11b.

²⁷Or. Rev. Stat. § 332.182.

²⁸*Id.* § 271.390. *See, supra*, note 7 and accompanying text.

²⁹*Id.* § 332.155(9).

equip, repair, lease, purchase and build schoolhouses . . . and like buildings . . . and . . . buy and lease lands for all school purposes.”³⁰ “Leases authorized by this section include lease-purchase agreements whereunder the district may acquire ownership of the leased property at a nominal price.”³¹ “Leases and lease-purchase agreements may be for a term of up to 30 years.”³²

A district . . . may purchase relocatable classrooms and other relocatable structures in installment transactions in which deferred installments of the purchase price are payable over not more than 10 years from the date such property is delivered to the district for occupancy and are secured by a security interest in such property. Such transactions may take the form of, but are not limited to, lease-purchase agreements.³³

School districts “[m]ay acquire personal property by a lease-purchase agreement or contract of purchase for a term exceeding one year.”³⁴

A lease-purchase agreement is one in which the rent payable by the district is expressly agreed to have been established to reflect the savings resulting from the exemption from taxation, and the district is entitled to ownership of the property at a nominal or other price which is stated or determinable by the terms of the agreement and was not intended to reflect the true value of the property.³⁵

School districts “may enter into rental or lease-purchase agreements covering motor vehicles.”³⁶ School districts may “lease, sell and convey all property of the district . . . [not] required for school purposes.”³⁷

Energy Performance Contracting

There is no particular statute enumerating the requirements of an energy savings contract. The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with a local government.³⁸ School districts and other public bodies may follow the methods provided in the Oregon Administrative Rules³⁹ to contract for energy savings measures outside competitive bidding requirements.⁴⁰

Fire Districts

Fire districts⁴¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴² and eminent domain⁴³ powers.

The district board may enter into rental or lease-purchase agreements to rent, lease or acquire real or personal property, or both, required for fire-protection purposes. Except for agreements to rent, lease or acquire real property, an agreement may not run for more than 10 years or be subject to renewal.⁴⁴

³⁰*Id.* § 332.155(1).

³¹*Id.*

³²*Id.*

³³*Id.* § 332.155(10).

³⁴*Id.* § 332.155(4).

³⁵*Id.* “Real and personal property of a taxable owner held under lease, sublease or lease-purchase agreement by . . . [a] public body other than the State of Oregon . . . is exempt from taxation” if certain requirements are met. *Id.* § 307.112(1).

³⁶*Id.* § 332.155(11).

³⁷*Id.* § 332.155(5).

³⁸*Id.* § 276.915.

³⁹Or. Admin. R. 137-049-0600 to 137-049-0690.

⁴⁰Or. Rev. Stat. § 279C.335(f).

⁴¹“Fire districts” are “rural fire protection districts” created under Or. Rev. Stat. Ch. 478.

⁴²Or. Rev. Stat. § 478.410.

⁴³*Id.* § 478.260.

⁴⁴*Id.* § 478.410(3).

The total principal amount payable under an agreement, together with the outstanding principal balance of all outstanding general obligation bonds, and other lease-purchase and installment purchase agreements, may not exceed one and one-fourth of one percent of the real market value of taxable property located within the district.⁴⁵

The extensive powers relating to the lease-purchase of real and personal property under Or. Rev. Stat. § 271.390 are available to fire districts.⁴⁶

Energy Performance Contracting

There is no particular statute enumerating the requirements of an energy savings contract. The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with an authorized state agency.⁴⁷ It appears that fire districts may follow the methods provided in the Oregon Administrative Rules⁴⁸ to contract for energy savings measures outside competitive bidding requirements.⁴⁹

Hospital Districts

Hospital districts⁵⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁵¹ and eminent domain⁵² powers. Hospital districts may “purchase and lease real and personal property.”⁵³ The extensive powers to lease-purchase real and personal property under Or. Rev. Stat. § 271.390 are available to hospital districts.⁵⁴

Energy Performance Contracting

There is no particular statute enumerating the requirements of an energy savings contract. The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with an authorized state agency.⁵⁵ It appears that hospital districts may follow the methods provided in the Oregon Administrative Rules⁵⁶ to contract for energy savings measures outside competitive bidding requirements.⁵⁷

State Entities

Except as otherwise provided in the Public Contracting Code, all public contracting by a contracting agency is subject to Chapter 279A.⁵⁸ The Oregon Department of Administrative Services (DAS) is the primary contracting agency for the state.

The Oregon Department of Administrative Services is required to conduct all procurements⁵⁹ and administer the contracting for goods⁶⁰ and information technology⁶¹ for state agencies⁶² pursuant to the

⁴⁵*Id.* § 478.410(2),(3).

⁴⁶*Id.* § 271.390. *See, supra*, note 7 and accompanying text.

⁴⁷*Id.* § 276.915.

⁴⁸Or. Admin. R. 137-049-0600 to 137-049-0690.

⁴⁹Or. Rev. Stat. § 279C.335(f).

⁵⁰Hospital districts are “health districts” created under Or. Rev. Stat. Ch. 440.

⁵¹Or. Rev. Stat. § 440.395.

⁵²*Id.* § 440.370.

⁵³*Id.* § 440.360(2).

⁵⁴*Id.* § 271.390. *See, supra*, note 7 and accompanying text.

⁵⁵*Id.* § 276.915.

⁵⁶Or. Admin. R. 137-049-0600 to 137-049-0690.

⁵⁷Or. Rev. Stat. § 279C.335(f).

⁵⁸*Id.* § 279A.020.

Public Contracting Code⁶³ unless a state agency is specifically authorized to enter into a procurement contract⁶⁴ or unless the director of administrative services delegates this authority.⁶⁵ The Director of DAS is authorized to enter into price agreements from which agencies other than the Department of Transportation, the State Secretary and the State Treasurer are required to participate unless otherwise approved by the Director.⁶⁶

The Public Contracting Code does not apply to

“[c]ontracts entered into by the State Treasurer in exercising the powers of that office . . . including but not limited to . . . bond documents, certificates of participation and other debt repayment agreements, and any associated contracts, agreements and documents, regardless of whether the obligations that the contracts, agreements or documents establish are general, special or limited, except that the State Treasurer’s public contracting for goods and services is subject to ORS chapter 279B [relating to competitive bidding].”⁶⁷

Other exceptions apply: the Public Contracting Code does not apply to the legislative department; the judicial department; acquisitions of interests in real property. There are numerous other exceptions.⁶⁸

⁵⁹Procurement “means the act of purchasing, leasing, renting or otherwise acquiring goods or services.” Procurement “includes each function and procedure undertaken or required to be undertaken by a contracting agency to enter into a public contract, administer a public contract and obtain the performance of a public contract under the Public Contracting Code.” *Id.* § 279A.010(1)(w).

⁶⁰“Goods” “includes supplies, equipment, materials, personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this paragraph.” *Id.* § 279A.010(1)279A.0(i).

⁶¹*See, infra*, note 100 and accompanying text.

⁶²*Id.* § 279A.050. State agency “means the executive department, except the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.” *Id.* § 279A.010(mm).

⁶³*Id.* § 279A.025. Public contract “means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.” *Id.* § 279A.010(z). *See generally id.* Chs. 279A, 279B, 279C.

⁶⁴*Id.* § 279A.140; § 279A.050. The Dept. of Transportation, the Secretary of State and the State Treasurer have delegated authority. Additional agencies are listed in section 279A.050. Procurements of information technology in excess of one million dollars or more must be approved by the chief information officer. *Id.*

⁶⁵*Id.* § 279A.050. The DAS Procurement Policy Office developed Or. Admin. R 125-246 through 249, DAS Public Contracting Rules, for state agencies subject to DAS authority. Delegations are covered by Or. Admin. R. 125-246-0170 (2012).

⁶⁶*Id.* The director is authorized to delegate price agreements for technology and telecommunications to the State Chief Information Officer. *See, supra*, notes 101 to 109. “Price Agreement” is defined as a public contract for the procurement of goods . . . at a set price with: (A) No guarantee of a minimum or maximum purchase; or (B) an initial order or minimum purchase combined with a continuing contractor obligation to provide goods . . . in which the contracting agency does not guarantee a minimum or maximum additional purchase. Or. Rev. Stat. 279C.440.

⁶⁷*Id.* § 279A.025(2)(p). The State Treasurer is required to issue and sign *bonds* of the State of Oregon under “State Borrowing” chapter 286A. *Id.* § 286A.005. Bond “means a contractual undertaking or instrument of the State of Oregon to repay borrowed moneys. . . [and] [d]oes not mean a financing agreement, as defined in ORS 283.085, if the principal amount of the agreement is \$100,000 or less, . . .” *Id.* § 286A.001(2). Section 283.085 provides that ““Financing agreement” means a lease purchase agreement, an installment sale agreement, a loan agreement or any other agreement:

- (a) To finance real or personal property that is or will be owned and operated by the state or any of its agencies;
- (b) To finance infrastructure, including but not limited to telecommunications systems, systems for water, sewage, electricity, steam or natural gas and other equipment or improvements that are necessary or appropriate to support a facility that is, or will be, owned or operated by the state;
- (c) To finance infrastructure components that are, or will be, owned or operated by a local government agency of this state if the director . . . determines that financing the infrastructure facilitates the construction or operation of an adult or juvenile corrections facility or a public safety training facility owned or operated by the state or any of its agencies;
- (d) To finance all or a portion of the state’s pension liabilities for retirement, health care or disability benefits, in an amount that produces net proceeds that do not exceed the State Treasurer’s estimate of those liabilities based on information provided to the State Treasurer by the Public Employees Retirement System; or
- (e) To refinance previously executed financing agreements.”

⁶⁸*Id.* § 279A.025.

Public contracting thresholds: procurement of goods or services \$10,000 or less may be awarded in any manner deemed practical;⁶⁹ procurement of goods or services in an amount between \$10,000 and \$150,000 requires compliance with “intermediate procedures” that include competitive bidding.⁷⁰

When the DAS or other agency “has authority to make procurements under a provision of law other than the Public Contracting Code, the contracting agency need not exercise the contracting agency’s authority in accordance with the provisions of the code if, under ORS 279A.025 [relating to exempt contracts and agencies], the code does not apply to the contract or contracting authority.”⁷¹

For lease-purchase agreements exceeding \$100,000, the Director of the Department of Administrative Services must comply with code sections 283.085 to 283.092. It is the only agency authorized to enter into financing agreements to acquire real or personal property for state agencies.⁷²

Financing agreements entered into under ORS 283.085 to 283.092 are subject to the following limitations:

(1) Neither the director nor any other agency of the state may pay amounts due under a financing agreement⁷³ from any source other than available funds. If there are insufficient available funds to pay amounts due under a financing agreement, the lender may exercise any property rights which the state has granted to it in the financing agreement, against the property which was purchased with the proceeds of the financing agreement, and apply the amounts so received toward payments scheduled to be made by the state under the financing agreement.

(2) Neither the director nor any other agency of the state may grant property rights in property unless the property is being acquired, substantially improved or refinanced with proceeds of a financing agreement entered into under ORS 283.085 to 283.092 or the property is land on which improvements financed, in whole or in part, under ORS 283.085 to 283.092 are located.

(3) A financing agreement with a principal amount in excess of \$100,000 is subject to the requirements of ORS chapter 286A, and the director may exercise the powers granted to a related agency, as defined in ORS 286A.001⁷⁴, with respect to a financing agreement described in this paragraph.

4) The expenditure of funds used to finance previously executed financing agreements or to pay costs incurred to issue a financing agreement must be recorded using administrative budget limitations.

(5) For purposes of this section, the principal amount of a financing agreement, other than a financing agreement to refinance a financing agreement, exceeds \$100,000 if the principal amount, when combined with the principal amount of a financing agreement, other than a financing agreement to refinance a financing agreement, previously issued for the same project exceeds \$100,000.

(6) Upon the request and with the approval of the Chief Justice of the Supreme Court or the State Court Administrator, the Director of the Oregon Department of Administrative Services may enter into financing agreements in accordance with ORS 283.085 to 283.092 on behalf of the Judicial Department.⁷⁵

The following rule regarding this code provision has been promulgated by DAS:

Approval and Execution of Financing Agreements

(1) The acquisition of any capital asset by a State Agency that is paid through a Financing Agreement must be done in accordance with the procedures established in ORS 283.087 to 283.092 if the principal portion of the agreement exceeds \$100,000.

⁶⁹*Id.* § 279B.065.

⁷⁰*Id.* § 279B.070.

⁷¹*Id.* § 279A.050(b).

⁷²Or. Admin. R. 122-070-0100.

⁷³Financing agreement “means a lease purchase agreement, an installment sale agreement, a loan agreement or any other agreement . . .” Or. Rev. Stat. § 283.085.

⁷⁴“Related agency” is defined by the code to mean “the state agency that requests the State Treasurer to issue bonds pursuant to ORS 286A.025 or for which the State Treasury has issued bonds.” *Id.* § 286A.001(9). In practice “related agency” appears to mean the Department of Administrative Services.

⁷⁵*Id.* § 283.087.

(2) The acquisition of any software or capital asset may not be divided into parts with each part being less than \$100,000, to avoid the Financing Agreement approval process. The Department [DAS, Budget and Management Division] will combine each component of a “single project” to determine if the principal amount of the financing for the project exceeds \$100,000. If the principal amount exceeds \$100,000 the financing is subject to ORS 283.087 to 283.092.

(3) A “single project” will be determined to exist if:

- (a) A State Agency is acquiring two or more items using separate Financing Agreements when the total principal sum of the Financing Agreements exceeds \$100,000;
- (b) The items perform or contribute to the same general function at a particular location or as part of an interdependent system; and
- (c) Are proposed to be acquired under a continuing appropriation or within the same biennium.

(4) If the principal amount of the Financing Agreement exceeds \$100,000, it must be executed by the Director. The form of the proposed agreement must be submitted to and approved by the Director at least 14 business days before the expected closing of the financing.

(5) The Director is the only state officer authorized to enter into Financing Agreements under ORS 283.087 to 283.092. The Deputy Director may execute a Financing Agreement in lieu of the Director under ORS 184.335.

(6) In cases of Financing Agreements approved in writing by the State Treasurer, or the Treasurer’s designee, and the Director to acquire equipment through the Department of Administrative Services, State Services Division in accordance with the Public Contracting Code, the Director’s approval of the terms of a proposed Financing Agreement, with such changes, if any, as are authorized by the Director, will serve as direction to the State Services Division Administrator to execute the Financing Agreement under the Director’s authority.

(7) Requests for approval of Financing Agreements will be made in the manner, and on forms as directed by the Department.⁷⁶

Generally, the attorney general may be required to approve for legal sufficiency all public contracts calling for payment in excess of \$100,000.⁷⁷ The threshold for information technology contracts is \$75,000.⁷⁸ Exceptions apply.⁷⁹

The director of DAS has the following additional statutory authority:

The Director of the Oregon Department of Administrative Services may:

- (a) Enter into agreements with trustees to hold financing agreement proceeds, payments and reserves as security for lenders, and to issue certificates of participation in the right to receive payments due from the state under a financing agreement. The trustee shall invest amounts held by the trustee at the direction of the State Treasurer. Interest earned on any investments held by a trustee as security for a financing agreement, at the option of the director, may be credited to the accounts held by the trustee and applied in payment of sums due under a financing agreement.
- (b) Enter into credit enhancement agreements for financing agreements or certificates of participation, provided that amounts due under credit enhancement agreements are payable solely from available funds and amounts received from the exercise of property rights granted under the financing agreements.
- (c) Use the gross proceeds of financing agreements for the purposes described in ORS 283.085 (3) and to pay the costs of reserves, credit enhancements and other costs associated with issuing, administering and maintaining the financing.
- (d) Use a single financing agreement to finance property to be used by multiple state agencies.

⁷⁶Or. Admin R. 122-070-0130.

⁷⁷Or. Rev. Stat. § 291.047.

⁷⁸*Id.*

⁷⁹*Id.*

(e) Subject to ORS 283.087 (2)(b), grant leases of real property with a trustee or lender. The leases may be for a term that ends on the date on which all amounts due under a financing agreement have been paid or provision for payment has been made, or 10 years after the last scheduled payment under a financing agreement, whichever is later. The leases may grant the trustee or lender the right to evict the state and exclude it from possession of the real property for the term of the lease if the state fails to pay when due the amounts scheduled to be paid under a financing agreement or otherwise defaults under a financing agreement. Upon default, the trustee or lender may sublease the real property to third parties and apply any rentals toward payments scheduled to be made under a financing agreement.

(f) Subject to ORS 283.087 (2)(b), grant security interests in personal property to trustees or lenders. The security interests attach and are perfected on the date the state takes possession of the personal property, or the date the lender advances money under a financing agreement, whichever is later. A security interest authorized by this section has priority over all other liens and claims. Upon default, the secured party has the rights and remedies available to a secured party under ORS chapter 79 for a first, perfected security interest in goods and fixtures. Within 10 days after a security interest authorized by this section attaches, the state shall cause a financing statement for the security interest to be filed with the Secretary of State in the same manner as financing statements are filed for goods. However, failure to file the statement does not affect the perfection of the security interest.

(g) Pledge for the benefit of trustees and lenders any amounts that are deposited with a trustee in accordance with a financing agreement. The pledge is valid and binding from the time it is made. Amounts pledged are subject to the lien of the pledge immediately without filing, physical delivery or other act. The lien of the pledge is superior to all other claims and liens of any kind whatsoever.

(h) Bill any state agency that benefits from a financing agreement for an appropriate share of the financing costs on a monthly or other periodic basis, and deposit payments received in connection with the billings with a trustee as security for a financing agreement. Any state agency receiving such a bill shall pay the amounts billed from the first amounts legally available to it. The director shall allocate in appropriate shares the financing costs of a financing agreement entered into for the purpose described in ORS 283.085 (3)(d) among all state agencies based on their payroll costs.

(i) Purchase fire and extended coverage or other casualty insurance for property acquired or refinanced with proceeds of a financing agreement, assign the proceeds of the insurance to a lender or trustee to the extent of their interest and covenant to maintain the insurance while the financing agreement is unpaid, so long as available funds are sufficient to purchase the insurance.

(2) As used in this section, “state agency” has the meaning given that term in ORS 286A.730.⁸⁰

Bond administration statutes provide:

(1) The Uniform Commercial Code does not apply to the creation, perfection, priority or enforcement of a lien of a pledge made by a state agency or the State Treasurer.

(2) When authorized by law to secure obligations with property of the State of Oregon, a state agency, or the State Treasurer acting under the State Treasurer’s own authority or on behalf of a state agency with the approval of the state agency, may pledge all or a portion of the property as security for payment of the obligations and for performance of a covenant or agreement entered into in relation to the issuance of the obligations.

(3) The lien created by a pledge described in subsection (2) of this section is valid and binding from the time the pledge is made. Pledged property is subject immediately to the lien of the pledge without physical delivery, filing or any other act.

(4) Except as otherwise expressly provided in an operative document, the lien of the pledge is superior to and has priority over all other claims and liens of any kind.

(5) When property subject to a pledge is acquired by the State of Oregon after the pledge is made:

(a) The property is subject to the lien upon acquisition by the State of Oregon without physical delivery, filing or any other act; and

(b) The lien relates back to the time the pledge was originally made.

⁸⁰*Id.* § 283.089. State agency means a state officer, board, commission, corporation, institution, department or other state organization that has officers or employees participating in the Public Employees Retirement System. *Id.* § 286A.730.

(6) (a) The State Treasurer, or the related agency, may reserve the right to pledge property as security for a subsequently issued obligation.

(b) If the State Treasurer or related agency reserves the right described in paragraph (a) of this subsection, subject to the terms of the operative document that created the previous pledge, the lien of the subsequent pledge may be on a parity or *pari passu* basis with the lien of the previous pledge, on a prior and superior basis with the lien of the previous pledge or on a subordinate basis with the lien of the previous pledge, as specified in the operative document creating the subsequent pledge. The lien of the subsequent pledge:

(A) Has the priority specified in the operative document creating the subsequent pledge;
and

(B) Is superior to and has priority over other claims and liens of any kind except the lien of a pledge with which the lien of the subsequent pledge is on a parity or subordinate basis, as specified in the operative document.

(7) Except as provided in subsection (8) of this section, a pledgee may commence an action in a court of competent jurisdiction to foreclose the lien of the pledge and exercise rights and remedies available to the pledgee under the operative document.

(8) When pledged property is in a fund for debt service reserves or payments, a pledgee may foreclose the lien of the pledge by applying the property to the payment of obligations subject to the terms, conditions and limitations in the operative document.

(9) An initiative or referendum measure approved by the electors of the State of Oregon that purports to change statutory provisions affecting rates, fees, tolls, rentals or other charges may not be given any force or effect if to do so would impair existing covenants made with holders of existing obligations regarding the imposition, levy or collection of the rates, fees, tolls, rentals or other charges pledged to secure outstanding obligations

(12) The State Treasurer, or a related agency with the approval of the State Treasurer, may pledge the full faith and credit of the State of Oregon as security for the payment of general obligation bonds. A pledge of the full faith and credit authorized by this subsection does not, by itself, create a lien on the revenues or property of the state.⁸¹

State lease-purchase agreements for public improvements are subject to the numerous statutes listed in section 276.071:

ORS 276.073 (Definitions for ORS 276.073 to 276.090) to 276.090 (State agencies to determine art work acquisitions), 279A.005 (Short title) to 279A.030 (Federal law prevails in case of conflict), 279A.050 (Procurement authority) to 279A.075 (Delegation), 279A.100 (Affirmative action), 279A.105 (Subcontracting to emerging small businesses or businesses owned or controlled by disabled veterans), 279A.110 (Discrimination in subcontracting prohibited), 279A.120 (Preference for Oregon goods and services), 279A.125 (Preference for recycled materials), 653.268 (Overtime for labor directly employed by public employers) and 653.269 (Exceptions to ORS 653.268) and ORS chapter 279C, except ORS 279C.600 (Right of action on payment bond or public works bond of contractor or subcontractor) to 279C.625 (Joint liability when payment bond not executed) apply to all public improvements that are being constructed, reconstructed or renovated for use by a state agency under a lease-purchase agreement or under any other agreement whereby ultimate state ownership is contemplated or expected.⁸²

Agencies are required to give notice to the Oregon Department of Administrative Services for public improvements under lease-purchase.⁸³

In relation to buildings and grounds managed by the state and DAS, DAS is authorized to lease-purchase or installment-purchase the following equipment:

⁸¹*Id.* § 286A.102.

⁸²*Id.* § 276.071.

⁸³*Id.* § 276.072.

(a) Steam heating systems, power systems, machines, engines and equipment, with necessary transmission poles and lines, pipes or conduits for the purpose of generating and furnishing steam heat, electric energy, current, light, heat and power for the public buildings and grounds.

(b) Systems for the purpose of transmitting and receiving messages by radio, telephone, telegraph or other device or system in the transaction of business of the state or in which the state is interested.⁸⁴

Additionally,

The department may contract to pay, as rental or otherwise, on the amortization plan, the principal and interest of the purchase price of such personal property.

(2) The rate of interest on the principal of the purchase cost and the terms and conditions for repayment shall be as determined by the department. The department may pledge, on behalf of the State of Oregon, for the retirement of such indebtedness, such reasonable sums from operating appropriations or service charges as is required for:

(a) The purchase or securing of steam heat, electrical current or energy from private persons or corporations for light, heat and power for any such public buildings.

(b) Transmitting and receiving messages by radio, telephone, telegraph or other device or system in the transaction of any or all business of the state or in which the state is interested.

(3) The department may make installment payments on such contracts on such purchase price. Such obligations shall not be deemed a general indebtedness of the state, but shall be payable out of appropriations made or provided for the operation and maintenance of such public buildings. In the case of telecommunications systems and all related equipment, repayment may be from service charges paid by agencies for the operation of the systems.⁸⁵

Public review is required for proposed capital projects of all state agencies and “[t]he review process may be applicable to capital projects meeting the definition of major construction/acquisition in the Governor’s budget and to significant leases.”⁸⁶ The review process may include an examination of “[t]he advisability of lease, purchase or other funding strategies.”⁸⁷

Capital construction projects must be submitted to Capitol Planning Commission for review and to the Governor for approval.⁸⁸

Public works contracts are covered by code chapters 297A and 297C and administrative code provisions.⁸⁹

The Department of Administration is required to approve lease agreements for “office quarters”⁹⁰ and has authority to enter into lease-purchases, leases with option to purchase, and rental agreements for state agencies.⁹¹ Prior to entering into such agreements the ODAS must report to the Joint Committee on Ways and Means during the period when the Legislative Assembly is in session or the Emergency Board or the interim Joint Committee on Ways and Means during the interim period.⁹² However, lease-purchase

⁸⁴*Id.* §§ 276.212; 276.218.

⁸⁵*Id.* § 276.218.

⁸⁶*Id.* § 276.227.

⁸⁷*Id.*

⁸⁸*Id.* § 291.224.

⁸⁹Or. Admin. R. Ch. 125, Division 246.

⁹⁰*Id.* § 276.428. Office quarters means “office space, office buildings and related service, storage and parking facilities and may also include factory built, modular or portable units.” *Id.* § 276.420.

⁹¹*Id.* § 276.429.

⁹²*Id.* § 276.429(4).

or installment-purchase agreements in excess of \$100,000 must be made in accordance with code sections 283.085 to 283.092.⁹³

Title to any interest in real property is taken in the name of the State of Oregon.⁹⁴

Before acquisition of any real property or interest therein by any state agency, except for highway right of way acquired by the Department of Transportation and park properties acquired by the State Parks and Recreation Department and property within the approved projected campus boundaries for public universities listed in ORS 352.002, the state agency shall report its intent of acquisition to the Oregon Department of Administrative Services. The department shall notify other state agencies owning land of the intended acquisition to determine whether another state agency desires to sell or transfer property that would meet the needs of the purchasing agency. In accordance with rules adopted by the Oregon Department of Administrative Services, if no other state agency desires to sell or transfer property that would meet the needs of the agency, the agency may acquire the real property or interest therein, consistent with applicable provisions of law.⁹⁵

The Department of Transportation has the power to “[a]cquire by purchase, lease, . . . real and personal property or any interest therein.”⁹⁶ The Department of Transportation has authority under the Public Contracting Code to procure goods, services, and public improvements relating to the operation, maintenance or construction of highways, bridges and other transportation facilities.⁹⁷ “The department may utilize moneys in the Public Transportation Development Fund to purchase or lease new or rebuilt buses and other public transportation equipment, to purchase real estate or to purchase, lease or construct facilities for future sale to public transportation entities either for cash or by installment contract, but no installment contract shall be for more than five years and the balance shall bear interest at a rate indicated by the monthly earnings of the Oregon Short Term Investment Fund.”⁹⁸ The transportation department may enter into leases agreements, lease-purchase agreements and installment sale arrangements for the purchase of real and personal property for tollway projects by the state from private entities or the government.⁹⁹ The department may lease or purchase data processing, word processing and photocopy equipment and services.¹⁰⁰

Information Technology

The Director of the Department of Administrative Services (DAS) may delegate to the State Chief Information Officer the authority to procure or supervise the procurement of all state agency information¹⁰¹ technology contracts except for information technology products or services incidental to the performance of personal services contracts described in ORS chapter 279C or construction contracts described in ORS chapter 279C.¹⁰² The State Chief Information Officer may require the director of DAS to obtain approval before delegating authority to purchase information technology or telecommunications.¹⁰³ The director may delegate exclusive authority to procure or supervise the procurement of all price agreements to the chief information officer.¹⁰⁴ The chief information officer

⁹³*Id.*

⁹⁴*Id.* §§ 270.020; 182.112.

⁹⁵*Id.* § 270.100. See also Or. Admin. R. 125-045-0220.

⁹⁶*Id.* § 184.689.

⁹⁷*Id.* § 279A.050(3).

⁹⁸*Id.* § 184.733.

⁹⁹*Id.* § 383.005.

¹⁰⁰*Id.* § 184.645.

¹⁰¹Information technology is “Any equipment or interconnected system or subsystem of equipment used in the acquisition, storage, manipulation, management, movement, control, security, display, switching, interchange, transmission, communication, or reception of data or information electronically . . .” Or. Admin Rule 125-246-0110.

¹⁰²Or. Rev. Stat. § 279A.050(2)(b); § 291.038.

¹⁰³*Id.* § 279A.075(2).

¹⁰⁴*Id.* § 279A.050(7).

must approve a procurement valued at \$1 million or more.¹⁰⁵ The Chief Information Officer is authorized by statute to oversee the acquisition of all information and telecommunications technology by state government and agencies, except institutions of higher education,¹⁰⁶ and is authorized to enter into “agreements to fund or otherwise acquire telecommunications equipment and services by installment purchase or lease purchase contracts.”¹⁰⁷ Lease-purchase contracts exceeding \$100,000 would be made by the Director of ODAS pursuant to the provisions of sections 283.085 to 283.092, discussed above.¹⁰⁸ Information technology contracts exceeding \$75,000 must be reviewed and approved by the attorney general.¹⁰⁹

Energy Performance Contracting

State agencies¹¹⁰ are authorized to “enter into such contractual and other arrangements as may be necessary or convenient to . . . finance projects . . .”¹¹¹ The Department of Energy maintains a list of persons/businesses prequalified to submit a bid or proposal to enter into an energy savings performance contract with an authorized state agency.¹¹² Buildings designed, constructed, or renovated by state agencies, must comply with the State Energy Efficiency Design program administered by the Oregon Department of Energy.¹¹³ It appears that state agencies may follow the methods provided by the Attorney General in the Oregon Administrative Rules¹¹⁴ to contract for energy conservation measures (ECMs) in design build projects for existing buildings outside of competitive bidding requirements.¹¹⁵ Alternatively they may follow rules of procedure established by the Department of Administrative Services or by any other agency granted such authority to establish its own rules.¹¹⁶

Higher Education

A public university with a governing board¹¹⁷ may

Acquire, purchase, purchase on a contractual basis, borrow, receive, own, hold, control, convey, sell, manage, operate, lease, lease-purchase, license, lend, invest in, issue, improve, develop, use, expend and dispose of personal property, including intellectual property, of any nature, tangible or intangible.¹¹⁸

Acquire, purchase, purchase on a contractual basis, borrow, receive, own, hold, control, convey, mortgage, pledge or otherwise encumber, sell, manage, operate, lease, lease-purchase, license, lend, invest in, improve, develop, use, expend and dispose of real property.¹¹⁹

¹⁰⁵*Id.*

¹⁰⁶*Id.* §§ 291.038, 291.039.

¹⁰⁷*Id.* § 283.524. Telecommunications contracts may be limited to ten years. *Id.* § 283.520.

¹⁰⁸*See, supra*, notes 72 to 75 and accompanying text.

¹⁰⁹Or. Rev. Stat. § 279A.140(2); § 291.047; § 291.049.

¹¹⁰State agency” or “agency” means each state branch, institution, department, board, commission or activity of whatever nature. *Id.* § 278.005.

¹¹¹*Id.* § 469.754. “Project” means a state agency’s improvement of the efficiency of energy use through conservation, development of cogeneration facilities or use of renewable resources. “Project” does not include a plan of a state agency to improve the efficiency of energy use in a state rented facility if the payback period for the project exceeds the term of the current state lease for that facility. *Id.* § 469.752.

¹¹²*Id.* § 276.915.

¹¹³*Id.* §§ 276.900 to 276.915.

¹¹⁴Or. Admin. R. 137-049-0600 to 137-049-0690.

¹¹⁵Or. Rev. Stat. § 279C.335(f). Or. Admin. R. 137-049-0680.

¹¹⁶Or. Rev. Stat. § 279A.065. Energy savings performance contracts are defined in public contracting code § 279A.010.

¹¹⁷A governing board is established for each of the following: University of Oregon; Portland State University; Oregon State University; Eastern Oregon University; Oregon Institute of Technology; Southern Oregon University; and Western Oregon University. *Id.* § 352.054. The Oregon Health and Science University (OHSU) is a separate entity of the state with its own governance and decent statutory authority to enter into lease-purchase agreements and installment sale agreements, including ground leases. *Id.* §§ 353.380 to 353.420. OHSU has the power of eminent domain. *Id.* § 353.110.

¹¹⁸*Id.* § 352.087(f).

Universities with governing boards have the power of eminent domain.¹²⁰

For purposes of section 271.390, discussed *supra*, relating to lease purchasing by local governments, a public university with a governing body is a “public body” covered by the statute.¹²¹

Generally, a public institution with a governing board is not a “state agency.” There are numerous exceptions set forth by statutory reference in section 352.138; Title 26, relating to Public Facilities, Contracting and Insurance is inapplicable to public universities with the exception of numerous sections of Chapter 279C, relating to public contracting for public improvements.¹²²

Legal title to all real and personal property acquired by a university with a governing board must be in the name of the State of Oregon and conveyances must be executed by the chairperson of the governing board on behalf of the State.¹²³

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.¹²⁴ Counties are constitutionally limited in the amount of debt they may incur.¹²⁵ Statutory limitations are imposed upon the amount of debt which municipalities and school districts may incur.¹²⁶ In *Brewster v. Deschutes County*,¹²⁷ a lease-purchase agreement of realty was held to violate the constitutional debt limit because when the contract was entered into a liability for the aggregate amount of the contract was incurred.¹²⁸ The opinion does not indicate whether a nonappropriation clause was included in the agreement.

In *Cole v. Baker*,¹²⁹ the court upheld the validity of a proposed certificate of participation financing by the City of Beaverton for a new city government facility (the “Center”). The underlying lease-purchase agreement was subject to nonappropriation at the end of each budget year¹³⁰ and in the event of default by the city the certificate holders would “have recourse against (a) any current appropriations for the rent in the city’s budget, (b) pledged surplus property and (c) the Center.”¹³¹ While the trial court held that “the city has incurred no “debt” subject to the charter limitation, because the city “has no unconditional obligation to pay anything except funds which it might currently appropriate,”¹³²

¹¹⁹*Id.* § 352.087(j).

¹²⁰*Id.* § 352.087(L).

¹²¹*Id.* § 352.408(2).

¹²²*Id.* § 352.138

¹²³*Id.* § 352.113.

¹²⁴Or. Const. art. XI, § 7; *id.* art. XI-P; *id.* art. XI-F(1) (higher education building projects).

¹²⁵“No county shall create any debt or liabilities which shall singularly or in the aggregate, with previous debts or liabilities, exceed the sum of \$5,000 ; provided, however, counties may incur bonded indebtedness in excess of such \$5,000 limitation to carry out purposes authorized by statute, such bonded indebtedness not to exceed limits fixed by statute.” Or. Const. art. XI, § 10.

¹²⁶“A city may not, unless authorized to do so by its electors or by a statue or charter, contract a voluntary floating indebtedness in excess of the sum of \$5,000 for general city purposes.” Or. Rev. Stat. § 221.410(2). School district debt is limited pursuant to Or. Rev. Stat. § 328.245. Municipalities and school districts can enter into binding full faith lease-purchase and installment purchase agreement, however, a municipalities charter should be reviewed for possible debt limitations.

¹²⁷1 P.2d 607 (Or. 1931). The court quoted with approval *Salem Water Co. v. City of Salem*, 5 Or. 29 (1873): A debt exists against the city whenever it agrees to pay money in return for services performed The moment the contract was made, it created a present obligation on the part of the city to pay money . . . at future periods. Now, whether this obligation can be called a debt in the technical sense or not, it is at least a liability. 1 P.2d at 609. *See also* *Brockway v. City of Roseburg*, 79 P. 335 (Or. 1905) (installment contract to provide city with light was debt in aggregate amount of contract).

¹²⁸1 P.2d at 609-10.

¹²⁹727 P.2d 171 (Or. Ct. App. 1986), *review denied*, 733 P.2d 449 (Or. 1987).

¹³⁰*Id.* at 172.

¹³¹*Id.* A deficiency judgment against the city was specifically precluded. *Id.*

¹³²*Id.* at 172-173.

the court of appeals did not reach this issue since at the time of authorization of the financing by the city, the city had unrestricted invested funds and appropriated funds for the project in excess of the total principal amount of the certificates of participation so that the net indebtedness of the city did not exceed the charter restriction.¹³³ The court of appeals upheld the mortgaging of the surplus property pledged in addition to the Center¹³⁴ and the conveyance of the project site for the Center.¹³⁵

The attorney general's office has advised that the Local Budget Law¹³⁶ would allow a hospital district to use a long-term equipment lease containing a purchase option so long as the district avoids making a financial obligation beyond a single fiscal year.¹³⁷ The advisory opinion states that the definition in the Local Budget Law of "[a]ppropriation" contains this restriction when it states that an appropriation "shall be limited to a single fiscal year."¹³⁸

The attorney general has advised, in reference to the state's ability to lease-purchase, that a lease-purchase agreement for a period of sixty months, with provision for release of liability for further payments if funds are not appropriated for any future fiscal period, does not violate the state's debt limitation.¹³⁹ The lease-purchase agreement reviewed by the attorney general also had provisions (a) that upon termination due to nonappropriation the state would have the duty to restore the equipment to full operational and good working order, and to average good condition and appearance for equipment of its age and type and (b) that provisions of the contract in conflict with law would be deemed inoperative to that extent.¹⁴⁰ The attorney general did not opine on whether the requirement to restore the equipment was enforceable; however, the severability provision of the contract would render that requirement inoperative should it be held invalid.¹⁴¹

In 1989, the Oregon Supreme Court upheld, in *State ex rel. Kane v. Goldschmidt*,¹⁴² nonappropriation financing by the state. A leasing program authorized under 1989 Or. Laws Ch. 1032 was at issue in the case.

Article XI, section 7 of the Oregon constitution prohibits the state legislature from creating debt or liabilities in excess of \$50,000 without voter approval. 1989 Or. Laws ch. 1032 authorized the Director of the Department of General Services, upon approval of the State Treasurer and the Executive Department, to enter into certain financing agreements including lease-purchase agreements, installment sale agreements, loan agreements or other agreements to finance real or personal property which will be owned or operated by the state or any of its agencies, or agreements to refinance previously executed financing agreements. The statute provided that payments were to be made solely from available funds, defined to be funds appropriated or otherwise made available by the legislature to pay amounts due under a financing agreement for the fiscal period in which the payments are due. If there are insufficient available funds, the lender may exercise any property rights which the state has granted under the financing agreement. These property rights include (1) with respect to personal property, the rights of a

¹³³*Id.* at 173.

¹³⁴*Id.* at 174. Since the statutes were silent on the power to mortgage the surplus property, the general grant of powers in the city's charter provided the necessary authority. *Id.*

¹³⁵*Id.* The site was not now "needed for public use," since the city had already moved to a new location pending construction of the Center on the site of the old city hall. *Id.*

¹³⁶Or. Rev. Stat. §§ 294.305 to 294.565. This law is applicable to counties, municipalities and school districts. *Id.* § 294.311(26).

¹³⁷Advisory Op. Att'y Gen. Request OP-6007 (Or. Aug. 7, 1986) (requested by Honorable Bill Bellamy).

¹³⁸*Id.* (citing Or. Rev. Stat. § 294.311(3)).

¹³⁹578 Op. Att'y Gen. 7407 (Or. 1977); 8015 Op. Att'y Gen. 423 (Or. 1981) (real property). The attorney general also views as valid a lease-purchase agreement containing options to renew and providing for release of the state without penalty upon failure to renew. 578 Op. Att'y Gen. at 7407 n.4.

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²783 P.2d 988 (Or. 1989) (en banc).

secured party under article 9 of the Oregon Uniform Commercial Code, (2) the right to receive moneys that may be in the hands of a private trustee and (3) the right to evict the state from possession of real property for the term of the underlying real property lease. For real property financings, the statute only anticipated lease-back transactions with the underlying real property lease exceeding the financing agreement by a maximum of ten years. Pursuant to 1989 Or. Laws ch. 731, the legislature authorized financings of \$172,000,000 under chapter 1032. Henry Kane attempted to stop this extensive leasing program by filing his suit, alleging that the chapter 1032 and the proposed agreement were a subterfuge and that they created debt under article XI, section 7 without voter approval. The Oregon Supreme Court held that chapter 1032 was not facially invalid.

The court discussed the meaning of “debt” under article XI, section 7 relying upon cases applicable to counties and cities. The court defined impermissible “debt” as “an unconditional and legal obligation of the state to pay, when at the time the obligations initially are created there are insufficient unappropriated and not otherwise obligated funds in the state treasury to meet those obligations.”¹⁴³ The court reached this decision after a comprehensive review of its prior debt decisions. Particular emphasis was placed on *Walsh Const. Co. v. Smith*.¹⁴⁴ In discussing a “moral make-up clause” the court quoted the following:

[I]t is at most based upon a moral obligation which the members of future legislatures might feel to meet the deficiency. We do not interpret Article XI, Section 7 as prohibiting such a moral and therefore unenforceable pledge.¹⁴⁵

The fact that the legislature may feel compelled to make payments in a future biennium out of the fiscal concern to protect its credit rating doesn’t convert the state’s obligation into a legal one subject to article XI.¹⁴⁶ The court noted however that contingent obligations that create liability of the general revenues of the state upon the occurrence of the contingency would create debt.¹⁴⁷

The court reviewed the nonappropriation language found in chapter 1032 and the proposed agreement. No nonsubstitution clause was included in the proposed agreement. The court noted that the statute “does not create ‘a fixed charge against future revenues,’ nor does it ‘impair the flexibility of planning and the ability of future legislatures to avoid a tax increase.’”¹⁴⁸

The court did express some concern with section 3(8) of chapter 1032, which allows the Director of the Department of General Services to bill any state agency which benefits from property acquired with the proceeds of a financing agreement for an appropriate share of the financing costs, including debt service and requires the agency to pay the amount billed from the first amounts legally available to it.¹⁴⁹ The court construed “legally available to it” to mean funds “which the legislature has explicitly designated” for repayment of the financing agreement.¹⁵⁰

Article XI, section 7 prohibits “liabilities” as well as debts. The court took a rather unique approach to solving a problem that has concerned other courts and commentators. The problem exists when the lessee stands to lose substantial “equity” or value should it fail to appropriate under the financing agreement. The court’s approach in *Kane* was to recognize this potential loss of value as a “contingent future liability.” The court’s language states:

¹⁴³*Id.* at 993.

¹⁴⁴272 Or. 398, 537 P.2d 542 (1975).

¹⁴⁵*Id.* 272 Or. at 404.

¹⁴⁶*Kane* at 995.

¹⁴⁷*Id.* at 992.

¹⁴⁸*Id.* at 995 (quoting *Martin v. Oregon Building Auth.*, 276 Or. 135, 141, 554 P.2d 126 (1976)).

¹⁴⁹*Id.* at 995 n.11.

¹⁵⁰*Id.*

Granting a security interest in land or personal property owned by the state creates a contingent future liability -- the loss of property or loss of use of the property -- a liability that might well be substantial. To the extent that the state stands to lose property or lose the use of property, in an amount in excess of the unpaid balance, even if only for the unexpired term of a real property lease, a contract may violate article XI, section 7. This is best made clear by including such provisions in the contracts -- that the security interests granted by the state are valid to the extent, and only to the extent, of the unpaid balances under the contracts. The trustee or lender can recover, upon the exercise of rights granted in the agreements, no more than the amounts unpaid under the agreements at the time of "foreclosure" for nonpayment.¹⁵¹

The court summarily dismissed plaintiff's lending of credit argument.

This decision has applicability to the state and counties. In nonappropriation financings involving the state and counties, nonsubstitution clauses should not be used. This decision should not affect most cities, school districts, community college districts, educational service districts and most other districts. In the event of nonappropriation or the event of default under a financing agreement, it must provide that there not be forfeiture of the asset without consent from the lessee at the time of the event of nonappropriation or the event of default. Without consent from the lessee to forfeit the asset, the asset should be sold or subleased. The procedure for the sale or sublease of personal property should follow procedures similar to those set forth in article 9 of the Oregon Uniform Commercial Code with any surplus proceeds going to the lessee. For real property the procedures should be modeled after foreclosures by suit in equity or trust deed sales, if the sale or sublease will be handled by an escrow agent or trustee, with any surplus proceeds going to the lessee. In no event would a deficiency judgment be allowed. Financing agreements with the state will also need to follow the provisions of chapter 1032 as interpreted by the court.

Interest Rate Limitations

Unless the parties have otherwise agreed to a rate of interest, nine percent per annum is the legal rate.¹⁵²

No other provisions limiting interest rates were found.

Miscellaneous

The Oregon Municipal Debt Advisory Commission may require notification prior to the proposed issuance of certificates of participation by a public body.¹⁵³

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁵¹*Id.* at 997.

¹⁵²Or. Rev. Stat. § 82.010(1). Maximum limits of 12 percent, or 5 percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank are applicable to loans of \$50,000 or less. *Id.* § 82.010(3). There are additional restrictions and exceptions to § 82.010(3). *Id.* § 82.025.

¹⁵³*Id.* § 287A.640. "Public body" includes counties, cities, school districts, fire districts and health districts. *Id.*

PENNSYLVANIA 2017

Current through end of the 2016 Regular Session, Westlawⁱ

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.² Counties may “[p]urchase, acquire by gift or otherwise, hold, lease, let and convey such real and personal property as shall be deemed to be for the best interests of the county.”³ Second class A and second class counties may enter into lease-leaseback arrangements with the General State Authority for county courthouses,⁴ and may sell or enter into a lease agreement with an industrial development agency.⁵ Counties may participate in the commonwealth’s cooperative purchasing program.⁶

Energy Performance Contracting

A county may enter into a guaranteed energy savings contract for purchase of energy conservation measures designed to reduce energy consumption or operating costs on a lease-purchase basis for a period of time not to exceed twenty years, subject to numerous requirements.⁷ With restrictions, some improvements not “causally related to an energy conservation measure” may be included in the contract.⁸ A written guarantee that savings will meet or exceed the cost of measures installed under the contract is required.

Municipalities

Municipalities⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.¹⁰ Municipalities which have adopted a Home Rule Charter pursuant to the Home Rule Charter and Optional Plans Law (Pa. Stat. Ann. tit. 53, Part III, Subpart E) have the power to buy, sell, lease, hold and dispose of real and personal property.”¹¹ The City of Philadelphia, a city of the first class, is able “to have, purchase, take, receive, possess and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels and effects to them and their successors forever, or for any other or less estate; and the same lands, tenements and hereditaments, goods, chattels and effects, to grant, bargain, sell, alien and convey, mortgage, pledge, charge and encumber, or demise and dispose of”¹² Second class and third class cities have the powers to “purchase [and] hold real and

¹Counties are divided by population into nine classes. Pa. Stat. Ann. tit. 16, § 210 . This discussion addresses all counties except counties of the first class or second class. Philadelphia is the only first class county. It has home rule powers as to county functions. Pa. Const. art 9, § 13.

²*See generally id.* Pa. Stat. tit. 16.

³*Id.* tit. 16, § 202(3) (all counties except first class and second class counties); *id.* § 3202 (second class and second class A counties). The sale of property by most counties must be for not less than fair market value. *Id.* § 2306 (all counties except first class and second class counties). The sale of real property by second class A and second class counties requires special procedures including notice and a hearing. *Id.* § 5506.

⁴*Id.* tit. 16, §§ 5508, 5509.

⁵*Id.* tit. 16 § 5506.1.

⁶Pa. Cons. Stat. Ann. tit. 62, §§ 1901 to 1913 (COSTARS).

⁷Pa. Cons. Stat. Ann. tit. 62, §§ 3751 to 3758.

⁸*Id.* tit. 62 § 3754.

⁹Municipalities for purposes of this discussion are cities, boroughs and townships. Municipalities may adopt charters and home rule. Pa. Const. art. 9, § 2. Cities are divided by population into four classes: first class, second class, second class A and third class. Pa. Stat. tit. 53, § 101 (West).

¹⁰*See generally* Pa. Stat. Ann. tit. 53.

¹¹Pa. Cons. Stat. Ann. tit. 53, § 2964.

¹²Pa. Stat. tit. 53, § 16252.

personal property”¹³ and to “lease, and to sell and convey, any real and personal property owned by the city.”¹⁴

Third class city councils must adopt resolutions for the approval of the acquisition, disposition and leasing of real property.¹⁵ They may “purchase, lease and own ground for, and erect, maintain and establish market[s];”¹⁶ and “acquire by lease, purchase or condemnation proceedings, any land . . . for the parking of motor vehicles.”¹⁷

Boroughs, incorporated towns, first class townships and second class townships may “[p]urchase, acquire by gift or otherwise, hold, lease, let and convey, by sale or lease, such real and personal property as shall be deemed to be to the best interest of the [municipality]”¹⁸ Boroughs must make contracts and purchases using competitive bidding.¹⁹

Municipalities expending liquid fuel tax funds on lease-purchase contracts of equipment for street and highway use in excess of \$10,000 must follow public bidding requirements.²⁰

Municipalities may participate in the commonwealth’s cooperative purchasing program.²¹

Energy Performance Contracting

A municipality may enter into a guaranteed energy savings contract for purchase of energy conservation measures designed to reduce energy consumption or operating costs on a lease-purchase basis for a period of time not to exceed twenty years, subject to numerous requirements.²² With restrictions, some improvements not “causally related to an energy conservation measure” may be included in the contract.²³ A written guarantee that savings will meet or exceed the cost of measures installed under the contract is required.

School Districts

School districts²⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁵ and eminent domain powers.²⁶ School districts may acquire by “purchase, lease, gift, devise, agreement, condemnation, or otherwise, any and all schools and real estate, either vacant or occupied, . . .

¹³*Id.* tit. 53, § 23102 (second class cities); *id.* Pa. Cons. Stat. Ann. tit. 11 § 12402.1 (third class cities).

¹⁴Pa. Stat. tit. 53, § 23102 (second class cities); Pa. Cons. Stat. Ann. tit. 11 § 12402.1 (almost identical language for third class cities). Third class cities must publicly sell personal property, *Id.*; must follow certain procedures for contracts in excess of \$1,000, *Id.*; and must follow certain procedures for contracts relating to real property and for contracts or purchases in excess of a base amount of \$18,5000 or new equipment. *Id.* § 11901.4.

¹⁵*Id.* § 11018.1.

¹⁶*Id.* § 12408.

¹⁷*Id.* § 12431.

¹⁸Pa. Cons. Stat. Ann. tit. 8, § 1201. (boroughs); *id.* § 53201.1 (incorporated towns); *id.* § 56501 (first class townships); *id.* § 66502 (second class townships). Public bidding and notice provisions are required for the sale of real and personal property in certain instances under these statutes.

¹⁹*Id.* § 1401.

²⁰Pa. Admin. Code tit. 67, § 449.8. ²¹Pa. Cons. Stat. Ann. tit. 62, §§ 1901 to 1913.

²¹Pa. Cons. Stat. Ann. tit. 62, §§ 1901 to 1913.

²²Pa. Cons. Stat. Ann. tit. 62, §§ 3751 to 3758.

²³*Id.* tit. 62, § 3754.

²⁴School districts are divided by population into five classes, first class, first class A, second class, third class and fourth class. Pa. Stat. tit. 24, § 2-202. In addition, a “city of the first class may frame and adopt charter provisions governing the administration of a separate and independent home rule school district.” Pa. Stat. Ann. tit. 53, § 13202 (repealed insofar as it is inconsistent with tit. 24, § 6-696, relating to distressed school districts). This discussion does not address such home rule school districts.

²⁵Pa. Stat. tit. 24, § 6-603.

²⁶*Id.* tit. 24, § 7-721.

and [may] acquire by purchase, lease, gift, or devise, other buildings approved for school use by the Department of Education as the board of school directors may deem necessary to furnish school buildings or other suitable sites for proper school purposes for said district or to enlarge the grounds of any school property held by such district, and [may] sell, convey, transfer, dispose of, or abandon the same, or any part thereof, as the board of school directors may determine.”²⁷ In addition, school districts are authorized to “lease for an extended period of five years or more, with or without provisions for acquisition of same, buildings or portions of buildings constructed for school use and/or other buildings or portions of buildings altered for school use provided such buildings comply with standards and regulations established by the State Board of Education and the Department of Labor and Industry.”²⁸

School districts of the second, third and fourth classes, “shall not construct, enter into a contract to construct or enter into a contract to lease a new school building or substantial addition to an existing school building without the consent of the electors obtained by referendum or without holding a public hearing” as provided for by statute.²⁹

Any school district may also enter into contracts or lease agreements with profit or nonprofit corporations, partnerships, associations, or persons, as follows:

(a) The board of school directors of any school district or the boards of school directors of any two or more school districts jointly may, if project conforms to plans for the orderly development of administrative units and attendance areas upon the written approval of the Department of Public Instruction--

(1) Enter into a lease or leases with a profit or nonprofit corporation, partnership, association or persons, for the rental of necessary grounds and buildings for school purposes or buildings to be erected for school purposes whereby the school district or districts shall have the right to renew the lease or leases not to exceed forty years at a stipulated rental to be paid by the school district or districts out of current revenues and at any time during the continuance of the lease or leases purchase the grounds and buildings at a stipulated price.

(2) In connection with the execution of the lease, sell, lease, land grant or convey, individually or jointly, to the corporation, partnership, association or person, with or without consideration, any lands, easements, or rights in lands, which are deemed necessary for the project together with any buildings, structures or improvements thereon erected as well as furnishings and equipment used or useful in connection therewith.

(3) Purchase or otherwise acquire additional lands or interests in lands which are deemed necessary for the project and finance the acquisition by the issuance and sale of general obligation bonds.

(4) Transfer, assign and set over to the corporation, partnership, association or person any contract which has been awarded for the project or projects.

....

(6) In case of joint leases, agree, subject to the approval of the Department of Public Instruction, on the manner of sharing between the school districts the rental or rentals and any other sums payable to the corporation, partnership, association or person and the costs and expenses of insuring, operating, maintaining and repairing the school property leased.

(7) Make all other contracts or agreements with the corporation, partnership, association or person or with other school districts deemed necessary or convenient in connection with the project.

(b) In all cases where the board of directors of any school district fails to pay or to provide for the payment of any rental or rentals due any corporation, partnership, association or person for any period in accordance with the terms of any lease entered into under the provisions of this section, the Superintendent of Public Instruction shall notify the board of its obligation and shall withhold out of any state appropriation due the school district an amount equal to the amount of rental or rentals owing by the school district to the

²⁷*Id.* tit. 24, § 7-703. The sale of unused and unnecessary lands and buildings must follow specific procedures. *Id.* tit. 24, § 7-707.

²⁸*Id.* tit. 24, § 7-703.1.

²⁹*Id.* tit. 24, § 7-701.1.

corporation, partnership, association or person and shall pay over the amount withheld to the corporation, partnership, association or person in payment of the rental.³⁰

School districts may also enter lease financings with the State Public School Building Authority.³¹

Purchases in excess of a base amount of \$18,500 are subject to certain requirements.³²

School districts and the State Public School Building Authority may participate in the commonwealth's cooperative purchasing program.³³

Energy Performance Contracting

A school district may enter into a guaranteed energy savings contract for purchase of energy conservation measures designed to reduce energy consumption or operating costs on a lease-purchase basis for a period of time not to exceed twenty years, subject to numerous requirements.³⁴ With restrictions, some improvements not "causally related to an energy conservation measure" may be included in the contract.³⁵ A written guarantee that savings will meet or exceed the cost of measures installed under the contract is required.

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

All expenditures of funds by commonwealth agencies,³⁶ under any contract,³⁷ are covered by the Commonwealth Procurement Code.³⁸ The commercial code, Title 13, supplements the Commonwealth Procurement Code.³⁹ Executive agencies⁴⁰ are required to use the Department of General Services as purchasing agent.⁴¹ Independent agencies⁴² are generally required to use the Department of General

³⁰*Id.* tit. 24, § 7-791.

³¹*Id.* tit. 24, § 7-784.

³²*Id.* tit. 24, § 8-807.1.

³³Pa. Cons. Stat. Ann. tit. 62, §§ 1901 to 1913.

³⁴Pa. Cons. Stat. Ann. tit. 62, §§ 3751 to 3758.

³⁵*Id.* tit. 62, § 3754.

³⁶"Commonwealth agency" means "[a]n executive agency, an independent agency or a State-affiliated entity." *Id.* tit. 62, § 103.

³⁷Contract means "[a] type of written agreement, regardless of what it may be called, for the procurement or disposal of supplies, services or construction" *Id.* tit. 62, § 103.

³⁸*Id.* tit. 62 § 102. There are few exceptions. The procurement code does not apply to intergovernmental contracts. The judiciary and legislative branches are permitted to use the Department of General Services as their purchasing agency. *Id.* See generally, Pa. Admin. Code tit. 4, ch. 69.

³⁹Pa. Cons. Stat. Ann. tit. 62, § 104.

⁴⁰Executive agency means "[t]he Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth. The term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies or any independent agency or State-affiliated entity." *Id.* tit. 62, § 103.

⁴¹*Id.* tit. 62, § 301.

⁴²Independent agency means "[b]oards, commissions and other agencies and officers of the Commonwealth which are not subject to the policy supervision and control of the Governor. The term does not include any State-affiliated entity, any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, any State-related institution, political subdivision or any local, regional or metropolitan transportation authority." *Id.*

Services for procurement of supplies⁴³ and construction, but not services.⁴⁴ The State System of Higher Education and other “state-affiliated entities”⁴⁵ are not required to use the department and may formulate their own procurement policy relating to supplies, services, and construction, but are required to use the procedures provided in the procurement code.⁴⁶ There is a similar exception for executive and independent agencies involved in heavy or specialized construction and for the Office of Attorney General, the Department of the Auditor General and Treasury Department as to the renting of machinery and equipment.⁴⁷

Pennsylvania procurement regulations provide that the term “purchase” as used in the regulations includes acquisition of goods by lease purchase.⁴⁸ Generally, contracts must be competitively bid.⁴⁹

Office space for state entities is controlled by the Department of General Services, Bureau of Real Estate.⁵⁰

No lease of real estate for use by an executive or independent agency and no sole source procurement of supplies, except for computer software updates under \$50,000, for an executive or independent agency for which the department acts as the purchasing agency shall be valid or effective unless, upon review, it is approved by the Board of Commissioners of Public Grounds and Buildings. Where the board is reviewing a proposed sole source lease or procurement being submitted pursuant to section 515 (relating to sole source procurement), approval of the lease or procurement shall require the unanimous vote of the board. Where the board is reviewing a proposed non-sole source lease, the lease shall be approved when one member of the board votes to approve the lease. All votes shall take place at a public meeting.⁵¹

Procurements that are not covered by a statewide contract and that are in excess of \$10,000 (adjusted annually) must be publicly bid.⁵²

The statutory provision for multiterm contracts is as follows:

(a) A contract for supplies, construction or services may be entered into for a period of time deemed to be in the best interests of the Commonwealth. The term of the contract and conditions of renewal or extension, if any, shall be included in the solicitation, and funds shall be available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds.

(b) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled, and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services or

⁴³Supplies means “[a]ny property, including, but not limited to, equipment, materials, printing, insurance and leases of and installment purchases of tangible or intangible personal property. The term does not include real property, leases of real property or alcoholic beverages or liquor purchased for resale by the Pennsylvania Liquor Control Board.” *Id.*

⁴⁴*Id.* tit. 62, § 301.

⁴⁵The term includes the Pennsylvania Turnpike Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement System, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, and the Pennsylvania Higher Educational Facilities Authority. *Id.* tit. 62, § 103.

⁴⁶*Id.* tit. 62, § 301(d).

⁴⁷*Id.* Other exceptions apply.

⁴⁸Penn. Admin. Code tit. 4, § 69.1 (West). Lease purchase means “A lease of goods or supplies with purchase option or equity credit accrual, or both. Title remains with the lessor until the purchase option is exercised or the purchase is made.” Installment purchase means “The acquisition of goods or supplies through a series of payments over a fixed period of time whereby title is obtained by the buyer upon receipt of the good or supply and the seller may retain a security interest until final payment is made.” Goods means “Equipment, furniture and furnishings, stationery, materials, or supplies that may be needed by a department, board or commission.” *Id.*

⁴⁹*Id.* § 69.3.

⁵⁰*Id.* tit. 4, ch. 1, § 1.321.

⁵¹Pa. Cons. Stat. Ann. tit. 62, § 326.

⁵²*Id.* tit. 62, § 514;

http://www.portal.state.pa.us/portal/server.pt/community/procurement_handbook/14304/act_57_thresholds/1044272.

construction delivered under the contract. Such reimbursement shall not include loss of anticipated profit, loss of use of money or administrative or overhead costs. The cost of cancellation may be paid from any appropriations available for that purpose. The contractor shall not be entitled to any reimbursement where the Commonwealth elects not to exercise a renewal or extension option provided for in the contract.⁵³

Statewide requirements contracts⁵⁴ in excess of \$1,000,000 (adjusted annually) must be approved by the State Treasurer.⁵⁵

Although without the force of law, the state's procurement manual offers the following guidance:

Procurement of Equipment Through Rental, Lease, Lease with Purchase Option, or Installment Purchase

A. Requirements. Equipment to be procured through a rental, lease, lease with purchase option, or installment purchase are acquired through the same procedures as the procurement of materials except as follows:

1. If the equipment is available through a lease or lease with purchase option from an effective DGS statewide requirements contract, the agency must lease the equipment from the statewide requirements supplier by issuing a Purchase Order generated from the contract.

2. All leases, leases with purchase options, and lease purchases that cover more than one fiscal year are multi-term contracts and must include a non-appropriation clause.

B. General. A Purchase Order covers the life of the rental, lease, lease with purchase option, or lease purchase agreement. (Annual renewals of Purchase Orders are not required.)⁵⁶

The following administrative code section provides for a master leasing program:

No Commonwealth administrative agency may arrange for financing of equipment leases or installment purchases, except through the Department of General Services' Master Leasing Program. Exceptions to this policy shall be granted, in writing, by the Secretary of General Services.⁵⁷

Construction of public buildings is under the oversight of the Department of General Services.⁵⁸

The Office of General Counsel is required to "[a]pprove all contracts . . . for form, content, [and] legality . . . prior to submission of the foregoing to the Department of Justice for review and approval as required by 37 Pa. Code Chapter 161." However, the code does not appear to provide for such requirements.⁵⁹ Several approved contracts have been archived for reference on the state website. A sample non-appropriation clause reads as follows:

NON-APPROPRIATION:

The Commonwealth's obligation to make payments during any Commonwealth fiscal year succeeding the current fiscal year shall be subject to availability and appropriation of funds. When funds (state and/or federal) are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal year period, the Commonwealth shall have the right to terminate the Contract or purchase order. The Contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized

⁵³Pa. Cons. Stat. Ann.. tit. 62, § 542.

⁵⁴Statewide requirements contract means "A contract entered into by the Department of General Services as purchasing agency which covers the annual, semiannual or quarterly contract requirements of all Commonwealth agencies and allows the agencies to order needed supplies directly from the contractor." *Id.* tit. 62, § 103.

⁵⁵*Id.* tit. 62, § 543.

⁵⁶Proc. Hdbk. Pt. II, ch. 12 (Sept. 2011).

<http://www.dgs.pa.gov/Documents/Procurement%20Forms/Handbook/Pt2/Pt%20II%20Ch%2012%20Procure%20of%20Equip%20Thru%20Rental%20Lease%20Lease-Purchase%20Option%20or%20Installment%20Purchase.pdf>.

⁵⁷Pa. Admin. Code tit. 4, ch. 1, subch. NN §1.486.

⁵⁸Pa. Cons. Stat. Ann. tit. 62, § 322.

⁵⁹Pa. Admin. Code tit. 4, § 253.6.

in the price of the supplies or services delivered under the contract or purchase order. Such reimbursement shall not include loss of profit, loss of use of money, or administrative or overhead costs. The reimbursement amount may be paid from any appropriations available for that purpose.⁶⁰

Information Technology

Information technology use and procurement is supervised and managed by the Office of Administration/Office for Information Technology.⁶¹ Where the office has delegated procurement authority, it will review and approve all procurements and contract amendments by the delegate in excess of \$250,000. It will also review and approve statewide contracts in excess of \$250,000. The office will review and approve all procurements of products other than a named standard when a named standard exists and will review all sole source procurements.⁶²

Higher Education

The Pennsylvania State System of Higher Education (PASSHE),⁶³ governed by a Board of Governors, is part of the Commonwealth System of Higher Education and oversees state-owned institutions of higher education.⁶⁴ PASSHE may “acquire, purchase, hold, lease as lessee and use any property, real, personal or mixed, tangible or intangible.”⁶⁵ The system has no power to pledge the credit or taxing power of the commonwealth, “nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, nor shall the Commonwealth be liable for the payment of principal or interest on such obligations.”⁶⁶ The system may execute and administer construction contracts.⁶⁷ Presidents of individual institutions may negotiate and award all contracts for equipment, services and supplies in excess of \$18,500 (or as adjusted).⁶⁸ Councils of trustees review and approve all contracts and purchases negotiated or awarded by an institution’s president.⁶⁹

The state system conforms to the statutory requirements of the Commonwealth Procurement Code in its status as a “state-affiliated entity.”⁷⁰ Appointed fiscal officers of each system institution (and the Office of the Chancellor for Office of the Chancellor procurements) will review and approve all procurements.⁷¹ The PASSHE Office of Legal Counsel will review contracts for leases for goods before forwarding them for review to the Office of the Attorney General.⁷² All contracts in excess of \$500,000 require signatures from the Office of University Legal Counsel, the Office of Attorney General and the Office of General Counsel.⁷³ Contracts for less than \$1500 using a pre-approved form and purchase orders

⁶⁰Dept. of Gen Serv. Standard Contract Terms and Conditions, http://www.dgs.pa.gov/Documents/Procurement%20Forms/BOP1204_Std_TermsAndConditionsPaperContract.pdf.

⁶¹Pa. Admin. Code tit. 4, § 7a.141; Exec. Order No. 2016-06 (4/18/2016).

⁶²Info. Tech. Policy, No. ITP-PRO001 (5/13/2005, rev. May 2016)..

⁶³PASSHE consists of 14 institutions. Pa. Stat. Ann. tit. 24, § 20-2002-A.

⁶⁴*Id.* § 20-2003-A.

⁶⁵Pa. Stat. Ann. tit. 24, § 20-2003-A(b)(3).

⁶⁶*Id.*

⁶⁷*Id.* § 20-2003-A.1.

⁶⁸*Id.* § 20-2010-A.

⁶⁹*Id.* § 20-2009-A.

⁷⁰PASSHE Bd. of Gov. Policy 1998-04-A (Adopted Oct. 8, 1998, Am Jan. 19, 2012). 62 Pa Con. Stat. Ann. § 103 defines PASSHE as a state-affiliated agency. The chancellor, the president of each university and written designees are authorized to enter into contracts. Policy 1998-04-A. Signature authority records are maintained in the Office of the Vice Chancellor for Administration and Finance and the Office of Chief Counsel. *Id.*

⁷¹*Id.*

⁷²Manual for Preparing and Processing Contracts for goods and Services, Office of Univ. Legal Counsel § I (2006). Available at <http://www.passhe.edu/inside/legal/Documents/manual.pdf>. The manual provides an explanation of the contracting process.

⁷³*Id.*

for goods of any value do not require review.⁷⁴ Procurements below \$10,000 may be made without competitive bidding.⁷⁵

Pennsylvania State University, The University of Pittsburgh, Lincoln University and Temple University are not members of PASSHE; they are “state-related institution[s]” under the Commonwealth Procurement Code.⁷⁶

Pennsylvania State University is authorized to self-govern through its board of trustees.⁷⁷ Pennsylvania State University requires contracts for equipment leases to be signed by an authorized officer of the university.⁷⁸

The University of Pittsburgh, Lincoln University and Temple University are covered by similar statutory provisions. The respective boards of trustees may make laws for their own government and for the university.⁷⁹ “In accordance with legislative appropriations made as provided by law, the Commonwealth may, by agreement with the board of trustees, acquire lands, erect and equip buildings, and provide facilities for the use of the university.”⁸⁰ The university has “no power at any time or in any manner to pledge the credit or the taxing power of the Commonwealth of Pennsylvania.”⁸¹ Lincoln University and Temple University are covered by similar provisions.⁸²

Institutions of higher education may participate in the commonwealth’s cooperative purchasing program.⁸³

Energy Performance Contracting

State agencies may enter into a guaranteed energy savings contract for purchase of energy conservation measures designed to reduce energy consumption or operating costs on a lease-purchase basis for a period of time not to exceed twenty years, subject to numerous requirements.⁸⁴ With restrictions, some improvements not “causally related to an energy conservation measure” may be included in the contract.⁸⁵

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁸⁶ The constitution provides that the debt of counties, municipalities and school districts shall be limited by the legislature.⁸⁷ The Local Government Unit Debt Act⁸⁸ limits debt of all local government units.⁸⁹ Under this act, “debt” is defined

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶Pa Cons. Stat. tit. 62, § 103.

⁷⁷Pa. Stat. Ann. tit. 24, §§ 2533; 2541.

⁷⁸Penn. State Pol’y Man. Policy FN11(Oct. 22, 2001); Guideline FNG02.

⁷⁹Pa. Stat. Ann. tit. 24, § 2510-205 (Univ. Pittsburgh); *id.* § 2510-405 (Lincoln Univ.); *id.* § 2510-5 (Temple Univ.).

⁸⁰*Id.* tit. 24, § 2510-208 (Univ. Pittsburgh); *id.* § 2510-408 (Lincoln Univ.); *id.* § 2510-7 (Temple Univ.).

⁸¹*Id.* tit. 24, § 2510-209 (Univ. Pittsburgh).

⁸²*Id.* § 2510-409 (Lincoln Univ.); *id.* § 2510-9 (Temple Univ.).

⁸³Pa. Cons. Stat. Ann. tit. 62, §§ 1901 to 1913 (COSTARS).

⁸⁴*Id.* tit.62, § 3751 to 3758.

⁸⁵*Id.* tit.62, § 3754.

⁸⁶Pa. Const. art. 8, § 7.

⁸⁷Pa. Const. art. 9, § 10 (except Philadelphia); art. 9, § 12 (Philadelphia).

⁸⁸Pa. Cons. Stat. Ann. tit. 53, §§ 8001 to 8049. School districts have the power to incur debt for specific purposes as well as those purposes under the act. Pa. Stat. Ann. tit. 24, § 6-631.

⁸⁹“Local government unit” includes, among other entities, counties, cities, boroughs, incorporated towns, townships, and school districts. Pa. Cons. Stat. Ann. tit. 53, § 8002(c).

as “the amount of all obligations for the payment of money incurred by the local government unit, whether due and payable in all events, or only upon the performance of work, possession of property as lessee, [or] rendering of services”⁹⁰ However, exception is made for “current obligations for the full payment of which current revenues have been appropriated”⁹¹ or “rentals or payments payable in future years under leases, guaranties, subsidy contracts or other forms of agreement not evidencing the acquisition of capital assets.”⁹² It appears that one may be able to fit into the exception for “rentals or payments payable in future years under leases” by including language that states that the payment obligation is “from current revenues and in the event that any payment is not paid in full when due, the deficiency should be paid out of current revenues of the entity in subsequent year or years.”⁹³ The act also requires the filing of a debt statement⁹⁴ and advertisement of proposed lease-purchase agreements.⁹⁵

Only one case has dealt with the provisions of the Local Government Unit Debt Act.⁹⁶ In that case the court upheld a city’s urban redevelopment project that was approved by the Department of Community and Economic Development. This act is very long and complicated. It is advisable that any potential lease financing be reviewed by the Department of Community and Economic Development.

In *Greenhalgh v. Woolworth*,⁹⁷ a case which predated the act, the court upheld a lease-purchase agreement by a school district for a term of thirty years⁹⁸ no present indebtedness was created, because the lease rental payments were to be paid out of the current revenues of the school district. Therefore the constitutional debt limits were not violated.⁹⁹

⁹⁰*Id.* tit. 53, § 8002(a).

⁹¹*Id.*

⁹²*Id.* Generally a lease, guaranty, subsidy contract or other agreement “evidence[s] the acquisition of a capital asset” if the payments “to be made in a subsequent fiscal year or subsequent fiscal years applicable to debt service requirements or capital costs are payable, whether in all events or only upon the happening of certain events, under the provisions of the instrument from the tax or general revenues of the local government unit and the term of such instrument is equal to or exceeds the useful life of the asset, regardless of the nature of the lessor or obligee.” *Id.* § 8004(b). Most leases by local government units with an authority would be classified as lease rental debt. Lease rental debt is defined under the act as “the principal amount of authority bonds or notes or bonds or notes of another local government unit to be repaid from payments of the local government unit made pursuant to leases, guaranties, subsidy contracts . . . where such payments are or may be made out of the tax or other general revenues.” *Id.* tit. 53 § 8002(a). Several exceptions and limitations apply. *See id.* tit. 53, subchapters A (§§ 8001 to 8009) and B (§§ 8021 to 8029). For a discussion of the validity of a lease-purchase agreement between a city and an authority which met these provisions of the act, *see Appeal of German*, 366 A.2d 311, 315-316 (1976).

⁹³*Consumer Education and Protection Association vs. City of Philadelphia*, 2001 WL34012648 (Pa. Cmwlth. 2002) in which the court upheld a lease financing transaction for stadiums in Philadelphia. In this decision, the court relied upon *Conrad vs. City of Pittsburgh* 218A. 2d 906 (Pa. 1966). The actual language approved in the CEPA decision provided that, in the case the current revenues of the city are insufficient, then “the City shall include amounts not so paid in the City’s operating budget for the ensuing Fiscal Year and shall produce sufficient current revenues to pay in the ensuing Fiscal Year such balance due for the preceding Fiscal Year in addition to the amount of Rent due for the ensuing Fiscal Year.” CEPA at 4 (court’s emphasis). It would appear that with such language one could have a lease that was not subject to annual appropriation, although it would be subject to sufficient current revenues during a fiscal year.

⁹⁴Pa. Cons. Stat. Ann. tit. 53, § 8110 .

⁹⁵*Id.* tit. 53, § 8003.

⁹⁶*Appeal of German*, 366 A.2d 311 (1976).

⁹⁷64 A.2d 659, 665 (Pa. 1949); *see also Detweiler v. School Dist.*, 104 A.2d 110 (Pa. 1954); *Kelley v. Earle*, 182 A. 501 (Pa. 1936), *later proceedings*, 190 A. 140 (Pa. 1937).

⁹⁸64 A.2d at 662.

⁹⁹*Id.* at 665.

Interest Rate Limitations

“[T]he maximum lawful rate of interest for the loan or the use of money in an amount of \$50,000 or less in all cases where no express contract shall have been made for a less rate shall be 6 percent per annum.”¹⁰⁰

No other interest rate limitations possibly applicable to lease-purchase agreements by governmental subdivisions were found.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰⁰Pa. Stat. Ann. tit. 41, § 201.

RHODE ISLAND 2018 REVISION

The Statutes and Constitution are current through Chapter 480 of the January 2017 Session, Westlaw¹

Municipalities

Municipalities¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ Municipalities “may take, purchase, and hold real and personal estate, and alienate and convey the property.”⁵ Municipalities “may make all contracts, including lease or lease-purchase agreements of real and personal property, necessary and convenient for the transaction of the business of the city or town.”⁶ Municipalities may “sell, lease, convey, or use for any other public or municipal purpose or purposes, or for any purpose whatsoever, any lands or properties owned by the city or town, which have been purchased, acquired, used, or dedicated in any manner for municipal or other public purposes, whenever, in the opinion of the [governing body of the municipality], the lands or properties have become unsuitable or have ceased to be used for those purposes.”⁷

School Districts

School districts⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁹ and eminent domain powers.¹⁰ School districts may “acquire by purchase, gift or other means of transfer . . . land and improvements . . . as a site for a school”¹¹ School districts are authorized to “construct, furnish and equip schools . . . and to make additions to schools as may be needed.”¹² School districts may “make all contracts and agreements that may be necessary for the exercise of the powers vested in [the school district].”¹³

Municipal Public Buildings Authorities

The Municipal Public Building Authorities statute¹⁴ provides for the creation in each city or town of a municipal public buildings authority of the municipality, having a separate legal existence.¹⁵ An authority has the power to:

To acquire, purchase, hold, and use any property, real, personal, or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to mortgage, lease, or sell any of that property; and (without limitation of the foregoing) to lease, as lessee, any property, real, personal, or mixed, or any interest therein, to lease as lessor to the municipality in which it is established, any project of the authority, and to sell, transfer, and convey to any lessee or to any other person upon such terms and conditions and for such considerations as the authority shall determine;

¹Municipalities for purposes of this discussion are cities or towns. R.I. Gen. Laws § 45-2-1. Municipalities may adopt home rule. R.I. Const. art. XIII, § 1. Municipalities may adopt charters. *Id.* art. XIII, § 2.

²R.I. Gen. Laws § 44-5-1.

³R.I. Const. art. I, § 16 and art. VI § 19.

⁴R.I. Gen. Laws § 45-6-1.

⁵*Id.* § 45-2-4.

⁶*Id.*

⁷*Id.* 45-2-5. *See also id.* §45-34-4 for the lease of land by the municipality from any person or for the erection of buildings and facilities for disposal of waste by any person.

⁸School districts for purposes of this discussion are regional school districts. *Id.* § 16-3-11.

⁹*Id.* § 16-3-13.

¹⁰*Id.* § 16-3-11(3)(i).

¹¹*Id.*

¹²*Id.* § 16-3-11(5).

¹³*Id.* § 16-3-11(6).

¹⁴*Id.* §§ 45-50-1 to -31.

¹⁵*Id.* § 45-50-2.

To acquire by purchase, lease, or otherwise, and to construct, improve, equip, furnish, maintain, renovate, repair, and operate projects, and to establish rules and regulations for the use of any project.¹⁶

An authority has the power to issue revenue bonds, payable from the revenue derived from the leasing of a project, in order to finance the acquisition or construction of the project.¹⁷ Revenue bonds issued pursuant to Chapter 50 (Municipal Public Buildings Authorities) are not considered a debt or a pledge of the faith and credit of the state or municipality.¹⁸

Municipalities meeting certain debt and budget criteria may also enter into lease financing with a municipal public building authority and with a convention center authority.¹⁹

Fire Districts

There appears to be no statutory framework for fire districts. It appears that there can be state chartered fire districts, but these are outside the scope of this survey.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

The Department of Administration is authorized to prepare the budget of state agencies,²⁰ subject to the approval of the governor, and to oversee contracting for state agencies.²¹ The department's responsibilities include overseeing construction, acquiring supplies and equipment, acquiring and managing state-owned motor vehicles, and the duty to approving the acquisition of electronic data processing services, equipment and information systems.²² The department manages state buildings not otherwise assigned to the control of an agency and manages leases of land and office space for state agencies.²³

All expenditures of public funds by any state agency, except for intergovernmental contracts or as otherwise provided by law, are covered by Chapter 37-2.²⁴ The procurement of supplies,²⁵ services and construction is centralized in the Chief Purchasing Officer of the Department of Administration.²⁶ "Public agencies"²⁷ are not required to use centralized purchasing, but are required to adhere to the procurement laws.²⁸ No contract is binding on the state unless approved by the department or made under the chief procurement officer's regulations or delegated authority.²⁹ The acquisition of real property is not subject

¹⁶*Id.* § 45-50-12(5) and (6).

¹⁷*Id.* § 45-50-10(a)(1).

¹⁸*Id.* § 45-50-11(a).

¹⁹*Id.* §§ 42-99-5, -6.

²⁰State agency "means any department, commission, council, board, bureau, committee, institution, or other governmental entity of the executive or judicial branch of this state not otherwise established as a body corporate and politic, and includes, without limitation, the board of governors for higher education except for purchases which are funded by restricted, sponsored, or auxiliary moneys and the board of regents for elementary and secondary education." *Id.* § 37-(28).

²¹*Id.* § 42-11-2.

²²*Id.*

²³*Id.*

²⁴*Id.* § 37-2-4.

²⁵The term supplies "means all property, including, but not limited to, leases of real property, printing, and insurance, land or permanent interest in land." *Id.* § 37-2-7(24). The term procurement includes leasing. *Id.* § 37-2-7(15).

²⁶*Id.* § 37-2-12.

²⁷"Public agency" refers to various authorities and commissions except to the bd. of governors for higher education for all purchases which are funded by "restricted, sponsored, or auxiliary monies." *Id.* § 37-2-7(16).

²⁸*Id.* § 37-2-12.

²⁹*Id.* § 37-2-54.

to competitive bidding, but must be approved by the state properties committee as to the determination of need and “as to the action of purchase or other acquisition, provided that the amount paid shall not exceed the appraised value.”³⁰ Purchases of real property are subject to approval by the governor.³¹

The Capitol Center Commission may enter into “contracts necessary or convenient to the exercise of its powers”³² and may terminate contracts for supplies at the convenience of the Commission.³³

The Rhode Island Department of Transportation has been delegated authority to enter into contract amendments on behalf of the state and to manage contracts relating to transportation projects.³⁴

Procurements in excess of \$10,000, for construction, and \$5,000, for all other purchases, are generally awarded by competitive sealed offers, competitive negotiation, noncompetitive negotiation or reverse auctions.³⁵

Multi-year contracts³⁶ are provided for as follows:

(a) Unless otherwise provided in the statute making appropriations therefor, multi-year contracts for supplies and services may be entered into for periods extending beyond the end of the fiscal year in which the contract was made, if funds for the first fiscal year of the contemplated contract are available at the time of contracting and the contract states that payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds therefor.

(b) Prior to the utilization of a contract as described in subsection (a) of this section, it shall be determined, in writing, by the chief purchasing officer:

(1) That estimated requirements cover the period of the contract, are reasonably firm, and continuing;
and

(2) That the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economics in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a contract as described in subsection (a) of this section, the contract for the subsequent year may be cancelled and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from:

(1) Appropriations currently available for performance of the contract;

(2) Appropriations currently available for procurement of similar supplies or services and not otherwise obligated; or

(3) Appropriations made specifically for the payment of cancellation costs.³⁷

³⁰*Id.* § 37-2-54(h). Property may be acquired by lease. *Id.* § 37-6-5. *See generally*, title 37 and R.I. Admin. Code R 58a-9-1:I to 58a-9-1:VIII.

³¹R.I. Gen. Laws. § 37-6-5.

³²R.I. Admin. Code R12-1-1:1.1

³³*Id.* R 12-1-1:4.3.

³⁴*Id.* § 2-7-1:12.

³⁵R.I. Gen. Laws § 37-2-22.

³⁶Contract “means all types of agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and construction management contracts. It also includes supplemental agreements with respect to any of the foregoing. “Contract” does not include labor contracts with employees of state agencies.” *Id.* § 37-2-7(5).

³⁷*Id.* § 37-2-33. Rules provide similar provisions. R. I. Admin. Code 41-1-1:XIII (Judiciary Multi-Year Contracts).

The Code provides that contracts that extend beyond a biennium are permitted if the contract states that payment shall be subject to the availability of funds.³⁸

The lease-purchase of motor vehicles must be approved by the office of fleet operations.³⁹

All leases must be approved as to form by the attorney general and as to substance by the director of administration, prior to acceptance.⁴⁰

Municipalities and regional school districts may participate in state master price agreement contracts for the purchase of supplies and equipment.⁴¹

Information Technology

All information technology projects must be vetted and approved by the department of information technology project review committee and purchases must be reviewed and approved by the agency IT manager or technical support manager prior to requisition submission.⁴²

Higher Education

The presidents of institutions of higher education⁴³ control and manage their respective institutions under supervision of the council on postsecondary education and the board of education on behalf of the State.⁴⁴ The president is responsible for the general management of property of the university.⁴⁵ Generally, “[a]ll housing, dining and other auxiliary facilities at all public institutions of higher learning shall be self-supporting and no funds shall be appropriated by the general assembly to pay operating expenses, including principal and interest on debt services, and overhead expenses for the facilities.”⁴⁶ The board is a “state agency” for purposes of the procurement code “except for purchases which are funded by restricted, sponsored, or auxiliary moneys.”⁴⁷

Purchasing regulations for multi-term contracts provide:

8.4.1 Multi-year contracts for supplies and services may be entered into for periods not extending beyond the end of the biennium in which the contract was made, if funds for the first fiscal year of the contemplated contract are available at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds therefor.

a. Multi-year contracts which extend beyond a biennium shall be permitted provided that:

(1) funds for the first year of the biennium are available; and

(2) contracts shall contain a standard clause which states that implementation of the contract beyond the first fiscal year shall be subject to the availability of funds.

³⁸R.I. Gen. Laws § 37-2-33.

³⁹West’s R.I. Admin. Code R. 2-2-3:5.

⁴⁰R.I. Gen. Laws § 42-20-8. This provision does not apply to the Board of Governors for Higher Education. *Id.* § 16-59-21.

⁴¹*Id.* § 37-2-56.

⁴²R.I. Div. of IT Policies; http://www.doit.ri.gov/documents/policies/IT_Protocol.pdf; R.I. Gen. Laws § 42-6-15.

⁵¹Univ of R.I., R.I. College; Community College of R.I.

⁴⁴R.I. Gen. Laws § 16-59-1,-4(3); *id.* §16-44-6. [The term “board of education” is used in place of “board of governors for higher education” in statutes enacted after 2013. *Id.* § 16-97-4.] The board has established procedures for documenting the purchase and lease of real property. Bd. of Gov. for Higher Ed. Proc. for Handling Real Estate Transactions (F-4.0 (Adopted 07/16/87, am. 05/05)).

⁴⁵R.I. Gen. Laws § 16-32-2.1(c).

⁴⁶*Id.* § 16-59-9 (d).

⁴⁷*Id.* § 37-2-7(16).

b. Multi-year contracts shall specify the annual costs and total value of each contract.⁴⁸

8.4.2 When funds are not available to support continuation of performance in a subsequent year of a [multi-year] contract, the contract for such subsequent year may be canceled.⁴⁹

Competitive bids are not required on purchases under \$5,000.⁵⁰ Quotations are not required for procurements below \$500.⁵¹

Energy Performance Contracting

New, renovated and newly leased public buildings must comply with energy conservation and energy cost savings standards and guidelines established by the Department of Administration.⁵²

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁵³ There are no constitutional debt limitations for municipalities or school districts. Statutory limitations are imposed upon municipalities⁵⁴ and school districts.⁵⁵ Purchase orders or financial commitments are unauthorized even on the order of the school committee unless it can be proven there will be no excess of expenditures, encumbrances, and accruals over revenues.⁵⁶

In *Opinion to the Governor*,⁵⁷ regarding the constitutionality of a statute which provided for lease by the state or municipalities from a newly created building authority,⁵⁸ the court held that lease agreements do not create debt since the annual rental obligations are to be paid out of current revenues. The lease agreement did not have a nonappropriation provision and allowed for transfer of the property to the state upon retirement of the authority's bonds.⁵⁹ The court reviewed holdings from other jurisdictions and in its finding included municipalities as well as the state.⁶⁰ The court said that lease agreements do not create a debt to the governmental entity as long as the agreement "is in fact a lease and not a contract of purchase on the installment plan."⁶¹ Under this holding lease agreements should be labeled leases. The court was not required to answer the second question presented to it as to whether a year-to-year lease which was renewable at the option of the state would violate debt limitations.⁶²

In *Advisory Opinion to the Governor (DEPCO)*,⁶³ the Supreme Court upheld legislation⁶⁴ giving depositors priority in payment over other unsecured creditors upon liquidation of state-regulated banks and

⁴⁸*Id.* § 8.4.1.

⁴⁹*Id.* § 8.4.2.

⁵⁰*Id.* § 5.10.1.

⁵¹*Id.* § 5.10.2.

⁵²*Id.* § 37-8-19 (applies to the state only).

⁵³R.I. Const. art. VI, § 16.

⁵⁴R.I. Gen. Laws § 45-12-2; *id.* § 45-12-11 (exceptions).

⁵⁵*Id.* § 16-3-17.

⁵⁶*Id.* § 16-3-11(b). It appears that appropriations must be approved at the "regional school district financial meeting." Op. Att'y Gen. (R.I. June 14, 1978) (available on Lexis, states library, Fla. file, Ag Lexis 111). All qualified voters of their respective towns may attend this meeting. R.I. Gen. Laws § 16-3-12.

⁵⁷308 A.2d 802 (R.I. 1973).

⁵⁸The Public Buildings Authority Law (R.I. Gen. Laws § 37-14-1 to 37-14-25), was repealed by P.L. 1997, ch. 30, effective July 1, 1997.

⁵⁹308 A.2d at 805.

⁶⁰*Id.* at 805-807.

⁶¹*Id.* at 805.

⁶²*Id.* at 808.

⁶³593 A.2d 943 (R.I. 1991).

⁶⁴R.I. Gen. Laws §§ 42-116-1 to -41.

financial institutions and authorizing the Rhode Island Depositors Economic Protection Corp. to issue bonds and notes in excess of \$50,000 without voter approval. Payment is secured by a special state sales tax fund deposits to which are subject to annual appropriation by the state legislature. Current year dedication of revenue to the fund is not binding on future general assemblies.

Interest Rate Limitations

The maximum legal rate of interest is the greater of 21 percent per annum or an alternate rate tied to the Domestic Prime Rate.⁶⁵ There is no limitation on the “rate of interest to be paid on any bonds or other evidences of indebtedness of a city, town or other political subdivision.”⁶⁶

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁶⁵*Id.* § 6-26-2.

⁶⁶*Id.* § 45-12-16.

SOUTH CAROLINA 2017

Current through the 2016 Session, subject to Technical Revisions by the Code Commissioner, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.¹ Counties may “make and execute contracts”² and are empowered to “acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property; and to acquire tangible personal property and supplies.”³

Counties may “purchase and hold, for the use of the county, lands and personalty within the limits thereof.”⁴

Counties may enter into “agreements with private entities to finance, acquire, construct, equip, maintain or operate public ferries, in whole or part.”⁵

Counties establishing 911 systems may use funds from charges for the service to lease-purchase emergency telephone equipment.⁶

All political subdivisions of the state are required to adopt ordinances or procedures for competitive bidding.⁷

Energy Efficiency Contracting

Counties may enter into lease-purchase agreements with vendors of energy efficiency products⁸ and they may enter into a guaranteed energy, water, or wastewater savings contract⁹ for duration of more than one year, subject to numerous restrictions.

Municipalities

Municipalities¹⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.¹¹

“All municipalities . . . may own and possess property . . . real, personal or mixed” and may, “by resolution of the council adopted at a public meeting . . . sell, alien, convey, lease or otherwise dispose of personal property and in the case of a sale, alienation, conveyance, lease or other disposition of real or mixed property, such council action must be effected by ordinance”¹²

¹See generally S.C. Code Ann. tit. 4.

²*Id.* § 4-9-30(3).

³*Id.* § 4-9-30(2).

⁴*Id.* § 4-1-10.

⁵*Id.* § 57-15-20.

⁶*Id.* § 23-47-40. This provision also applies to other political subdivisions.

⁷*Id.* § 11-35-50.

⁸*Id.* § 48-52-660.

⁹*Id.* § 48-52-670.

¹⁰Municipalities for purposes of this discussion are incorporated cities and towns and townships created by act of the General Assembly. *Id.* § 5-1-20.

¹¹See generally *id.* tit. 5.

¹²*Id.* § 5-7-40.

Municipalities establishing 911 systems may use funds from charges for the service to lease-purchase emergency telephone equipment.¹³

Energy Efficiency Contracting

Municipalities may enter into lease-purchase agreements with vendors of energy efficiency products¹⁴ and they may enter into a guaranteed energy, water, or wastewater savings contract for duration of more than one year, subject to numerous restrictions.¹⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax¹⁶ and eminent domain powers.¹⁷

School districts may “purchase, rent, lease or otherwise acquire the supplies and equipment necessary for the operation of the public schools and other school facilities of the district.”¹⁸ School districts may also purchase “lands for the erection thereon of any public schoolhouse or building or making any addition to or extension of any public schoolhouse or building . . . or for public school playgrounds or other use for such public schools.”¹⁹

School districts must receive approval from the South Carolina Department of Education before acquiring real property.²⁰

School districts may, subject to approval of the county board of education or governing body of the county, “sell or lease school property, real or personal, in their school district whenever they deem it expedient to do so and apply the proceeds of any such sale or lease to the school fund of the district.”²¹

School districts “may lease any school property for a rental which the board considers reasonable or permit the free use of school property for: (1) civic or public purposes”²² In *Whiteside v. Cherokee County School District*,²³ the Supreme Court of South Carolina upheld a ground lease underlying a proposed certificate of participation financing pursuant to this section. The ground lessee paid nominal rent. The lease-purchase of the property back to the district was subject to nonappropriation.

¹³*Id.* § 23-47-40. This provision also applies to other political subdivisions.

¹⁴*Id.* § 48-52-660.

¹⁵*Id.* § 48-52-670.

¹⁶*Id.* § 59-73-60.

¹⁷*Id.* § 59-19-200.

¹⁸*Id.* § 59-19-130.

¹⁹*Id.* § 59-19-180.

²⁰*Id.* § 59-23-250.

²¹*Id.* § 59-19-250.

²²*Id.* § 59-19-125.

²³428 S.E.2d 886 (S.C. 1993). Compliance with approval requirements in S.C. Code Ann. § 59-19-250, *supra*, was not required. See also Op. Att’y Gen. (Sept. 29, 1993) (available on States library, S.C. 1993, Ag Lexis 100) (discussing *Whiteside*) (available at WL 439033) and, *infra*, note 85 and accompanying text.

Boards of trustees of a single high school may, subject to the approval of the county board of education, “manage, lease, dispose of, sell, deliver or convey the property of the district upon such terms and conditions as the [school] board shall deem proper.”²⁴

Energy Efficiency Contracting

School districts may enter into lease-purchase agreements with vendors of energy efficiency products²⁵ or they may enter into a guaranteed energy, water, or wastewater savings contract²⁶ for duration of more than one year, subject to numerous restrictions.

Fire Districts

Fire districts²⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁸ and eminent domain²⁹ powers. Fire districts may “purchase and build or contract for building . . . fire protection, . . . systems, and may lease, own, hold, and acquire all necessary equipment and property for that purpose.”³⁰

“Joint county fire districts,” are special purpose districts created by legislation.³¹ These fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.³² Such fire districts generally have the power to “acquire, purchase, . . . lease and dispose of any property, real, personal, or mixed.”³³

Energy Performance Contracting

Special purpose districts may enter into lease-purchase agreements with vendors of energy efficiency products³⁴ or they may enter into a guaranteed energy, water, or wastewater savings contract³⁵ for duration of more than one year, subject to numerous restrictions.

Hospital Districts

Regional Health Service Districts³⁶ appear to be creatures of the general assembly and might qualify as tax-exempt issuers for purposes of federal income tax law depending upon their enabling legislation.

²⁴S.C. Code Ann. § 59-39-90.

²⁵*Id.* § 48-52-660.

²⁶*Id.* § 48-52-670.

²⁷Fire districts for purposes of this survey are special purpose districts created under *id.* tit. 6, ch. 11.

²⁸*Id.* § 6-11-271.

²⁹*Id.* § 6-11-130.

³⁰*Id.* § 6-11-100.

³¹*See, id.* title 4, ch. 23.

³²*Id.* § 4-23-40; *id.* § 4-23-240; *id.* § 4-23-430 (21); *id.* § 4-23-830(18).

³³*Id.* § 4-23-230(k); *id.* § 4-23-430(5); *id.* § 4-23-830(5). Article 1 fire districts have the power to “buy.” *Id.* § 4-23-40.

³⁴*Id.* § 48-52-660.

³⁵*Id.* § 48-52-670.

³⁶Regional Health Service Districts are special purpose districts created by the General Assembly under *id.* tit. 6, ch. 11.

“Hospital service districts”³⁷ may qualify as tax-exempt issuers for purposes of federal income tax law due to their power of eminent domain, but it is not clear.³⁸ Hospital service districts may acquire by purchase or otherwise, any real or personal property for any authorized use and dispose of it.³⁹

State Entities

Code section 11-27-110, called the “anti-lease purchase law” provides that lease-purchase or financing agreements are subject to the constitutional debt limitation. This provision is discussed in the debt limitation section of the survey. It is set out here:

(A) As used in this section:

(1) “asset” means any real property and permanent improvements thereon including structures, buildings, and fixtures;

(2) “bond act” means:

(a) the county bond act, as contained in Chapter 15 of Title 4;

(b) the municipal bond act, as contained in Article 5, Chapter 21 of Title 5;

(c) the school bond act as contained in Article 1, Chapter 71 of Title 59;

(d) the provisions contained in Articles 3 and 5, Chapter 11, Title 6 pertaining to special purpose districts;

(e) any provision of law by which the State may issue obligations secured in whole or in part by the full faith, credit, and taxing power of the State; and

(f) any other law, general or special, providing for the issuance of general obligation bonds by the State or any of its political subdivisions;

(3) “constitutional debt limit” for the State or any political subdivision of the State which has the power to incur general obligation bonded indebtedness, means the limitation of the principal amount of general obligation bonded indebtedness specified in Article X of the Constitution;

(4) “enterprise charge” means a local accommodations tax or a local hospitality tax, or both of them, imposed by one or more governmental entities, the proceeds from which may be used only for limited purposes which either (i) has been imposed within the two fiscal years prior to the date of an enterprise financing agreement, or (ii) to the extent a governmental entity pledges such a charge in connection with an enterprise financing agreement, the governmental entity covenants and agrees not to increase disbursements from its general fund to pay for costs which could have been paid from the charge for a period of two fiscal years after the date of the acquisition or completion of the asset provided by the enterprise financing agreement;

(5) “enterprise financing agreement” means a financing agreement entered into to provide an asset for a governmental enterprise (i) the revenues from which are expected to be sufficient to pay the amounts due under the financing agreement, or (ii) for which an enterprise charge has been imposed in an amount expected to be sufficient to pay the amounts due under the financing agreement, or (iii) a combination of revenues described under (i) and (ii) are expected to produce an amount sufficient to pay the amounts due under the financing agreement;

(6) “financing agreement” means, with respect to any governmental entity, any contract entered into after December 31, 1995, under the terms of which a governmental entity acquires the use of an asset which provides:

(a) for payments to be made in more than one fiscal year, whether by the stated term of the contract or under any renewal provisions, optional or otherwise;

³⁷“Health service districts” may be created under *id.* tit. 44, ch. 7.

³⁸*Id.* §44-7-2060(9) provides the power of eminent domain under chapter 5 of title 28, however that chapter does not exist. Chapter 2 provides for the exercise of eminent domain by a public body which “means this State or any county, city, town, municipal corporation, municipality, authority or other subdivision, agency or body or instrumentality, corporate or otherwise, authorized by law to exercise the power of eminent domain.” *Id.* § 28-2-30(18).

³⁹*Id.* § 44-7-2060(4).

(b) that the payments thereunder are divided into principal and interest components or which contain any reference to any portion of any payment under the agreement being treated as interest;

(c) that title to the asset will be in the name of or be transferred to the governmental entity if all payments scheduled or provided for in the financing agreement are made; and

(d) for any contract entered into after December 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a nonprofit corporation, political subdivision, or any other entity in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities. This item shall apply to any contracts entered into after August 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a non-profit corporation, political subdivision, or any other entity, from any source other than the issuance of general obligation indebtedness by the school district, in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.

However, the term excludes any refinancing agreement and contracts entered into in connection with issues of general obligation bonds or revenue bonds issued pursuant to authorization provided in Article X of the Constitution;

(7) “governmental enterprise” means any activity undertaken by a governmental entity which either (i) derives revenues from or because of an activity on a basis other than the exercise of the power of taxation by that governmental entity, or (ii) is entitled to be paid or supported from an enterprise charge;

(8) “governmental entity” means:

(a) the State, whose general obligation debt service payments are limited pursuant to Section 13, Article X of the Constitution; or

(b) any political subdivision of the State including a municipality, county, school district, special purpose district, or similar entity, whose general obligation debt is limited as provided in Sections 14 and 15, in Article X of the Constitution;

(9) “limited bonded indebtedness” means the amount of bonded indebtedness that may be incurred by a governmental entity without a referendum or, where the context requires, the amount of such indebtedness then outstanding;

(10) “principal balance” means the total amount, excluding any amount characterized as interest, payable as of any time of consideration under any financing agreement, including any renewals or extensions of the agreement; and

(11) “refinancing agreement” means an agreement or agreements that would be a financing agreement except that (i) it refinances an asset acquired under the terms of a contract or contracts that is not a financing agreement solely by virtue of being dated prior to January 1, 1996, September 1, 2006, or January 1, 2007, and (ii) the sum of all payments to be made under such agreement is less than the sum of the payments under the contract or contracts it refinances.

(B) A governmental entity described in subsection (A) (8)(b) of this section may not enter into a financing agreement, other than an enterprise financing agreement, a loan agreement for energy conservation measures as provided for in Section 48-52-650, a lease purchase agreement for energy efficiency products as provided for in Section 48-52-660, or a guaranteed energy savings contract as provided for in Section 48-52-670, where no such lease agreement or contract shall constitute in any manner an agreement, consent, authority, or otherwise, to provide retail sales of energy by an energy or power provider or creates the authority to sell or provide retail energy or power, if the principal balance of the financing agreement, when added to the principal amount of limited bonded indebtedness outstanding on the date of execution of the financing agreement exceeds eight percent of the assessed value of taxable property in the jurisdiction of the governmental entity unless the financing agreement is approved by a majority of the electors voting on the agreement in a referendum duly called for this purpose by the governmental entity.

(C) If a governmental entity described in subsection (A)(8)(b) of this section has outstanding any financing agreement, other than an enterprise financing agreement, a loan agreement for energy conservation measures as provided for in Section 48-52-650, or a lease purchase agreement for energy efficiency products as provided in Section 48-52-660, or a guaranteed energy savings contract as provided in Section 48-52-670, where no such lease agreement or contract shall constitute in any manner an agreement, consent, authority, or otherwise, to provide retail sales of energy by an energy or power provider or creates the authority to sell or provide retail energy or power, on the date of issuance of any limited bonded indebtedness pursuant to any bond act, the amount of this limited bonded indebtedness plus the amount of all other limited bonded indebtedness of the

governmental entity, when added to the principal balance under any financing agreement or agreements of the governmental entity must not exceed the amount of the governmental entity's constitutional debt limit unless this bonded indebtedness is approved by a majority of the electors voting on the bonded indebtedness in a referendum duly called for this purpose by the governmental entity. This requirement applies notwithstanding any other provision of any bond act and is in addition to the terms and conditions specified in any bond act.

(D) A payment made by the State pursuant to a financing agreement is deemed general obligation debt service subject to the debt service limitation provided in Section 13, Article X of the Constitution.⁴⁰

Generally, the South Carolina Consolidated Procurement Code⁴¹ applies to every expenditure of funds under contract by the State.⁴² Procurement⁴³ is generally centralized in the chief procurement officer.⁴⁴ The chief procurement officer may exempt specific purchases from the procedures required by the code.⁴⁵ Statutory exemptions include Department of Transportation or Department of Public Safety construction and equipment.⁴⁶ Small purchase procedures may be used by governmental bodies in conducting procurements up to fifty thousand dollars.⁴⁷ Particular governmental bodies may be assigned differential dollar limits below which they may make direct procurements not under term contracts.⁴⁸

All procurements involving construction, architectural and engineering, construction management, and land surveying services must be conducted through the Office of State Engineer in accordance with the "Manual for Planning and Execution of State Permanent Improvements" and with any regulations promulgated by the State Budget and Control Board.⁴⁹

The Joint Bond Review Committee of the general assembly must review the "establishment of any permanent improvement project and the source of funds" prior to approval by the state Budget and Control Board.⁵⁰

⁴⁰*Id.* § 11-27-110.

⁴¹*Id.* tit. 11, Ch.35.

⁴²*Id.* § 11-35-40(2). The acquisition of a facility or capital improvement by a foundation or by any eleemosynary organization for any state agency, institution of higher education which involves the use of public funds is subject to the procurement code. *Id.* § 11-35-40(4).

⁴³Procurement means "buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration." *Id.* § 11-35-310(24).

⁴⁴*Id.* § 11-35-510. "Chief procurement officer" means "(a) the management officer for information technology, (b) the state engineer for areas of construction, architectural and engineering, construction management, and land surveying services, and (c) the materials management officer for all other procurements." *Id.* § 11-35-310(5).

⁴⁵*Id.* § 11-35-710.

⁴⁶*Id.*

⁴⁷*Id.* § 11-35-1550.

⁴⁸*Id.*; *id.* § 11-35-1210. Term contract means "contracts established by the chief procurement officer for specific supplies, services, or information technology for a specified time and for which it is mandatory that all governmental bodies procure their requirements during its term. As provided in the solicitation, if a public procurement unit is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price. The solicitation used to establish the term contract must specify contract terms applicable to a purchase from the vendor offering the lower price. If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external audit. A term contract may be a multi-term contract as provided in Section 11-35-2030." *Id.* § 11-35-310(35).

⁴⁹*Id.* § 11-35-830; S.C. Code Regs § 19-445.2000.

⁵⁰S.C. Code Ann. § 2-47-30. "Permanent improvement project" is defined in section 2-47-50 "with regard to all institutions of higher learning." *See, infra*, note 65 and accompanying text for the full definition.

Information technology procurements must be conducted through the Office of Information Management in accordance with regulations promulgated by the State Budget and Control Board [Department of Administration].⁵¹

The code of regulations provides the following regarding lease-purchase or installment purchase agreements:

A. Justification. A governmental body proposing to enter into an agreement other than an outright purchase is responsible for the justification of such action. Lease, lease/purchase, installment purchase, or rental agreements are subject to the procedures of the Procurement Code and these Regulations.

B. Procedures. Upon written justification by the procurement officer of the governmental body of such alternate method, the following procedures will be followed:

(1) The State of South Carolina Standard Equipment Agreement will be used in all cases unless modifications are approved by the designated board officer or his designee. A purchasing agency may enter into an agreement for the rental of equipment without using the Standard Equipment Agreement when the agreement has a total potential value of fifteen thousand dollars or less or the agreement does not exceed ninety days in duration.

(2) Installment purchases will require the governmental body to submit both a justification and purchase requisition to the appropriate chief procurement officer or his designee for processing.

(3) All lease/purchase and installment sales contracts must contain an explicitly stated rate of interest to be incurred by the State under the contract.⁵²

Multi-term contracts are authorized by the statutory code as follows:

(1) Specified Period. Unless otherwise provided by law, a contract for supplies, services, or information technology must not be entered into for any a period of more than one year unless approved in a manner prescribed by regulation of the board. The term of the contract and conditions of renewal or extension must be included in the solicitation and funds must be available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds for them.

(2) Determination Prior to Use. Before the utilization of a multi-term contract, it must be determined in writing by the appropriate governmental body that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) such a contract serves the best interests of the State by encouraging effective competition or otherwise promoting economies in state procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.

⁵¹S.C. Code Ann. § 11-35-820; S.C. Code Regs § 19-445.2000; *id.* § 19-445.2115. Information Technology (IT) means “data processing, telecommunications, and office systems technologies and services:

(a) ‘Data processing’ means the automated collection, storage, manipulation, and retrieval of data including: central processing units for micro, mini, and mainframe computers; related peripheral equipment such as terminals, document scanners, word processors, intelligent copiers, off-line memory storage, printing systems, and data transmission equipment; and related software such as operating systems, library and maintenance routines, and applications programs.

(b) ‘Telecommunications’ means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.

(c) ‘Office systems technology’ means office equipment such as typewriters, duplicating and photocopy machines, paper forms, and records; microfilm and microfiche equipment and printing equipment and services.” S.C. Code Ann. § 11-35-310(1).

⁵²S.C. Code Regs § 19-445.2152.

(4) The maximum time for a multi-term contract is five years. Contract terms of up to seven years may be approved by the designated board officer. Contracts exceeding seven years must be approved by the board.⁵³

Regulations governing multi-term contracts provide:

A. General.

A multi-term contract is a contract for the acquisition of supplies, services, or information technology for more than one year. A contract is not a multi-term contract if no single term exceeds one year and each term beyond the first requires the governmental body to exercise an option to extend or renew. A multi-term contract is appropriate when it is in the best interest of the State to obtain uninterrupted services for a period in excess of one year, where the performance of such services involves high start up costs, or when a changeover of service contracts involves high phase in/phase out costs during a transition period. The multi-term method of contracting is also appropriate when special production of definite quantities of supplies for more than one year is necessary to best meet state needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance when it requires alteration in the contractor's facilities or operations involving high start up costs.

B. Objective.

The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurements which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during changeover of service contracts.

C. Exceptions.

This Regulation 19-445.2135 applies only to contracts for supplies, services, or information technology and does not apply to contracts for construction.

D. Conditions for Use.

(1) A multi-term contract may be used if , prior to issuance of the solicitation, the Procurement Officer determines in writing that:

(a) Special production of definite quantities or the furnishing of long term services are required to meet state needs; or

(b) a multi-term contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(2) The following factors are among those relevant to such a determination:

(a) firms which are not willing or able to compete because of high start up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;

(b) lower production cost because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(c) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality;

(d) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(3) The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision.

E. Solicitation.

The solicitation shall state:

⁵³S.C. Code Ann. § 11-35-2030. It isn't clear whether multi-term contracts relate to lease-purchase agreements or mainly to indefinite delivery/indefinite quantity type procurement contracts. This provision does not apply to lease-purchase contracts with vendors of energy efficiency products under *id.* § 48-52-660.

- (1) the estimated amount of supplies or services required for the proposed contract period;
- (2) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
- (3) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the state's rights or the contractor's rights under any termination clause in the contract;
- (4) that the procurement officer of the governmental body must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;
- (5) whether bidders or offerors may submit prices for:
 - (a) the first fiscal period only;
 - (b) the entire time of performance only; or
 - (c) both the first fiscal period and the entire time of performance;
- (6) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and,
- (7) that, in the event of cancellation as provided in (E) (3) of this subsection, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

F. Award.

Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is give such bidder or offeror an undue competitive advantage in subsequent procurements.

G. Maximum Contract Periods

Prior to opening, a contract with a total potential duration in excess of five years must be approved as required by Section 11-35-2030(4).⁵⁴

The Office of State Treasurer may provide and negotiate financing agreements in accordance with procurement statutes and regulations for equipment under the master lease program on behalf of boards, commissions, institutions, and agencies of state government.⁵⁵

The Department of Administration may acquire real property in the name of South Carolina.⁵⁶ Leases of real property by governmental bodies, unless exempted, must be made through the Division of General Services of the Department of Administration.⁵⁷ All lease-purchases for real property must be reviewed by the Joint Bond Review Committee and approved by the Budget and Control Board [Division of General Services] before a final lease becomes effective.⁵⁸ All transactions involving real property for more than one million dollars must be reviewed by the State Fiscal Accountability Authority and recorded with the Department of Administration. All transactions involving real property by governmental bodies, except local subdivisions, for transactions of one million dollars or less must be approved by and recorded with the Department of Administration.⁵⁹

⁵⁴S.C. Code Regs § 19-445.2135.

⁵⁵S.C. Code Ann. § 1-1-1020. Equipment includes "office equipment, telecommunications equipment, energy conservation equipment, medical equipment, data processing equipment, and related software."

⁵⁶*Id.* § 1-11-110.

⁵⁷S.C. Code Ann. § 1-11-55; S.C. Code Regs § 19-447.1000. Public institutions of higher education and technical schools may lease property under \$100,000. *Id.*

⁵⁸*Id.* § 19-447.1000.

⁵⁹S.C. Code Ann. § 1-11-65.

Lease-purchases of aircraft for more than a thirty-day period must be authorized by the Department of Administration or the State Fiscal Accountability Authority and the Joint Bond Review Committee.⁶⁰

Higher Education

Institutions of higher education⁶¹ are covered by the state procurement code.⁶² Institutions may exercise the power of eminent domain over private lands for the acquisition of facilities, subject to the approval of the State Fiscal Accountability Authority or the Department of Administration.⁶³ Institutions must ask approval of the State Commission on Higher Education when seeking to acquire property not immediately contiguous to a campus.⁶⁴ As noted in the previous section, the Joint Bond Review Committee of the general assembly must review the “establishment of any permanent improvement project and the source of funds” prior to approval. “Permanent improvement project” is defined as:

- (1) acquisition of land, regardless of cost, with staff level review of the committee and the State Fiscal Accountability Authority, up to two hundred fifty thousand dollars;
- (2) acquisition, as opposed to the construction, of buildings or other structures, regardless of cost, with staff level review of the committee and the State Fiscal Accountability Authority, up to two hundred fifty thousand dollars;
- (3) work on existing facilities for any given project including their renovation, repair, maintenance, alteration, or demolition in those instances in which the total cost of all work involved is one million dollars or more;
- (4) architectural and engineering and other types of planning and design work, regardless of cost, which is intended to result in a permanent improvement project. Master plans and feasibility studies are not permanent improvement projects and are not to be included;
- (5) capital lease purchase of a facility acquisition or construction in which the total cost is one million dollars or more;
- (6) equipment that either becomes a permanent fixture of a facility or does not become permanent but is included in the construction contract shall be included as a part of a project in which the total cost is one million dollars or more; and
- (7) new construction of a facility that exceeds a total cost of five hundred thousand dollars.⁶⁵

The University of South Carolina, the Medical University of South Carolina, College of Charleston, Francis Marion University, Lander University, Coastal Carolina University boards of trustees, and the State Board for Technical and Comprehensive Education⁶⁶ have been granted the power in their enabling statutes to purchase and lease real estate and personal property.⁶⁷ The Clemson University board of trustees may

⁶⁰*Id.* § 1-11-405.

⁶¹State supported institutions of higher learning include The University of South Carolina, Clemson University, The Citadel, The Medical University of South Carolina, Winthrop University, South Carolina State University, Francis Marion University, Lander University, The College of Charleston, Coastal Carolina University, Technical Education Colleges and Centers. See *id.* tit. 59, ch. 101.

⁶²*Id.* § 11-35-310; *id.* § 11-35-40.

⁶³*Id.* § 59-101-650. See also *id.* § 59-117-70 (Univ. So. Carolina); *id.* § 59-123-90 (The Medical Univ. So. Carolina); *id.* § 59-130-30 (College of Charleston); *id.* § 59-133-30 (Francis Marion Univ.); *id.* § 59-135-30 (Lander Univ.); *id.* § 59-136-130 (Coastal Carolina Univ.); *id.* § 59-53-52 (St. Bd for Tech and Comprehensive Education).

⁶⁴*Id.* § 59-103-110.

⁶⁵*Id.* § 2-47-50.

⁶⁶The State Board for Technical and Comprehensive Education governs the State Technical and Comprehensive Education System. The schools within the system are partially funded by the state. “Area commissions” are delegated primary responsibility for local governance and supervision of individual institutions. *Id.* § 59-53-51. Area commissions may “acquire by . . . purchase or otherwise all kinds and descriptions of real and personal property” and exercise the right of eminent domain. *Id.* § 59-53-52 (4), (13). Particular restrictions may apply.

⁶⁷*Id.* § 59-117-40 (Univ. So. Carolina).

purchase property, but a two-thirds vote of the board of trustees is required to authorize the expenditure of any monies appropriated to the university by the State.⁶⁸ The board of visitors of The Citadel, the Military College of South Carolina, and the board of trustees of Winthrop University have general power to govern their institutions' affairs.⁶⁹ The board of trustees of South Carolina State University has general power to govern the university and is authorized to purchase real estate.⁷⁰ Each institution has established purchasing procedures in conformance with the state procurement code, which are generally available on institution or board of trustee websites, and which are beyond the scope of this survey.

The board of trustees of many universities with the approval of the Department of Administration or State Fiscal Accountability Authority, as appropriate, may enter into one or more ground lease agreements with a private entity whereby the private entity will provide all services necessary for the creation and operation of an on-campus student housing facility including, but not limited to, financing, designing, construction, managing, operating, maintaining, and related services.⁷¹

The University of South Carolina, Clemson University, the Citadel, Winthrop University, and Francis Marion University have the authority to issue revenue bonds that have been defined to mean "installment contract(s)."⁷²

Energy Performance Contracting

State agencies may enter into lease-purchase agreements with vendors of energy efficiency products⁷³ and governmental units may enter into guaranteed energy, water, or wastewater savings contracts for durations of more than one year, subject to numerous restrictions.⁷⁴

Debt Limitations

The State, counties, incorporated municipalities, school districts, and special purpose districts are constitutionally limited in the amount and kind of debt which they may incur.⁷⁵

In *Duncan v. City of Charleston*,⁷⁶ a proposed contract between the city and a water company was challenged as an unconstitutional creation of debt.⁷⁷ Under the terms of the contract, the city obligated itself to pay \$42,000 per year for fifty years, reserving an option to purchase.⁷⁸ The court found this

⁶⁸*Id.* § 59-119-60; § 59-119-80.

⁶⁹*Id.* § 59-121-40; *id.* § 59-121-50.

⁷⁰*Id.* § 59-127-20; *id.* § 59-127-60.

⁷¹*Id.* § 59-127-85 (South Carolina State University); *id.* § 59-133-60 (Francis Marion University); *id.* § 59-117-65 (University of South Carolina); *id.* § 59-125-130 (Winthrop University); *id.* § 59-130-60 (College of Charleston).

⁷²*Id.* § 59-117-220 (Univ. So. Carolina); *id.* § 59-119-720 (Clemson); *id.* §§ 59-121-310 to 59-121-450 (athletic facilities) and §§ 59-122-10 to 59-122-130 (housing and auxiliary facilities); *id.* § 59-125-320 (Winthrop); *id.* § 59-133-220 (Francis Marion).

⁷³*Id.* § 48-52-660. "State agency" means "a state government agency subject to the procurement code. For state institutions of higher learning, this definition only applies to those facilities greater than ten thousand gross square feet and does not include those facilities whose function is defined as athletics or research. For state technical colleges, this definition does not apply to those facilities whose primary function is to provide technical training and education in programs where significant energy consumption is necessary for the conduct of the academic program." *Id.* § 48-52-620.

⁷⁴*Id.* § 48-52-670. "For purposes of this section 'governmental unit' means a state government agency, department, institution, college, university, technical school, legislative body, or other establishment or official of the executive, judicial, or legislative branches of this State authorized by law to enter into contracts including all local political subdivisions including, but not limited to, counties, municipalities, public school districts, or public service or special purpose districts." *Id.* § 48-52-670 (C).

⁷⁵S.C. Const. art. X, § 13 (State); *id.* art. X, § 14 (counties, incorporated municipalities, and special purpose districts); *id.* art. X, § 15 (school districts).

⁷⁶39 S.E.2d 265 (S.C. 1901).

⁷⁷*Id.* at 265.

⁷⁸*Id.*

unconditional obligation to pay to be the creation of a bonded indebtedness of the city, and therefore, an unconstitutional creation of debt.⁷⁹

In 1985, the attorney general opined that the State may lease-purchase new prison facilities without creating an indebtedness.⁸⁰ After reviewing case law from other states and the *Duncan* decision, the attorney general concluded that “an appropriately drafted nonappropriation clause in the lease-purchase agreement would prevent the agreement from creating indebtedness.”⁸¹ In 1986, the attorney general opined that school districts, while not having express statutory authority, would be able to lease-purchase school buildings.⁸²

In *Caddell v. Lexington County School District No. 1*,⁸³ the court held that a certificate of participation lease-purchase financing did not create debt of the district. The lease-purchase agreement was structured as a year to year rental providing that the district need not renew the lease-purchase agreement and may refuse to do so without penalty. The court also approved a thirty-year ground lease of the site and existing structure.⁸⁴

In *Whiteside v. Cherokee County School District*,⁸⁵ the court upheld a ground lease underlying a proposed certificate of participation financing.

In *Redmond v. Lexington County School District*,⁸⁶ the court held that voter approval is not required for a lease-purchase agreement for construction of a new school building, even where voters had previously rejected referenda on three occasions to authorize bonded indebtedness for the same construction project.⁸⁷ The court also held that the school board’s selection of the lease-purchase alternative, rather than seeking voter approval, was not an abuse of the board’s discretion.⁸⁸

The court stated, however, that “the use of lease-purchase agreements in these circumstances appears to allow the school districts to circumvent the spirit of the conditional limitation on general obligation debt. But . . . the legislature has not provided a similar limitation on lease-purchase agreements. However, it is apparent some members of the legislature are finding this resulting incongruity of concern, as evidenced by the South Carolina Senate’s recent passage of a bill which would require the amount expended for lease-purchase agreements to be counted towards the constitutional limitation on general obligation debt. If this bill is eventually passed by the House and signed by the Governor, the Defendant’s position will obviously not merit the same result reached . . . in this case.”⁸⁹

The court’s reference in *Redmond* was to legislation adopted in May 1995⁹⁰ which has the effect of including the principal balance of certain lease-purchase agreements in governmental entities’ Constitutional debt limitations, regardless of whether or not a lease-purchase agreement is subject to annual appropriation. Governmental entities include the State, counties, municipalities, school districts, special

⁷⁹*Id.* at 272-273.

⁸⁰Op. Att’y Gen., slip op. Dec. 9, 1985.

⁸¹*Id.*

⁸²Op. Att’y Gen., slip op. Aug. 5, 1986.

⁸³373 S.E.2d 598 (S.C. 1988). In light of the *Caddell* decision, the attorney general opined that school building fund money under S.C. Code Ann. §§ 59-21-320, et seq., and *id.* 59-21-420 can be used to pay for lease-purchase contracts for the acquisition of school facilities. Op. Att’y Gen. (Feb. 15, 1989) (available on States library, 1989 S.C. Ag LEXIS 49).

⁸⁴373 S.E.2d 598. See also *Nichols v. South Carolina Research Auth.*, 351 S.E.2d 155 (S.C. 1986) (holding that a mortgage covering a known and quantifiable asset only was not a pledge of the state’s credit in that it imposed no taxpayer liability).

⁸⁵428 S.E.2d 886 (S.C. 1993). See, *supra*, note 23 and accompanying text.

⁸⁶445 S.E.2d 441 (S.C. 1994).

⁸⁷*Id.*, 443.

⁸⁸*Id.*, 444.

⁸⁹*Id.*, 444.

⁹⁰S.C. Code Ann. § 11-27-110 (2011).

purpose districts or similar entities. “Financing agreements” entered into after December 31, 1995, are included in a governmental entities’ debt limitation. A “financing agreement” is defined as a contract under which a governmental entity acquires the use of an “asset” (defined as any real property and permanent improvements thereon including structures, buildings and fixtures (but not including personal property)) which provides (a) for payments in more than one fiscal year, whether by the stated term of the contract or under any renewal provisions, optional or otherwise, (b) that payments are divided into principal and interest components or there is any reference to any portion of any payment being treated as interest, and (c) that title to the asset is in the name of or will be transferred to the governmental entity if all payments are made; and (d) “for any contract entered into after December 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a nonprofit corporation, political subdivision, or any other entity in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities. This item shall apply to any contracts entered into after August 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a non-profit corporation, political subdivision, or any other entity, from any source other than the issuance of general obligation indebtedness by the school district, in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.”⁹¹ 1997 amendments added a provision to the definition of financing agreement excluding any refinancing agreement and contracts entered into in connection with issues of general obligation bonds or revenue bonds issued pursuant to authorization provided in Article X of the State Constitution.⁹² Financing agreements which are excluded from this legislation are (A) financing agreements which provide an asset for a governmental “enterprise” the revenues from which are expected to be sufficient to make payments, (B) lease-purchase agreements for energy efficiency products and (C) guaranteed energy savings contracts.⁹³

Statutory amendments in 1997 to this statute defined “enterprise financing agreement” as

a financing agreement entered into to provide an asset for a governmental enterprise (i) the revenues from which are expected to be sufficient to pay the amounts due under the financing agreement, or (ii) for which an enterprise charge has been imposed in an amount expected to be sufficient to pay the amounts due under the financing agreement, or (iii) a combination of revenues described under (i) and (ii) are expected to produce an amount sufficient to pay the amounts due under the financing agreement.⁹⁴

“Governmental enterprise” was redefined to mean “any activity undertaken by a governmental entity which either (i) derives revenues from or because of an activity on a basis other than the exercise of the power of taxation by that governmental entity, or (ii) is entitled to be paid or supported from an enterprise charge”⁹⁵ The 1997 amendments added a definition of “enterprise charge” meaning “a local accommodation tax or a local hospitality tax, or both of them, imposed by one or more governmental entities, the proceeds from which may be used only for limited purposes” subject to certain conditions contained in the definition.⁹⁶ Financing agreements, other than enterprise financing agreements, lease-purchase agreements for energy efficient products, or guaranteed energy savings contracts, are subject to the limitations on bonded indebtedness.⁹⁷

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.* § 11-27-110(A)(5) (2011).

⁹⁵*Id.* § 11-27-110(A)(7).

⁹⁶*Id.* § 11-27-110(A)(4).

⁹⁷*Id.* § 11-27-110(B).

In *Colleton County Taxpayer's Assn. v. School District of Colleton County* the court, in considering a school district's installment payment contract, noted the constitutionality of lease-purchase agreements and narrowly interpreted the definition of "financing agreement" in section 11-27-110.⁹⁸

In a recent Attorney General opinion the Attorney General noted the need for any sale or ground lease of property to be leased back to be for "reasonable equivalent value."⁹⁹

Interest Rate Limitations

Interest rates are limited by the following:

Notwithstanding any limitation or restriction now existing by statute heretofore enacted, bonds or other obligations of the state, its agencies, or political subdivisions of the state shall bear interest at a rate or rates determined by the governing body of the entity issuing the bonds.¹⁰⁰

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

⁹⁸638 S.E.2d 685 (S.C. 2006).

⁹⁹2015 WL 5616228 (S.C.A.G.).

¹⁰⁰S.C. Code Ann. § 11-9-360.

SOUTH DAKOTA 2018 REVISION

Current through laws of the 2018 Regular Session effective March 23, 2018, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ “[A]ny county may enter into a lease-purchase agreement for a term of years, not exceeding ten, for the purchase or lease by the county of real or personal property.”⁵ Counties may acquire by purchase or condemnation a site for construction of a county building or joint county and municipal building.⁶ Counties may lease real estate belonging to the county and not required for immediate public use, at a public auction.⁷ Counties may “sell, trade, destroy or otherwise dispose of any land, structures, supplies, equipment or other property which . . . is no longer necessary, useful or suitable for the purpose for which it was acquired.”⁸

Counties have broad authority with respect to the “acquisition, lease, sale and lease-back of land, improvement and capital equipment to be used for any lawful purpose”⁹

Counties are “authorized to contract for the lease or purchase of land, facilities and vehicles for the operation of a solid wastes management system either for the county or as a regional solid wastes authority.”¹⁰

Counties are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.¹¹

Energy Performance Contracting

Counties may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.¹²

Municipalities

Municipalities¹³ qualify as tax-exempt issuers for purposes of federal income tax due to their tax,¹⁴ eminent domain¹⁵ and police powers.¹⁶ Municipalities may “acquire by lease, purchase . . . or

¹Any county may elect a charter form of government. S.D. Const. art. IX, § 2.

²S.D. Codified Laws Ann. § 10-12-8.

³*Id.* § 7-18-9.

⁴*See generally id.* tit. 7, ch. 7-18.

⁵*Id.* § 7-21-16.1. A lease-agreement for a term exceeding one-year requires the approval of more than 60% of the members-elect of the board of commissioners. *Id.* *See id.* § 7-21-25 for limits on debts and liabilities.

⁶*Id.* § 7-25-6.

⁷*Id.* § 7-30-1 (certain procedures must be followed).

⁸*Id.* § 6-13-1. Certain procedures are required. *Id.* §§ 6-13-2 to -15. These statutes are applicable to any political subdivision.

⁹*Id.* § 7-25-19. The statute conveys to counties the powers that the South Dakota Building Authority has under *id.* §§ 5-12-15, -19, -42 to -45. This includes a lessee’s option to purchase, exemption from property taxation, lease of the underlying land to the lessor for nominal rent and sale of the improvements on the underlying land to the lessor for fair market value. *See, infra*, notes 90-91 and accompanying text.

¹⁰*Id.* § 7-33-3.

¹¹*Id.* § 5-18A-22; *id.* § 5-18A-1(21).

¹²*Id.* §§ 1-33B-1 to -27.

¹³Municipalities for purposes of this discussion are cities and towns. *Id.* § 9-1-1(6). Any city may adopt a charter form of

other lawful means . . . real and personal property . . . for all purposes authorized by law or necessary to the exercise of any power granted.”¹⁷ Municipalities may “convey, sell, give, dispose of, or lease both the personal and real property of the municipality.”¹⁸ “[A]ny municipality may enter into a lease-purchase agreement for a term of years, not exceeding ten years for equipment and twenty years for an improvement to real property, for the purchase or lease by the municipality of real or personal property.”¹⁹

Municipalities have similar authority as counties with respect to the “acquisition, lease, sale and lease-back” of land, improvements and equipment²⁰ for the municipality’s “auditorium or convention center and all related facilities”²¹ and “all or a portion of a system or part of a system of waterworks . . . and, any system or part of a system for the collection, treatment, and disposal of sewage and other . . . wastes”²² Municipalities may enter into a lease-purchase agreement or a lease with option to purchase public parks, parkways, and boulevards.²³

Municipalities are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.²⁴

Energy Performance Contracting

Municipalities may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.²⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ School districts may “purchase, hold, and use personal and real property for school purposes, and sell and dispose of the same.”²⁸ School districts “[a]s provided and permitted by law” may “lease real and personal property . . . , purchase all necessary books and equipment, purchase real property and erect necessary buildings for the operation of . . . schools.”²⁹ School districts may “lease equipment, teacherages, buildings or other real estate or personal property for a period not to exceed thirty years”³⁰ and “purchase, lease, rent, sell, equip and move schoolhouses, dormitories, dwellings for teachers homes, and other structures . . . as the board shall deem necessary”³¹ School districts may “purchase or lease computer hardware and software.”³² “The proposed

government. S.D. Const. art. IX, § 2.

¹⁴S.D. Codified Laws Ann. § 9-12-2(2).

¹⁵*Id.* § 9-12-1(2).

¹⁶*See generally id.* tit. 9, ch. 29.

¹⁷*Id.* § 9-12-1(2).

¹⁸*Id.* § 9-12-1(6). *See also id.* §§ 9-12-5 to -5.2 as well as, *supra*, note 9 and accompanying text for additional authority.

¹⁹*Id.* §9-21-18.1. A lease-purchase agreement for a term exceeding one year requires the approval of more than 60% of the members-elect of the governing body of the municipality. *Id.*

²⁰*See, supra*, note 9 and accompanying text.

²¹*Id.* § 9-52-29.

²²*Id.* § 9-40-37. *See also id.* § 9-48-5 (sewer mains); *id.* § 9-47-17 (water mains).

²³*Id.* § 9-38-31.

²⁴*Id.* § 5-18A-22; *id.* § 5-18A-1(21).

²⁵*Id.* §§ 1-33B-1 to -27.

²⁶*See generally id.* tit. 13, ch. 11.

²⁷*Id.* § 13-24-2.

²⁸*Id.* § 13-5-1.

²⁹*Id.* § 13-8-39.

³⁰*Id.* § 13-24-10.

³¹*Id.* § 13-24-9.

aggregate lease payments provided for under a lease agreement shall be subject to the statutory bid requirements.”³³

The general fund in any school district authorized to receive funds from the federal government under Public Law 874 may be utilized for lease payments on equipment, teacherages, buildings and other real estate, subject to the limitation that no more than 10 percent of the general fund budget may be expended for lease payments during any school fiscal year.³⁴

If the lease agreement provides for an option to purchase the leased property at the end of the lease period upon payment of the stipulated amount, the final payment at the end of the lease which shall result in the acquisition of the property and title thereto, shall be made from the capital outlay fund³⁵

Before entering into an installment purchase contract or a lease-purchase agreement which would “obligate the school district for future payments on the principal, the total of which will exceed one and one-half percent of the taxable property within the district,”³⁶ the school board must conduct a public hearing.³⁷ The power to enter into the lease-purchase agreement may require voter approval “if five percent of the voters . . . petition . . . for that purpose.”³⁸

School districts may “purchase and lease land for school purposes, subject to the rules for the use of such land as adopted by the state board of education.”³⁹

School districts may also “acquire . . . buses for the transportation of students.”⁴⁰

School districts have the power to dispose of property.⁴¹

School districts are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.⁴²

School districts may enter into financing agreements with a health and educational facilities authority.⁴³

Energy Performance Contracting

³²*Id.* § 13-16-3.

³³*Id.* § 13-24-10.

³⁴*Id.* § 13-16-4.

³⁵*Id.* “The capital outlay fund of the school district is a fund provided by law to meet expenditures which result in the acquisition or lease of or additions to real property, plant, or equipment It may also be used for installment or lease-purchase payments for the purchase of real property, plant or equipment, which have a contracted terminal date not exceeding twenty years from the date of the installment contract or lease-purchase The total accumulated unpaid principal balances of such installment contracts and lease-purchase . . . may not exceed three percent of the taxable valuation. The school district shall provide a sufficient levy each year under the provisions of § 13-16-7 to meet the annual installment contract, lease-purchase and capital outlay certificate payments, including interest . . . A school district which contracts its student transportation may expend from the capital outlay fund an amount not to exceed fifteen percent of the contract amount.” *Id.* § 13-16-6.

³⁶*Id.* § 13-16-6.3.

³⁷*Id.*

³⁸*Id.* § 13-16-6.4.

³⁹*Id.* § 13-24-1.

⁴⁰*Id.* § 13-29-1.

⁴¹*See, supra*, note 9 and accompanying text for additional authority.

⁴²S.D. Codified Laws Ann. § 5-18A-22; *id.* § 5-18A-1(21).

⁴³S.D. Codified Laws Ann. § 13-19-1.2.

School districts may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.⁴⁴

Townships

Townships⁴⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,⁴⁶ eminent domain⁴⁷ and police powers.⁴⁸ Organized townships may “acquire, by purchase . . . or other lawful means, real property . . . necessary or convenient for township purposes, or for the exercise of powers granted to the township”⁴⁹ and may “make such contracts and purchase and hold such personal property as may be necessary for the exercise of its . . . powers . . . , including the purchase of or contracting for firefighting equipment.”⁵⁰ Townships are authorized to enter into a lease-purchase agreement of real or personal property for a term not to exceed ten years.⁵¹ Approval of more than sixty percent of the members-elect of the board of supervisors is required.⁵² A township’s lease-purchase of any road grader or any other machine or tool, the cost of which exceeds fifteen thousand dollars,” is subject to voter approval.⁵³

Townships have the power to dispose of property.⁵⁴

Townships are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.⁵⁵

Energy Performance Contracting

Townships may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.⁵⁶

Fire Districts

Fire districts⁵⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.⁵⁸ Fire districts may purchase or lease such fire-fighting equipment, supplies, and other real or personal property as shall be necessary and proper to carry out the general fire protection program of the district.⁵⁹

⁴⁴ *Id.* §§ 1-33B-1 to -27.

⁴⁵ A township is a division of a county. *Id.* §§ 8-1-1 to -2.

⁴⁶ *Id.* § 8-10-1.

⁴⁷ *Id.* § 8-2-1(2).

⁴⁸ *Id.* § 8-2-1(4).

⁴⁹ *Id.* § 8-2-1(2).

⁵⁰ *Id.* § 8-2-1(3); townships are required to enter into contracts for “fire fighting equipment and protection with a political subdivision . . . or with a nonprofit fire protection corporation or association legally organized and certified in this state. No contract may have a term that exceeds ten years in length. The amount of money each township shall pay shall be determined through negotiation and shall be specified in the contract.” *Id.* § 8-9-4.

⁵¹ *Id.* § 8-10-32.

⁵² *Id.* Lease-purchase agreements are permitted notwithstanding provisions limiting expenditures to tax levy. *Id.*

⁵³ *Id.* § 8-9-3.

⁵⁴ *Id.* § 8-2-1(5). *See also, supra*, note 9 and accompanying text for additional authority.

⁵⁵ *Id.* § 5-18A-22; *id.* § 5-18A-1(21).

⁵⁶ S.D. Codified Laws Ann. §§ 1-33B-1 to -27.

⁵⁷ Fire districts are rural fire protection districts created under Title 34, Ch. 31A.

⁵⁸ *Id.* § 34-31A-21.

⁵⁹ *Id.* § 34-31A-17.

Fire districts are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.⁶⁰

Energy Performance Contracting

Fire districts may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.⁶¹

Hospital Districts

Hospital districts⁶² qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.⁶³ Public hospital districts “have power to own and operate and equip public hospitals, or to lease and operate public hospitals or to maintain or aid in the maintenance and operation of a public hospital, and in either case to supply hospital facilities and services to residents of such districts.”⁶⁴ Hospital districts “may purchase, construct, equip, lease, or otherwise acquire public hospital facilities.”⁶⁵

Hospital districts are “purchasing agencies” for purposes of the public bidding laws, but purchases of equipment involving the expenditure of less than fifty thousand dollars are exempt from the chapters’ application.⁶⁶

Energy Performance Contracting

Hospital districts may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.⁶⁷

State Entities

The Capitol Complex Restoration and Beautification Commission administered under the department of administration is responsible for administering the procurement of supplies and public improvements, providing for the lease of real property, and maintaining the buildings and grounds of the capitol complex.⁶⁸ The commission has may exercise the power of eminent domain and acquire lease and sell real property for the state capitol complex.⁶⁹ Procurement of “office rooms outside of the capitol” requires consent of the governor.⁷⁰

In the matter of supplies⁷¹ and public improvements,⁷² the Bureau of Administration serves as central procurement agency for the state, except for the legislative and judicial branches and as otherwise provided by statute.⁷³ State agencies and institutions are responsible for the procurement of services.⁷⁴

⁶⁰*Id.* § 5-18A-22; id § 5-18A-1(21).

⁶¹*Id.* §§ 1-33B-1 to -27.

⁶²Hospital districts. *Id.* § 34-10-1. “Hospital” or “pubic hospital” includes nursing facilities and homes for the aged under the statute. *Id.*

⁶³*Id.* § 34-10-16.

⁶⁴*Id.* § 34-10-1.

⁶⁵*Id.*

⁶⁶*Id.* § 5-18A-22; id § 5-18A-1(21).

⁶⁷*Id.* §§ 1-33B-1 to -27.

⁶⁸*Id.* § 1-14-12. The commission has quasi-judicial, and quasi-legislative functions independent of the commissioner of administration. *Id.* § 5-15-1.1.

⁶⁹*Id.* § 5-15-12.

⁷⁰*Id.* § 5-15-27.

⁷¹Supplies means any property, including equipment. *Id.* § 5-18A-1(29).

Supplies under four thousand dollars are not required to comply with competitive bidding requirements.⁷⁵ Public improvements involving fifty thousand dollars or more or supplies involving twenty-five thousand dollars or more require advertising for bids.⁷⁶ Exemptions from procurement laws include among others, Department of Transportation highway construction contracts; communications technologies, computer hardware and software, peripheral equipment, and related connectivity; any supplies, services, and professional services required for externally funded research projects at institutions under the control of the Board of Regents; and purchasing by certain authorities.⁷⁷

The attorney general is responsible for drawing all state contracts for supplies.⁷⁸ The Commissioner of Administration or designee is authorized to sign such contracts.⁷⁹

It is prohibited for any officer, board or commission to incur any expense in excess of appropriations.⁸⁰

Information Technology

The Commissioner of Information and Telecommunication is authorized to manage and approve the acquisition of information technologies and telecommunications for the State.⁸¹

The Commissioner of Information and Telecommunication is authorized to enter into “lease-purchase agreements providing for the acquisition of equipment for state boards, commissions, agencies

⁷²Public improvements means “the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied.” *Id.* § 5-18A-1(22). Capital improvements involving one million five hundred thousand or more shall be managed and approved by a State Building Committee. *Id.* § 5-14-3. Capital improvements are classified as “new construction” and “land acquisition.” “Land acquisition” expenditures include lease-purchase agreements of existing facilities. *Id.* § 5-14-1.

⁷³*Id.* § 5-18A-34. Purchasing contracts by any authorized purchasing agency are controlled by *id.* Chapters 5-18A, 5-18B, 5-18C, and 5-18D.

⁷⁴*Id.*

⁷⁵*Id.* § 5-18A-11(2).

⁷⁶*Id.* § 5-18A-14.

⁷⁷*Id.* § 5-18A-22.

⁷⁸*Id.* § 5-18D-10.

⁷⁹*Id.*

⁸⁰*Id.* § 4-8-3.

⁸¹*Id.* § 1-33-44. It appears that the bureau handles information acquisition for all offices and branches of government. Statutory definitions relating to information technology include: (1) “Data processing,” any automated collection, storage, manipulation, and retrieval of data including: central processing units for micro, mini, and mainframe computers; any related peripheral equipment such as, but not limited to, terminals, document scanners, word processors, intelligent copiers, disk units, tape units, controllers, plotters, offline memory storage, printer devices, and data transmission equipment; and any software such as, but not limited to, operating systems, teleprocessing monitors, data base monitors, library and maintenance routines, and application program

(2) “Office systems technology,” office equipment such as typewriters, duplicating, photocopy, and paper handling machines or equipment, micrographic equipment, and printing equipment and services.

(3) “Services,” the providing of consultant assistance for any aspect of information technology, to include data processing, office system technology, and telecommunication systems and networks.

(4) “Telecommunications,” any transmission, emission, or reception of signals of any kind containing communications of any nature, by wire, radio, optical, or other electromagnetic means, including all facilities, equipment, supplies, and services for transmission, emission, or reception. Telecommunications does not include data processing services provided or authorized by the Bureau of Administration or Federal Communication Commission licensed facilities under the control of the South Dakota Board of Educational Telecommunications. *Id.* § 1-33-42.

and instrumentalities, and shall have all powers determined by the commissioner to be necessary to accomplish this purpose.”⁸²

A state agency using leased automatic data processing equipment may, with the approval of the commissioner of information and telecommunications, enter into a contract with a leasing company for the lease or purchase by the agency of automatic data processing equipment with nonstate funds furnished by the company, and may transfer the title of the equipment to the leasing company for lease back to the agency at a rate which takes into account the value of any accruals applied to the equipment. A state agency may also transfer nonstate funds from a leasing company to the seller of automatic data processing equipment without complying with the requirements of law relating to the deposit of funds in the state treasury.⁸³

Charges for early termination of data processing equipment contracts may be authorized:

Termination charges or fees for early termination of a state contract for automatic data processing equipment, not to exceed five thousand dollars, may be authorized by the commissioner of information and telecommunications if the requesting agency can pay the charges from its operating budget. If the charges or fees needed exceed five thousand dollars, they shall be paid from a special legislative appropriation for the purpose of paying the termination charges or fees for a particular contract.⁸⁴

Higher Education

Public institutions of higher education are controlled by the Board of Regents.⁸⁵ The board may “hold” and lease any property belonging to the institutions under its control,⁸⁶ and shall have charge and supervision of construction of all buildings for institutions.⁸⁷ It may exercise the power of eminent domain when the Legislature has appropriated money for such purpose.⁸⁸ Contracts for supplies and the erection or repair of buildings are required to comply with the state procurement law, Chapters 5-18A and 5-18B.⁸⁹

Legislative approval is required for making lease or lease-purchase payments related to the erection, maintenance or leasing of facilities.⁹⁰ The Board of Regents may enter into contracts for the acquisition of facilities with the South Dakota Building Authority.⁹¹

The Board of Regents “may provide and enter into an agreement for the joint exercise of governmental power with the Bureau of Information and Telecommunications.”⁹² The board appears to treat technology purchases like other acquisitions of personal property, but may require certain approvals depending upon the type and cost of the technology sought.⁹³

The affirmative vote of a majority of the members of the Board of Regents is required to make any official action.⁹⁴

⁸²*Id.* § 1-33-48.

⁸³*Id.* § 1-33-53.

⁸⁴*Id.* § 1-33-55.

⁸⁵*Id.* § 13-49-1; S.D. const. art. 14, § 3. Career and technical education programs operated by the secretary of education and LEAs are beyond the scope of this survey.

⁸⁶S.D. Codified Laws Ann. § 13-49-11.

⁸⁷*Id.* § 13-49-13.

⁸⁸*Id.* § 13-51-9.

⁸⁹*Id.* § 13-49-16.

⁹⁰*Id.* § 13-51-1.

⁹¹*Id.* § 13-51-2; generally, *id.* tit. 5, ch. 12 (Building Authority enabling statutes).

⁹²*Id.* § 1-33-46.

⁹³So. Dak. Bd. of Regents Pol’y Man., No. 7:6 (Dec. 2010); *id.* No. 5:3 (last rev. Dec. 2013). Available online on the board’s website. <http://www.sdbor.edu/policy/documents..>

⁹⁴S.D. Codified Laws Ann. § 13-49-7.

The following contracts require board action:⁹⁵

Leases of real property (land and generally whatever is erected, growing upon or affixed in a permanent or semi-permanent manner to the land) involving acquisition or conveyance of interests lasting more than five years and exceeding \$50,000 per year. Renewal of interest in property for subsequent periods requires Board approval.

Equipment leases exceeding \$100,000 per year, excluding master lease agreements that have been executed by a designee in the Board office and have had legal counsel review.

Contracts that arise in connection with the issuance of revenue bonds.

The following contracts require action by the Executive Director of the board:⁹⁶

Capital improvement contract documents.

Any contract other than Leases of Real Property having a term greater than five years and an annual cost exceeding \$50,000, or an annual cost of more than \$250,000 per year.

Energy Performance Contracting

State government may enter into guaranteed energy savings contracts over a period not exceeding fifteen years pursuant to detailed statutory requirements.⁹⁷

Debt Limitations

The State, counties, cities, townships, school districts and other districts are constitutionally limited in the amount of debt which they can incur.⁹⁸ Statutory limitations are imposed on the amount of “debt” or “any pecuniary liability” counties and cities may incur.⁹⁹ Limitations exist on the amount school districts may expend for lease payments.¹⁰⁰ Fire districts are statutorily limited in the amount of debt they may incur.¹⁰¹

⁹⁵So. Dak. Bd. of Regents Pol’y Man., No. 5:3.

⁹⁶*Id.*

⁹⁷S.D. Codified Laws Ann. §§ 1-33B-1 to -27.

⁹⁸S.D. Const. art. XIII, §§ 1, 2 (State); *id.* § 4 (political subdivisions).

⁹⁹It is unlawful for any “county to contract any debt or incur any pecuniary liability, unless both the principal and annual interest thereof, in addition to other necessary disbursements, can be paid by the levy for the current year on the taxable property within the county at not exceeding the maximum rate prescribed by law; or in case such levy for the current year has been made, then by levy for the next subsequent year at not exceeding such maximum rate.” S.D. Codified Laws Ann. § 7-21-16. *See also id.* 7-21-25. “[E]xcept as otherwise provided no contract shall be made by . . . any municipality and no expense shall be incurred . . . unless an appropriation shall have been previously made . . .” *Id.* § 9-21-10. It is a misdemeanor offense for officers of a municipality, unless authorized by law to “contract any debt or incur any pecuniary liability, for the payment of either principal or interest, for which during the current year or any subsequent year it will be necessary to levy on the taxable property of such municipality a higher rate of tax than the maximum rate prescribed by law.” *Id.* § 9-21-18. The attorney general reviewed a five-year lease-purchase agreement that was subject to nonappropriation in light of section 7-21-16 and stated that although one could argue that the nonappropriation clause transforms the contract into a one-year lease with four annual renewals, because of the nonsubstitution clause, which lasted the term of the lease, the lease-purchase agreement violated *id.* 7-21-16. *Op. Att’y Gen.* No. 85-12 (S.D. 1985); WL 257717. *But see* S.D. Codified Laws Ann. § 7-21-16.1 enacted in 1995. The language used in the lease at issue was as follows: “Notwithstanding the foregoing, Lessee agrees that it will not (a) cancel this Lease under the provisions of this Section 2.5 if any funds are appropriated to it, or by it, for the acquisition, retention or operation of the Units or other equipment performing functions similar to the Units for the fiscal year in which such termination occurs or the next succeeding fiscal year thereafter, and (b) give priority in the application of funds to any other functionally similar equipment during the term of this Lease.” *Op. Att’y Gen.* No. 85-12.

¹⁰⁰*See, supra*, note 37 and accompanying text.

¹⁰¹S.D. Codified Laws § 34-31A-17(5) (citing § 34-31A-31).

In *McFarland v. Barron*,¹⁰² a lease-purchase agreement in which the state was the lessee was upheld. The lease-purchase agreement provided that rent was to be payable solely from appropriation by the legislature, that the lease was automatically renewed if such appropriation was made, and that if no appropriation was made the property would be leased to others.¹⁰³ The court reasoned that because there was no obligation to pay rent until it came due under the terms of a lease, the aggregate amount of future rents did not constitute debt.¹⁰⁴ In *Millar v. Barnett*,¹⁰⁵ a twenty-year lease by the city of a city civic center to be constructed by a nonprofit corporation was upheld. The lease was renewable automatically unless specifically not renewed at the beginning of each year.¹⁰⁶ The city had the option of receiving title once bonds issued by the corporation were paid. The court found that the agreement did not violate the debt limitation stating that there was no difference in this lease and the lease in *McFarland* as both would deny the city the right to use of the property if the leases were not renewed.

Because the school district capital outlay fund¹⁰⁷ is funded by an annual levy, the court in *Schull Construction Co. v. Webster Independent School District No. 101*¹⁰⁸ held it mandatory

that all installment and lease payments be made out of the current annual levy authorized by the school board for that purpose. If a contract or lease covers more than one year it should contain a clause to the effect that continuation of the contract or lease is dependent upon the annual levy.¹⁰⁹ [Emphasis added.]

Interest Rate Limitations

“Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate . . . between or among persons, corporations . . . or any other entities if they establish the interest rate by written agreement.”¹¹⁰ “Under an obligation to pay interest, no rate being specified, interest is payable . . . at a maximum rate of the Category C rate of interest as established in § 54-3-16.”¹¹¹

“The maximum allowable interest rate for bonds¹¹² issued by a public body¹¹³ may be whatever rate the governing body prescribes.”¹¹⁴

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹⁰²164 N.W.2d 607 (S.D. 1969).

¹⁰³*Id.* at 609-10.

¹⁰⁴*Id.* at 611.

¹⁰⁵221 N.W.2d 8 (S.D. 1974).

¹⁰⁶*Id.* at 9.

¹⁰⁷*See, supra*, notes 35 to 38.

¹⁰⁸198 N.W. 2d 512 (S.D. 1972).

¹⁰⁹*Id.* at 516.

¹¹⁰S.D. Codified Laws Ann. § 54-3-1.1.

¹¹¹*Id.* § 54-3-4. Section 54-3-16 sets the rate for Category C at twelve percent per year. *Id.* § 54-3-16.

¹¹²Bond means “any obligation for the payment of a specified sum of money at a specified future date, for the repayment of money borrowed by a public body . . . including but not limited to revenue bonds, assessment bonds and general obligation bonds.” *Id.* § 6-8B-1(1).

¹¹³Any county, municipality, township or school district is a public body. *Id.* § 6-8B-1(6).

¹¹⁴*Id.* § 6-8B-12.

TENNESSEE 2018 REVISION

Current through 2018 Reg Sess of the 110th General Assembly, Westlaw through April 9, 2018¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,² eminent domain³ and police powers.⁴ “Each county may acquire and hold property for county purposes and make all contracts necessary or expedient for the . . . improvement thereof, . . . and may make any order for the disposition of its property.”⁵ In addition, counties may “enter into, with any contracting party or parties, contracts, leases or lease-purchase agreements with respect to capital improvement property for terms not to exceed forty years or the useful life of the subject capital improvement property, whichever is less.”⁶

Counties may also lease, from a not-for-profit corporation, “any project erected upon land conveyed or leased to a not-for-profit corporation or upon any of the land owned by a not-for-profit corporation”⁷ A project is defined to include “any building, structure, facility or permanent improvement, including the necessary equipment and furnishings therefor”⁸ The county may “. . . sell and convey title to a not-for-profit corporation any land and any existing building thereon owned by the municipality”⁹ The obligations under the lease “including any unconditional or other obligation to pay rentals for a fixed term or terms shall not be deemed or construed as constituting a debt of the [county] within the terms, provisions or limitations of any constitutional, statutory, charter or other limitations.”¹⁰ The lease must provide that the not-for-profit corporation convey all of its right, title and interest in and to the property to the county upon “retirement of all bonds and other obligations issued by such not-for-profit corporation for the purpose of financing the cost of such project.”¹¹

Counties may also enter into lease-purchase financing arrangements with public building authorities.¹²

Counties are “authorized to establish, construct, install, acquire, operate and maintain urban type public facilities in any area or areas within their borders”¹³

¹Counties may adopt a charter form of government. Tenn. Const. art. XI, § 9; Tenn. Code Ann. § 5-1-203.

²Tenn. Const. art. II, § 29.

³Tenn. Code Ann. § 29-17-201.

⁴See generally *id.* tit. 5, ch. 20.

⁵*Id.* § 5-7-101.

⁶*Id.* § 7-51-902. These provisions apply to any county, incorporated city or town. *Id.* § 7-51-901(4). “Capital improvement property” means any real or tangible property needed for a governmental purpose and having a useful life of one year or more, and any real or tangible personal property with respect to which capital outlay notes can be legally authorized and issued by a municipality.” *Id.* § 7-51-901(1). Public notice must be published for the meeting of the governing body approving any contract, lease or lease-purchase agreement for any real property when the term thereof (including any renewals or extensions) is to be for five years or more. *Id.* § 7-51-904(b). Municipalities, counties and school districts may contract among themselves for matters concerning education. *Id.* § 7-51-908. See also, *id.* § 7-51-909 (tax exemption for capital improvement property). Various private acts applicable to different counties may also apply.

⁷*Id.* § 12-2-302(3).

⁸*Id.* § 12-2-301(4).

⁹*Id.* § 12-2-302(1). These provisions also apply to municipalities.

¹⁰*Id.* § 12-2-304.

¹¹*Id.* § 12-2-305.

¹²*Id.* §§ 12-10-101 to -124.

¹³*Id.* § 5-16-101(a)(including fire protection and emergency medical services).

“Each county may lease land or existing buildings owned by the county to any person, corporation, partnership or association for such consideration and upon such terms as in the judgment of the governing body are in the interest of the county.”¹⁴

Subject to certain exceptions, “all purchases, leases or lease-purchase arrangements with expenditures of less than ten thousand dollars (\$10,000) in any fiscal year may be made in the open market without newspaper notice but, when possible, shall be based on three (3) competitive bids.”¹⁵

Energy Performance Contracting

Contracts by counties, “for energy-related services that include both engineering services and equipment, and have as their purpose the reduction of energy costs in public facilities, shall be awarded on the same basis as contracts for professional services.”¹⁶ Adoption of energy efficiency standards in procurement policies are required.¹⁷

Municipalities

Municipalities¹⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁹ eminent domain²⁰ and police powers.²¹ Mayor-aldermanic charter municipalities have authority to “[a]cquire or receive and hold, maintain, improve, sell, lease, mortgage, pledge or otherwise dispose of property, real or personal, and any estate or interest therein, within or without the municipality or state.”²² Manager-commission charter municipalities and modified manager-council charter municipalities have the authority “[t]o acquire, or receive and hold, maintain, improve, sell, lease, mortgage, pledge or otherwise dispose of property, real or personal, and any estate or interest therein within or without the city or state.”²³

The provisions which apply to lease-purchase financing by counties (i) for capital improvement property, (ii) from not-for-profit corporations and (iii) from public building authorities apply to municipalities as well.²⁴

Subject to certain exceptions, “all purchases and leases or lease-purchase agreements shall be made or entered into only after public advertisement and competitive bid.”²⁵

Energy Performance Contracting

Contracts by municipalities “for energy-related services that include both engineering services and equipment, and have as their purpose the reduction of energy costs in public facilities, shall be awarded on

¹⁴*Id.* § 5-7-116; Op. Att’y Gen. 93-02 (Tenn. 1/11/93).

¹⁵Tenn. Code Ann. §§ 5-14-204, -205.

¹⁶*Id.* § 12-4-110 (energy related services).

¹⁷*Id.* § 12-3-607.

¹⁸Municipalities for purposes of this discussion are cities and towns. Metropolitan governments are not addressed. Municipalities may adopt home rule. Tenn. Const. art. XI, § 9.

¹⁹Tenn. Const. art. II, § 29.

²⁰Tenn. Code Ann. § 29-17-301.

²¹*See generally id.* tit. 6, ch. 54.

²²*Id.* § 6-2-201(8).

²³*Id.* § 6-19-101(8); *id.* 6-33-101 (cross-referencing the powers for modified manager-council charter municipalities to § 6-19-101).

²⁴*See supra* notes 6-12 and accompanying text.

²⁵Tenn. Code Ann. § 6-56-304.

the same basis as contracts for professional services.”²⁶ Adoption of energy efficiency standards in procurement policies is required.²⁷

School Districts

The county legislative body oversees the county school district.²⁸ A special school district created by a private act may levy taxes against the property located within such special school district.²⁹ The governing body of the municipality oversees the city school district.³⁰

The attorney general has stated that a school district cannot enter into a lease-purchase agreement on its own authority. A lease-purchase agreement by a school district “would have to be approved by the governing body of the municipality.”³¹

Fire districts

Fire districts³² do not appear to qualify as tax-exempt issuers for purposes of federal income tax law for lack of requisite sovereign powers. Fire districts is empowered to enter into leases, which would need to be taxable with respect to any interest payments.³³

Hospital districts

Hospital districts³⁴ do not qualify as tax-exempt issuers for purposes of federal income tax law. They do not have the requisite sovereign powers of taxation or eminent domain;³⁵ however, they do have the power to enter into a leases, which would need to be taxable with respect to any interest payments.³⁶ Many hospital authorities in Tennessee are created under private act. Review of such acts is beyond the scope of this survey.

State Entities

State entities can lease real property.³⁷ Lease agreements for duration in excess of five years or for more than \$150,000 per year must be approved as to form and legality by the attorney general and reporter and must be approved by the state building commission.³⁸ If the amount does not meet these thresholds, the office of state architect is to post certain information and update such information.³⁹ A lease shall not be valid if the requirements of Section 12-2-115 are not met.⁴⁰

²⁶*Id.* § 12-4-115 (energy related services); § 12-4-106 (contracts for professional services).

²⁷*Id.* § 12-3-607.

²⁸*Id.* § 49-2-101.

²⁹*Id.* § 49-2-107.

³⁰*Id.* § 6-21-801 (manager-commission charter municipalities); *id.* § 6-36-101 (by a board of education in modified manager-council charter municipalities).

³¹86-65 Op. Att’y Gen. (Tenn. 1986) WL 717497, (construing Tenn. Code Ann. §§ 7-51-901 to -908). Municipality includes county.

³²Tenn. Code Ann. §§ 5-17-101 to -108.

³³*Id.* § 5-17-102.

³⁴*Id.* §§ 7-57-101 to -604 (metropolitan hospital authorities).

³⁵*Id.* § 7-57-303.

³⁶*Id.* § 7-57--301(22).

³⁷*Id.* § 12-2-114 (“entity” means any state agency, department, or institution of higher education of the state).

³⁸*Id.* § 12-2-115; §4-15-102 (powers of building commission; powers do not extend to the acquisition of highway rights of way). By-laws, Pol’y & Proc. Of the St. Bldg. Comm’n Item 7 (rev. Jan. 2018).

³⁹*Id.* § 12-2-115(b)(2).

⁴⁰*Id.* § 12-2-115(c).

Agencies may acquire land by purchase or condemnation with the approval of the Commissioner of Finance and Administration;⁴¹ condemnation must also be approved by the Governor.⁴² Purchases of real property and improvements to real property are subject to the approval of the State Building Commission.⁴³

The State centralized the procurement⁴⁴ duties of the department of general services and the department of finance and administration in the purchasing commission under the direction of the chief procurement officer.⁴⁵ The chief procurement officer may delegate procurement authority; records of delegated authority and signatories are maintained by the central procurement office.⁴⁶ Any contract for goods must be executed by the head of the contracting agency and approved by the chief procurement officer.⁴⁷

With few exceptions, the acquisition or leasing of equipment is the responsibility of the central procurement office pursuant to code title 12, ch. 3.⁴⁸ Contracts, including leases, awarded by the state building commission under section 4-15-102, relating to improvements to real property, would generally be exempt from the operation of title 12, ch. 3:

If there is a question whether a contract or procurement requires state building commission or central procurement office approval, the chief procurement officer and the state architect shall determine in writing the procurement method or the contract form that is in the best interest of the state. Any such agreement reached by the chief procurement officer and the state architect shall be subject to the approval of the comptroller of the treasury.⁴⁹

The Procurement Procedures Manual covers consolidated purchasing procedures generally applicable to state departments and agencies.⁵⁰ Central procurement office *rules* do not apply to contracts requiring approval of the state building commission.⁵¹

The comptroller of the treasury has authority to review contracts prior to execution.⁵²

⁴¹*Id.* § 12-1-106.

⁴²*Id.* § 12-1-107.

⁴³*Id.* § 4-15-102; § 12-2-115; By-laws, Pol’y & Proc. Of the St. Bldg. Comm’n Item 8 (rev. Jan. 2018).

⁴⁴Procurement means buying, purchasing, renting, leasing, or otherwise acquiring of any goods or services [and]... also includes all functions that pertain to the obtaining of goods or services, including the description of requirements, selection and solicitation of sources, preparation and award of a contract, and all phases of contract administration; “goods” means all “personal property, including, but not limited to, supplies, equipment, materials, printing” Tenn. Code Ann. § 12-3-201.

⁴⁵*Id.* §§ 4-56-102, 4-3-1103, 4-3-1104.

⁴⁶*Id.* § 4-56-105; Rule 0690-03-01.04.

⁴⁷Tenn. Code Ann. § 12-3-303(a).

⁴⁸*Id.* § 12-3-101; Tenn. Admin. Code Rule 0690-03-01-.01. The following entities are exempt from operation of the chapter, but may elect to procure goods through the central procurement office: the legislative branch; the judicial branch; the board of trustees of the University of Tennessee system, the Tennessee board of regents system, and the state university boards, the department of transportation contracts under Tenn. Code Ann. title 54, ch. 5. *Id.* § 12-3-102.

⁴⁹*Id.* § 12-3-102.

⁵⁰Tenn. Admin. Code Rule 0690-03-01 (rev’d Jan. 2014); Amended Procurement Procedures Manual of the Central Procurement Office Dated; February 15, 2018. “Agency” means state board, commission, committee, department, officer, or any other unit of state government. Rule 0690-03-01.02. Other exempted situations apply; except The University of Tennessee and The Tennessee board of Regents college and university systems and except for certain contracts of the Department of Transportation under title 54.

⁵¹*Id.* 0690-03-01.02.

⁵²Tenn. Code Ann. § 4-56-108 (Numerous situations for contract review are enumerated including a review requirement for contracts involving information systems and infrastructure in excess of \$500,000 and contracts that propose a term exceeding 60 months); Tenn. Admin. Code 0690-03-01-.18; Amended Procurement Procedures Manual of the Central Procurement Office Dated; February 15, 2018 § 5.15.3.1 (Contract approvals by state officials).

The code states that contracts executed for a duration in excess of twelve months:

(1) ... may contain a provision giving the state the right of cancellation for convenience for periods of time established by the chief procurement officer;

(2) ...shall contain a provision giving the state the right of cancellation at the end of any fiscal year without notice, in the event that funds to support the contract become unavailable; and

(3) ...may [not] be let for periods of time in excess of sixty (60) months, unless the chief procurement officer determines the contract is in the best interest of the state and approves the contract in accordance with rules and regulations, and policies and procedures approved by the procurement commission, as being in the best interest of the state.⁵³

Pursuant to administrative rules, term contracts for periods longer than twelve months shall meet the following conditions:

(1) Such term contracts must contain a provision giving the state the right of cancellation at any time with no more than one (1) year's notice, and at the end of any fiscal year without notice, in the event that funds to support the contract become unavailable; and

(2) No term contract may be let for periods of time in excess of sixty (60) months, unless approved by the chief procurement officer as being in the best interest of the state and notice of such approvals for term contracts posted on the state procurement office's Internet site.⁵⁴

Leases with option to purchase are provided for in the state purchasing manual as follows:

Any request for a lease with an option to purchase at the end of the term of such lease should include documentation as to why this method is preferred in lieu of an initial open market purchase. These factors will be utilized in the analysis by Purchasing in determining the best method of purchase. If the lease purchase method is applied, the Invitation to Bid should include a cost for a buy-out at the end of the term of the lease. The Division of Accounts should be notified by the agency prior to the first payment.⁵⁵

Purchases under \$50,000, or other amount delegated by the department of general services to an individual agency, and not subject to a state term contract, are not reviewed by the central procurement office.⁵⁶

Local governments may use state master agreements⁵⁷ and may request the central procurement office to purchase goods on their behalf.⁵⁸

Some contracts are subject to fiscal review by several offices:

Certain contracts or amendments to certain contracts must be contemporaneously filed with the Central Procurement Office, Office of the Comptroller, and the Fiscal Review Committee of the General Assembly for review. This includes, but is not limited to, the following:

All proposed noncompetitive contracts with a term of greater than one year or containing a provision authorizing a contract renewal beyond one year, and having a cumulative value of \$250,000 or more;

Any amendment to a contract described above, whether originally procured competitively or noncompetitively which:

⁵³Tenn. Code Ann. §12-3-305(c).

⁵⁴Tenn. Admin. Code Rules 0690-03-01-.14, -.17.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.* § 12-3-1205.

⁵⁸*Id.* § 12-3-1201.

Increases or decreases funding;

Extends or shortens the contract term;

Changes the entity or name of the entity with which the State is contracting; or

Otherwise changes an original or amended contract in a substantive manner.⁵⁹

Information Technology

An information systems council has been authorized to oversee matters concerning the state's information systems, but it does not appear to have established any rules or regulations relating to the acquisition of equipment separate from general contract and procurement requirements.⁶⁰

Higher Education

There are two systems of public higher education in Tennessee: the State University and Community College System of Tennessee, governed by the Tennessee Board of Regents,⁶¹ and the University of Tennessee, governed by a board of trustees.⁶²

The Tennessee Board of Regents and each state university board are authorized to “purchase land . . . to condemn land, to erect buildings, and to equip them for the institution subject to the requirements of the state building commission and to the terms and conditions of legislative appropriations. Each board shall be vested with title to property so purchased or acquired.”⁶³ Before borrowing money for any purpose, each board must secure approval of the state school bond authority.⁶⁴ Every college and university is authorized to sell land subject to the approval of the state building commission.⁶⁵ Any proposed acquisition of property is subject to approval of the Chancellor.⁶⁶ More specifically, agreements related to the lease of real property for more than five years or involving expenditures of more than \$15,000; or purchase orders for \$250,000 or more in expense, are subject to the approval of the chancellor.⁶⁷

Contracts of state colleges and universities operated by the state board of regents (or the board of trustees of the University of Tennessee) are exempt from application of central procurement office rules.⁶⁸ The chancellor recently established the Council of Buyers to develop procurement procedures for institutions within the system.⁶⁹

⁵⁹Amended Procurement Procedures Manual of the Central Procurement Office Dated; February 15, 2018.

⁶⁰*Id.* §§ 4-3-5502, -5504.

⁶¹*Id.* § 49-8-101. The system is composed of state universities, community colleges, and state colleges of applied technology. The governance of each state university is vested in each respective institution's “state university board.” *Id.* [During 2016 and 2017 and after, governance authority was transferred from the board of regents to state university boards. Tenn. Code Ann. § 49-8-101(2).]

⁶²*Id.* §§ 49-9-201, -202.

⁶³*Id.* § 49-8-203(a)(3).

⁶⁴*Id.* § 49-8-203 (b), the state school bond authority is a corporate governmental agency of the state created to finance capital projects for public institutions of higher education.

⁶⁵*Id.* § 49-8-111.

⁶⁶Bd. of Regents Office of Gen. Counsel Policies & Guidelines 4:02:09:00(I) (last accessed May, 2018); Bd. of Regents Pol'y 1:03:02:10. Purchasing guidelines require a formal solicitation process for cost is \$50,000 or more. Purch. Guideline B-120.

⁶⁷Bd. of Regents Pol'y 1:03:02:10(III.A.2) (rev. Sept. 15, 2016).

⁶⁸Tenn. Admin. Code R. 0690-03-01.01

⁶⁹Bd. of Regents Pol'y 4:02:10:00.

The University of Tennessee Board of Trustees has the power of eminent domain⁷⁰ and is authorized to “purchase . . . any lands, tenements, goods or chattels . . . for the use of the university” and may make bylaws, rules and regulations for the government of the university.⁷¹ Capital outlays are subject to approval by the Board of Trustees, the General Assembly, the State Building Commission, the Tennessee Higher Education Commission (THEC), the Tennessee State School Bond Authority, and any required technical approvals.⁷² The President or other officer, or designee of the university as determined from time to time, has power to sign legal documents.⁷³

State term contracts will be used if available. Purchases of goods for \$10,000 or more will be made by the procurement department.⁷⁴

Energy Performance Contracting

The State may purchase products “according to energy efficiency standards” adopted by the procurement commission for “use in state purchasing procedures.”⁷⁵

Debt Limitations

The State is constitutionally limited in the amount of debt it may incur.⁷⁶ There are no constitutional debt limitations for political subdivisions. It appears that the lease-purchase financing by counties and municipalities (i) for capital improvement property, (ii) from not-for-profit corporations, and (iii) from public building authorities would not create debt and would not need a nonappropriation type clause.⁷⁷

Interest Rate Limitations

The maximum rate of interest “[f]or all written contracts, including obligations issued by or on behalf of the state of Tennessee, any county, municipality or district in the state, or any agency, authority, branch, bureau, commission, corporation, department, or instrumentality thereof, . . . [is] the applicable formula rate.”⁷⁸ The formula rate is the lesser of 24 percent per annum or “four percentage points above the average prime loan rate . . . for the most recent week for which such an average rate has been published by the board of governors of the Federal Reserve System.”⁷⁹

⁷⁰Tenn. Code Ann. § 29-17-401.

⁷¹*Id.* § 49-9-209. Lease agreements for real property are covered by Bd of Trustees of the Univ. Tenn. Pol’y No. FI0625 (eff. 10/20/2017)(certain approvals are required for leases involving more than \$25,000 annual consideration or for a term greater than five years). Real property acquisitions are covered by capital outlay Bd of Trustees of the Univ. Tenn. Pol’y No: FI0620 (eff. 12/20/2017). Approvals are required by the board, THEC, the state department of general services, and the state building commission.

⁷²Bd. of Trustees of the Univ. Tenn. Bylaws Art. I § 2, Art. III § 7 (am. 10/14/2016 & 06/22/2017); Bd of Trustees of the Univ. Tenn. Pol’y No. FI0620 (eff. 12/20/2017). The Tennessee State School Bond Authority finances construction for revenue-producing projects such as dormitories, athletics facilities, parking garages, student centers, and hospitals. Where a capital project is not financed through the authority, approval of the authority is still required. Bd. of Trustees Pol’y BT0015 (eff. 06/21/2012).

⁷³Bd. of Trustees of the Univ. Tenn. Bylaws Art. IV § 9. .

⁷⁴Bd. of Trustees of the Univ. Tenn. Pol’y No. FI0405 (eff. 10/09/2017).

⁷⁵Tenn. Code Ann. §§ 12-3-904, -905.

⁷⁶Tenn. Const. art. II, § 24.

⁷⁷*See, supra*, notes 6-12 and accompanying text. *See also* Washington County Bd. of Educ. v. MarketAmerica, Inc., 693 S.W.2d 344 (Tenn. 1985) (acknowledging authority of county governments to enter into long-term contracts both prior to and subsequent to enactment of Tenn. Code Ann. § 7-51-901).

⁷⁸*Id.* § 47-14-103(2). This provision would be overridden by a specific statute that fixes a maximum rate. *Id.* § 47-14-103(1).

⁷⁹*Id.* § 47-14-102(7).

Miscellaneous

The attorney general has opined that the State of Tennessee's Prevailing Wage Act is inapplicable to lease-purchase agreements.⁸⁰ The attorney general has also opined that the Tennessee transfer tax would be applicable to a trust indenture, deed of trust and U.C.C. financing statement in a lease-purchase transaction.⁸¹

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁸⁰87 Op. Att'y Gen. 116 (July 20, 1987); WL 273061.

⁸¹88 Op. Att'y Gen. 130 (1988); WL 410204.

TEXAS 2017

Through the end of the 2015 regular session of the 84th Leg., Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties have specific authority to lease-purchase personal property⁴ over a twenty-five year term⁵ as follows:

(a) The governing body of a governmental agency may execute, perform, and make payments under a contract with any person for the use or the purchase or other acquisition of any personal property, or the financing thereof. The contract is an obligation of the governmental agency. The contract may:

- (1) be on the terms considered appropriate by the governing body;
- (2) be in the form of a lease, a lease with an option or options to purchase, an installment purchase, or any other form considered appropriate by the governing body including that of an instrument which would be required to be approved by the attorney general pursuant to Chapter 1202, Government Code, provided that contracts in such form must be approved by the attorney general in accordance with the terms of that chapter;
- (3) be for a term approved by the governing body and contain an option or options to renew or extend the term; and
- (4) be made payable from a pledge of all or any part of any revenues, funds, or taxes available to the governmental agency for its public purposes.⁶

¹Tex. Const. art. VIII, § 9.

²Tex. Local Gov't Code ch. 261.

³*Id.* ch. 231.

⁴*Id.* § 271.005 (Chapter 271 - Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments, Subchapter A - Public Property Finance Act, Tex. Local Gov't Code).

⁵*Id.* § 271.009.

⁶The following definitions are applicable to subchapter A – Public Property Finance Act:

(1) “Contract” means an agreement entered into under this subchapter but does not mean a contract solely for the construction of improvements to real property.

(2) “Governing body” means the board, council, commission, agency, court or other body or group that is authorized by law to acquire personal property for each respective governmental agency.

(3) “Governmental agency” means a municipality, county, school district, conservation and reclamation district, hospital organization, or other political subdivision of this state.

(4) “Hospital organization” means a district, authority, board, or joint board organized under the laws of this state for hospital purposes.

(5) “Personal property” includes appliances, equipment, facilities, and furnishings, or an interest in personal property, whether movable or fixed, considered by the governing body of the governmental agency to be necessary, useful, or appropriate to one or more purposes of the governmental agency. The term includes all materials and labor incident to the installation of that personal property. The term includes electricity. The term does not include real property.

(6) “School district” means an independent school district, common school district, community college district, junior college district, or regional college district organized under the laws of this state.

(7) “Improvement” means a permanent building structure, fixture, or fence that is erected on or affixed to land but does not include a transportable building or structure whether or not affixed to the land.

(8) “Real property” means, land, improvement, or an estate or interest in real property, other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation in real property. *Id.* § 271.003 (numbering for items set forth above is for this discussion and varies from the numbering of the items set forth in § 271.003).

The attorney general opined that the subchapter cannot be used for the acquisition of a county jail: “The parties to a contract may not bring property ordinarily considered to be real property within the terms of this statute by agreeing to characterize it as personal property.” Op. Att’y Gen. No. JM-800 (Sept. 29, 1987).

Public bidding must be complied with,⁷ and such agreements may be validated by the attorney general's office if the contract provides for the payment of an aggregate amount of \$100,000 or more.⁸ The contracts are legal and authorized investments for banks, savings banks, trust companies, savings and loan associations, insurance companies, fiduciaries and trustees, and the sinking funds of counties, municipalities, school districts and other political subdivisions or corporations of the State of Texas.⁹

Counties and other political subdivisions of the state may use state contracts for information technology.¹⁰

The attorney general has opined that counties can lease-purchase jails.¹¹ Contracts for correctional facilities for certain inmates may be made with a private organization.¹² Counties may enter into lease-purchase contracts to finance the acquisition and equipping of criminal justice facilities, including correctional facilities, subject to numerous restrictions.¹³

Counties with over 600,000 people, and owning and using a courthouse that is more than 30 years old and which has not been completely renovated or remodeled during that time, may enter into financing transactions with county building authorities.¹⁴

Counties must publicly bid the sale or lease of real property owned by the county.¹⁵ A county can trade in personal property on new personal property, if in the best interest of the county.¹⁶

Subject to numerous restrictions, counties with a population of more than 250,000 may sell land, buildings, facilities or equipment for the purpose of making contracts for the lease or rental of land, building, facilities, or equipment or for receiving services from others for county purposes.¹⁷

Counties may “purchase, lease . . . lease with an option to purchase . . . a building or rooms, other than the courthouse, for the housing of county or district offices, county or district courts, justice of the peace courts, county records or equipment (including voting machines), or county jail facilities, or for the conducting of other public business.”¹⁸

⁷Tex. Local Gov't Code § 271.006; §271.0065. . See also *id.* ch. 262. “Purchase” means any kind of acquisition, including a lease, of an item. *Id.* § 262.022(6).

⁸*Id.* § 271.007.

⁹*Id.* § 271.008.

¹⁰Tex. Gov't Code § 2054.0565.

¹¹Op. Att'y Gen. No. JM-697 (May 14, 1987). It seems that the opinion is based on the ability of counties to enter into long-term obligations such as warrants and the statutory obligation to provide a service.

¹²Tex. Local Gov't Code §§ 351.101 to .104 (2005).

¹³*Id.* §§ 361.051 to .054.

¹⁴See generally *id.* ch. 293 (requires voter approval).

¹⁵*Id.* § 263.001 (some exceptions exist in chapter 263); see also *id.* § 263.007 (sealed-bid procedure permissible).

¹⁶*Id.* § 263.152.

¹⁷*Id.* § 263.053.

¹⁸*Id.* § 292.001. In *Zimmelman v. Harris County*, 819 SW2d 178 (Tx. Ct. App. 1991) the court held that the county had uncontested authority to lease purchase a jail from a private non-profit corporation (citing this section, 292.001, and Vernon's Ann. Texas Const. Art. 11, § 2).

Energy Performance Contracting

Counties may enter into energy savings performance contracts for energy or water conservation measures, financed under a lease-purchase contract, subject to numerous restrictions.¹⁹

Municipalities

Municipalities²⁰ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,²¹ eminent domain²² and police powers.²³

Type A General-Law Municipalities “may take, hold, purchase, lease, grant, or convey property located in or outside the municipality.”²⁴ Type B General-Law Municipalities may “hold and dispose of (1) personal property; and (2) real property located within the municipal boundaries.”²⁵ Municipalities “may sell and convey land or an interest in land that the municipality owns, holds, or claims as a public square, park or site for the city hall or other municipal building or that is an abandoned part of a street or alley.”²⁶ The provisions regarding lease-purchase of personal property by counties also apply to municipalities.²⁷

Where a municipality has entered into a lease-purchase or installment purchase of real property financed by the issuance of certificates of participation “[t]he governing body of a municipality may not make an agreement under which the municipality is a lessee in a lease-purchase of real property or is a purchaser in an installment purchase of real property unless the governing body first obtains an appraisal by a qualified appraiser who is not an employee of the municipality. The purchase price may not exceed the fair market value of the real property, as shown by the appraisal.”²⁸

Like counties, home rule municipalities may enter into lease-purchase contracts to finance the acquisition and equipping of criminal justice facilities, including correctional facilities, subject to numerous restrictions.²⁹

A home rule municipality that has a population of less than 80,000 and borders on the Gulf of Mexico may “acquire by any method, including by . . . lease, or purchase or may improve land or buildings, or may construct or enlarge buildings, to be used for public parks, playgrounds, or other facilities that serve the purpose of attracting visitors and tourists to the municipality. The municipality or board may lease the facilities, as lessor or lessee, on terms the municipality or board considers appropriate”³⁰

¹⁹Tex. Local Gov’t Code §§ 302.001 to .007.

²⁰Municipalities for purposes of this discussion are all municipalities unless otherwise noted. Cities with populations of 5,000 or more may adopt charters. Tex. Const. art. XI, § 5.

²¹Tex. Tax Code § 302.001.

²²Tex. Local Gov’t Code ch. 251..

²³*Id.* ch. 211.

²⁴*Id.* § 51.015. This provision is also applicable to Type C General-Law Municipalities in certain instances. *Id.* §§ 51.051, .052.

²⁵*Id.* § 51.034. This provision is also applicable to Type C General-Law Municipalities in certain instances. *Id.* §§ 51.051, .052.

²⁶*Id.* § 253.001(a). Sale of a public square or park may require voter approval. *Id.* § 253.001(b).

²⁷*See supra* notes 4-9 and accompanying text.

²⁸Tex. Local Gov’t Code § 252.050.

²⁹*Id.* §§ 361.051 to .054.

³⁰*Id.* § 306.032.

Municipalities may use state contracts for information technology.³¹

Energy Performance Contracting

Municipalities may enter into energy savings performance contracts for energy or water conservation measures, financed under a lease-purchase contract, subject to numerous restrictions.³²

School Districts

School districts³³ may qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁴ and eminent domain powers.³⁵ The provisions regarding lease-purchase of personal property by counties also apply to school districts.³⁶ A school district may contract with any person for use, acquisition, or lease with option to purchase of a school bus if the contract is determined to be economically advantageous.³⁷

The attorney general's office had historically stated that school districts had no authority to lease-purchase real property.³⁸ In 1993, the legislature amended the Public Property Finance Act to authorize school districts to "execute, perform, and make payments . . . for the use or purchase or other acquisition of real property or an improvement to real property."³⁹ The legislation authorizes the pledge or use of maintenance tax proceeds for payment of the contracts.⁴⁰ A lease-purchase agreement entered into by a school district for real property or an improvement thereto must be submitted to the attorney general for approval.⁴¹ The office of the attorney general has notified bond counsel that it "will not approve any contracts for the purchase or other acquisition of real property or improvements to real property payable in any manner from school district maintenance taxes without at least the benefit of higher authority" because the legislation "would seem to be contrary to the holding of *Madeley v. Trustees of Conroe Independent School District* (citation omitted)."⁴²

In *Bland Independent School District v. Blue*,⁴³ the Texas Supreme Court reversed the Court of Appeals, which had held that plaintiff taxpayers may maintain an action to challenge the validity of a

³¹*See, supra*, note 10.

³²Tex. Local Gov't Code §§ 302.001 to.007.

³³School districts include independent school districts, rural high school districts, common school districts. The commissioners court of the county supervises common school districts such that the tax-exempt issuer may be the county. Tex. Educ. Code Titles 1 and 2, §§ 11.301, 11.302, 11.304. Some independent school districts are supervised by municipalities such that the issuer may be the municipality. *Id.* Home rule municipalities may provide for a public school system in the municipality.

³⁴*Id.* Tex. Educ. Code Tit. 2, Chapter 45.

³⁵*Id.* § 11.155 (independent school districts).

³⁶*See supra* notes 4-9 and accompanying text.

³⁷Tex. Educ. Code § 34.009 (restrictions apply).

³⁸Letter addressed to "All Bond Counsel," dated July 3, 1986, from Susan Lee Voss, Section Chief, Public Finance, Att'y General's Office. This letter also prohibited the lease-purchasing of jails by counties, which in a subsequent attorney general's opinion was approved. *See supra* note 10.

³⁹Tex. Local Gov't Code § 271.004. This statute is subject to numerous restrictions, including notices and the right of voters to petition an election. *Id.*

⁴⁰*Id.* § 271.004(e). Must be previously approved by the voters of the school district and [be] subject to annual appropriation, or paid from a source other than ad valorem taxes in order to not be considered indebtedness under § 26.04(c), Tax Code.

⁴¹*Id.* § 271.004(g).

⁴²Letter to "All Bond Counsel," dated July 13, 1993, from Sheela Rai, Asst. Att'y General, Chief, Public Finance Section. (The citation for *Madeley* is 130 S.W.2d 929 (Tex. Ct. App. 1939)).

⁴³34 S.W.3d 547 (Tex. 2000), *reversing* *Bland Independent School District v. Blue*, 989 S.W.2d 441 (Tex. App. Dallas 1999).

school district lease-purchase agreement and to enjoin future expenditures of public funds by the school district. The case involved the building of a pre-engineered building that was completed prior to the commencement of litigation. The Supreme Court held that a plaintiff that showed no special injury lacked standing to sue the district to prohibit the payment of the rental payments and therefore the trial court lacked subject matter jurisdiction. The plaintiffs attempted to fit under an exception that would not require a taxpayer to show special injury in which a suit is brought in equity to enjoin the illegal expenditure of public funds. The court held that such a suit would not be appropriate where the construction of the project was complete, so that the only obligation of the district was to make “loan” payments.

The Texas Attorney General has opined that Education Code sections 44.031 and 44.033, which contain public procurement requirements for school district contracts, apply to school district lease-purchase contracts entered under Local Government Code sections 271.004 and 271.005.⁴⁴

School districts may use state contracts for information technology.⁴⁵

Instructional facilities allotment payments from state aid are available for debt service on lease-purchase agreements subject to a complicated process.⁴⁶

Energy Performance Contracting

School districts may enter into energy savings performance contracts for energy or water conservation measures, financed under a lease-purchase contract for a term not to exceed twenty years, subject to numerous restrictions.⁴⁷

Fire Districts

Fire districts⁴⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their power to tax.⁴⁹ The provisions regarding lease-purchase of personal property by counties also apply to fire districts.⁵⁰

Fire districts may use state contracts for information technology.⁵¹

Energy Performance Contracting

Fire districts may enter into energy savings performance contracts for energy or water conservation measures, financed under a lease-purchase contract, subject to numerous restrictions.⁵²

⁴⁴Op. Att’y Gen. No. GA-0494 (Dec. 22, 2006).

⁴⁵*See, supra*, note 10.

⁴⁶Tex. Admin. Code tit. 19, § 61.1032. The basic allotment that a school district receives can be used for lease purchase agreements. *Id.* tit. 19, § 105.12. *See also* Tex. Admin. Code tit. 19, § 61.1035 for additional allotment information.

⁴⁷Tex. Educ. Code § 44.901(f).

⁴⁸Fire districts are “Fire Control, Prevention, and Emergency Medical Services Districts.”

⁴⁹Tex. Local Gov’t Code § 344.053; § 344.055.

⁵⁰*Id.* § 344.151. *See supra* notes 4-9 and accompanying text.

⁵¹*See, supra*, note 10.

⁵²*Id.* §§ 302.001 to .007.

Hospital Districts

Hospital districts⁵³ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁵⁴ and eminent domain⁵⁵ powers. The provisions regarding lease-purchase of personal property by counties also apply to hospital districts.⁵⁶

Hospital districts may use state contracts for information technology.⁵⁷

Energy Performance Contracting

Hospital districts may enter into energy savings performance contracts for energy or water conservation measures, financed under a lease-purchase contract, subject to numerous restrictions.⁵⁸

State Entities

Constitutional debt limitations apply to lease-purchases that have a principal amount greater than \$250,000. The limitation states that additional debt that is intended to be paid from general revenues may not be authorized if the maximum annual debt service on debt payable from the general revenue fund would exceed five percent of the average general revenue fund revenues for the previous three years.⁵⁹

All state leases greater than \$250,000 or for a term longer than five years must be approved by the Texas Bond Review Board.⁶⁰

The Texas Procurement Manual explains:

The Texas Constitution and the General Appropriations Act prohibit a state agency from incurring obligations in excess of amounts lawfully appropriated by the Texas Legislature over the course of a biennium. Therefore any installment purchase, lease purchase, lease with option to buy, equipment lease, or any other type of purchase which incurs an obligation beyond the current appropriations biennium is strictly prohibited, unless such obligation is expressly conditioned upon continued legislative appropriation.

Notwithstanding this prohibition, a state agency may incur an excess obligation if its proposed installment purchase arrangement has been certified by CPA [Comptroller of Public Accounts] as cost effective. General Appropriations Act, Article IX, §6.03 (2008-2009 Biennium)[similar, 2012-13 Biennium].

However, any certification by TPASS [Texas Procurement and Support Services] related to obligations incurred for the purchase or lease of automated information systems equipment may only be made if the requesting agency has on file with the Legislative Budget Board a Biennial Operating Plan, including any amendments, and the plan has been approved by the Legislative Budget Board.

Requests for Certifications should be directed to CPA Fiscal Management Division.

For CPA to make a certification as provided for under the General Appropriations Act, the following information must be provided with the purchase requisition and be signed by the purchasing director or other proper authority of the submitting agency:

⁵³Hospital districts are created under the Constitution, art. 9, by special or general law or by voter approval.

⁵⁴Tex. Health & Safety Code § 281.121 (hospital districts in counties of at least 190,000); § 283.121 (optional hospital district law of 1957); §§ 286.161, 286.171 (hospital districts created by voter approval).

⁵⁵*Id.* § 281.054 (hospital districts in counties of at least 190,000); *id.* § 282.046 (hospital districts in counties of 75,000 or less) *id.* § 283.050 (optional hospital district law of 1957); *id.* § 286.080 (hospital districts created by voter approval).

⁵⁶*Id.* § 344.151. *See supra* notes 4-9 and accompanying text.

⁵⁷*See, supra*, note 10.

⁵⁸Tex. Local Gov't Code §§ 302.001 to .007.

⁵⁹Tex. Const. art. III, § 49-j.

⁶⁰Tex. Gov't Code § 1231.001(2)(B); § 1231.041; Tex. Admin. Code tit. 3 pt 9, ch. 181, subch A, Rule § 181.1, 181.3.4

A statement comparing the anticipated cost savings to be realized through the present acquisition of the equipment versus the outright purchase of the equipment at a later time when adequate funds become available;

A statement affirming that the ordering entity expects to be able to make payments beyond the current biennium without having to rely on an increased level of general revenue appropriations;

An estimate of the total anticipated interest charges over term of the installment contract; and

A statement indicating that the lease (or installment) purchase is the most cost effective means of obtaining the needed equipment despite the additional interest cost to the state.

In addition to the above requirements, any purchase agreement subject to this section must contain a clause enabling the agency to cancel the agreement in the event the legislature curtails or fails to appropriate money to cover the term of the agreement to prevent any unconstitutional excess obligation. For example, "Any contract resulting from this solicitation is contingent upon the continued availability of lawful appropriations by the Texas Legislature."

Penalty for Requisitioning Officer or Employee

If any excess obligation is incurred that violates the General Appropriations Act or the Texas Constitution [Article XVI, Section 10], the State Auditor shall certify the fact of the violation and the amount of over-obligation to TPASS, and TPASS shall deduct an amount or amounts equivalent to the over-obligation from the salary or other compensation due the officer or employee responsible for disbursing or requisitioning, and apply that amount to payment of the obligation. General Appropriations Act, Article IX, §6.03 (2008-2009 Biennium); Texas Constitution, Article XVI, Section 10.⁶¹

State agency⁶² governing boards must approve contracts for the purchase of goods or services that have a value exceeding \$1 million. Such contracts must be signed by the presiding officer of the governing body.⁶³ Contracts exceeding \$5 million must be verified in writing for compliance with state law and agency policy.⁶⁴

The Texas Facilities Commission is the state agency generally responsible for the acquisition and management of land and buildings and for construction for the State, except for projects by the Texas Department of Transportation or a state institution of higher education in certain situations.⁶⁵ The commission, as provided by legislative appropriation, may: (1) acquire necessary real and personal property and modernize, remodel, build, or equip buildings for state purposes; and 2) contract as necessary to accomplish these purposes.⁶⁶ The commission may exercise the power of eminent domain to acquire building sites.⁶⁷ Only the legislature may authorize a project.⁶⁸ "A contract may not be awarded for an amount greater than the amount that the comptroller certifies to be available for the project."⁶⁹

⁶¹2012 Tex. Proc. Manual § 2.18, <http://www.comptroller.texas.gov>.

⁶²"State agency" generally means "(1) a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute; (2) the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council; or (3) a university system or an institution of higher education as defined by Section 61.003, Education Code, except a public junior college." *Id.* § 2151.002.

⁶³Tex. Gov't Code § 2261.254. (Exceptions exist for agencies that have delegated authority, the Texas Department of Transportation, and for institutions of higher education in some situations. *Id.* § 2261.001.)

⁶⁴*Id.* § 2261.255.

⁶⁵Tex. Gov't Code § 2151.003 and Chs. 2165, 2166.003. The Texas Facilities Commission is subject to a sunset provision. *Id.* § 2152.002.

⁶⁶*Id.* § 2166.052.

⁶⁷*Id.* § 2166.055.

⁶⁸*Id.* § 2166.251.

⁶⁹*Id.* § 2166.255.

Equipment not constructed or installed under a construction contract must be acquired through regular state purchasing methods.⁷⁰

The facilities commission manages leasing by a state agency as lessee.⁷¹ The original term of a lease may not exceed ten years and renewals may not exceed ten years each.⁷² The lease contract is contingent on appropriations.⁷³ A lease may contain an option to purchase, subject to appropriation.⁷⁴ A lease with an option to purchase must indicate (1) the amount that will accumulate and be credited toward the purchase at various times during the lease term; and (2) the purchase price of the property at the beginning of each fiscal biennium during the lease term.⁷⁵

The Texas Public Finance Authority maintains a Master Lease Purchase Program for financing equipment⁷⁶ acquisitions, and legislatively authorized construction projects, by State agencies.⁷⁷

The Comptroller of Public Accounts (CPA) [primarily acting through the Texas Procurement and Support Services Division (TPASS)] is responsible for acquiring by purchase or lease all goods⁷⁸ and services for a state agency.⁷⁹ Pursuant to statute, state agencies have delegated authority to purchase goods not exceeding \$15,000,⁸⁰ but greater amounts may be delegated by individual rule; the division has set a limit for commodity purchases at \$25,000.⁸¹ Competitive bidding is required for goods exceeding \$5,000.⁸²

Administrative rules regarding the lease-purchase of capital equipment provide:

- (1) An agency may acquire capital equipment by lease-purchase if it is cost effective.
- (2) If a proposed lease purchase is for information technologies resources, as defined in the Texas Government Code, Title 10, Subchapter A, Chapter 2054, the requisition must include written evidence that the Department of Information Resources has approved the agency's biennial operating plan. For other items, the commission will determine the cost effectiveness of a lease purchase. To establish cost effectiveness, the requisitioning agency should submit the following information:
 - (A) anticipated interest charges over the life of the contract;
 - (B) anticipated cost savings which would result from outright purchase;
 - (C) an affirmative statement that the agency reasonably expects to be able to make payments beyond the current biennium without requiring an increase in appropriations;
 - (D) any information requested by the commission; and

⁷⁰*Id.* § 2166.256.

⁷¹*Id.* § 2167.002.

⁷²*Id.* § 2167.055.

⁷³*Id.*

⁷⁴*Id.* § 2167.056.

⁷⁵*Id.*

⁷⁶“‘Equipment’ means a fixed asset, other than land or a building, used by a state agency to conduct state business. The term includes computer equipment.” *Id.* § 1232.003.

⁷⁷See generally, *id.* §§ 1232.103. “‘State agency’ means a board, commission, department, office, agency, institution of higher education, or other governmental entity in the executive, judicial, or legislative branch of state government.” *Id.* § 1232.003.

⁷⁸Goods means “supplies, materials, or equipment.” *Id.* § 2155.001(1). However, the division of information resources has general procurement authority for information technology and communications.

⁷⁹*Id.* § 2155.061. “State agency” generally means “(1) a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute; (2) the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council; or (3) a university system or an institution of higher education as defined by Section 61.003, Education Code, except a public junior college.” *Id.* § 2151.002.

⁸⁰*Id.* § 2155.132.

⁸¹*Id.*; Tex Admin. Code tit. 34 Rule § 20.41 (Oct. 7, 2016).

⁸²*Id.*

(E) any other information the agency considers relevant.⁸³

Information Technology

The procurement of information technology by state agencies⁸⁴ is centralized in the Department of Information Resources (DIR).⁸⁵

“Each state agency,⁸⁶ excluding . . . institutions of higher education, must purchase⁸⁷ any commodity items that are listed under the commodity⁸⁸ codes under the department’s responsibility in accordance with a contract developed by the department, unless the agency first obtains an exemption . . . or obtains express prior approval from the Legislative Budget Board for the expenditure necessary for the purchase; or, obtains a certification from the department . . . that the commodity item is not available for purchase under an existing contract developed by the department unless the value of that contract exceeds \$1 million dollars.”⁸⁹ Agencies may use a request for offers purchase method for automated information systems that are not available under the department of information IT commodity purchasing program.⁹⁰

The Department of Information Resources may “lease, or lease-purchase in accordance with [Gov’t Code] Chapters 2155, 2156, 2157, and 2158 any or all of the facilities or equipment necessary to provide telecommunications service.”⁹¹

⁸³*Id.* § 20.33. Lease-purchase means “an installment sale which gives the lessee the right to purchase the equipment at an agreed upon price under certain conditions. Title passes from seller to agency if and at the time the option to purchase is exercised.” 2012 Tex. Proc. Manual, Glossary.

⁸⁴State agency means “a department, commission, board, office, or other agency that is in the executive or legislative branch of state government and that was created by the constitution or a statute, excluding an institution of higher education as defined by §61.003, Texas Education Code; or the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council or another agency in the judicial branch of state government.” Tex. Admin Code DIR RULE §217.3 (June 10, 2009 am. Nov. 23, 2015).

⁸⁵Tex. Gov’t Code § 2054.0285. The Department of Information Resources is subject to the Texas Sunset Act, Ch. 325.

⁸⁶State agency means “a department, commission, board, office, council, authority or other agency in the executive branch or judicial branch of state government, that is created by the constitution or a statute of the state. The term does not include institutions of higher education, as defined in §61.003, Education Code.” Tex. Admin Code DIR RULE § 212.1(7).

⁸⁷Purchase means “to obtain ownership, any rights with respect to the use, transfer of ownership, or delivery of commodity items through acquisition, lease or any other method.” *Id.* § 212.1(6).

⁸⁸Commodity items means “commercially available Software, Hardware and Technology Services that are generally available to businesses or the public and for which the department determines that a reasonable demand exists in two or more state agencies.” *Id.* Rule §212.1(1).

⁸⁹Tex. Admin. Code § 212.10. (Sept. 22, 2005, am. Nov. 17, 2011).

⁹⁰*Id.* tit. 34, Rule § 20.391.

⁹¹Tex. Gov’t. Code § 2170.003. *id.* Ch. 2155 (*Purchasing; General Rules and Procedures*); Ch. 2156 (*Purchasing Methods*); Ch. 2157 (*Purchasing; Purchase of Automated Information Systems*); Ch. 2158 (*Purchasing; Miscellaneous Provisions for Purchase of Certain Goods and Services*).

(a) A state agency may not spend appropriated funds for a major information resources project unless the project has been approved by:

(1) the Legislative Budget Board in the agency's biennial operating plan; and

(2) the quality assurance team.

(b) The department shall develop rules or guidelines for its review of major information resources projects and project management practices for the projects. The department shall also assist the Legislative Budget Board in evaluating the determinations about comparative costs and benefits that state agencies make under Subsection (c).

(c) A state agency that proposes to spend appropriated funds for a major information resources project must first determine:

(1) the comparative benefits of using agency personnel contrasted with using outside contractors to design the project; and

(2) the comparative total costs of leasing and of purchasing the information resources and information resources technologies involved in the project, with those costs to be determined after taking into account the use of the resources and technologies over their lifetimes.

(d) Before a state agency may initially spend appropriated funds for a major information resources project, the state agency must quantitatively define the expected outcomes and outputs for the project and provide that information to the quality assurance team.⁹²

Higher Education

Lease-purchase agreements (in excess of \$250,000 or of a duration longer than five years)⁹³ entered into by institutions of higher education are not subject to approval by the Bond Review Board if:

(1) the institution or the university system of which the institution is a component has an unenhanced long-term debt rating of at least AA- or its equivalent; and

(2) the general revenue of this state is not pledged to the payment of the security.⁹⁴

Contracts with a value greater than \$1 million must be approved by an institution's board of regents.⁹⁵

Individual university systems may create a system-wide revenue financing program to provide funds to acquire or equip property, buildings, facilities or related infrastructure at institutions or entities of the university system.⁹⁶ In connection with the financing program, Chapter 55 authorizes Texas systems of higher education to "acquire" and "equip" property, buildings and facilities.

A county or a municipality may enter into a lease-purchase agreement to acquire land or buildings or other permanent improvements for use by an institution of higher education.⁹⁷

⁹²*Id.* § 2054.118;

⁹³*See supra* notes 60-61 and accompanying text.

⁹⁴Tex. Gov't Code § 1231.041.

⁹⁵Tex. Educ. Code § 51.9337(f).

⁹⁶Tex. Educ. Code § 55.02.

⁹⁷Tex. Gov't Code § 1434.051. This chapter applies only to: (1) a home-rule municipality with a population of 25,000 or more that has an institution of higher education located within its boundaries or has entered into an agreement with an institution of higher education relating to the provision of services in furtherance of the completion of certificate programs, degree programs, or other higher education programs within the municipality by the institution of higher education; or (2) a county within which a municipality described by Subdivision (1) is located. *Id.* § 1434.001.

An institution of higher education⁹⁸ may “acquire goods or services by the method that provides the best value to the institution” and may adopt its own rules and procedures.⁹⁹

An institution may elect to acquire goods or services as provided by the competitive bidding statutes, Subtitle D, Title 10 of the Government Code.¹⁰⁰

In any contract for the acquisition of goods and services “to which an institution of higher education is a party, a provision required by applicable law to be included in the contract is considered to be a part of the executed contract without regard to: (1) whether the provision appears on the face of the contract; or (2) whether the contract includes any provision to the contrary.”¹⁰¹

The Texas Higher Education Coordinating Board has oversight authority over construction of university facilities for the purpose of accommodating student enrollment.¹⁰²

The construction and repair of permanent improvements requires competitive bidding.¹⁰³

There are several university systems managed by boards of regents authorized to govern the affairs of member institutions.¹⁰⁴

The University of Texas System was established pursuant to Texas Constitution article 7, section 10 and the power to manage the university delegated by the Legislature to the Board of Regents.¹⁰⁵ The board may exercise the power of eminent domain.¹⁰⁶ Contracts must be approved by the board or entered into in accordance with board rules.¹⁰⁷ Extensive rules, policies, and other information are available online.¹⁰⁸ The University of Texas System may use its Revenue Financing System as an alternative to vendor lease-purchase financing which is considered to be more expensive.¹⁰⁹ Vendor lease-purchases in excess of \$250,000 or for 5 years will be submitted to the Texas Bond Review Board for prior approval.¹¹⁰ Real property lease-purchase contracts will be reviewed and approved by the university’s office of general counsel.¹¹¹ Lease contracts for the university may be handled either by the university or by the Texas Facilities Commission and may be subject to review by the UT System Real Estate Office.¹¹² “All expenditures may be made by the order of the board and shall be paid on warrants from the comptroller based on vouchers approved by the chairman of the board or his delegate, or by the

⁹⁸Institution of higher education means “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003.

⁹⁹*Id.* § 51.9335(a), (d), (g); *see also, id.* § 73.115 (The University of Texas M. D. Anderson Cancer Center); § 74.008 (The University of Texas Medical Branch at Galveston).

¹⁰⁰*Id.*

¹⁰¹*Id.* § 51.9335(h).

¹⁰²*Id.* § 61.0572. Tex. Admin. Code Tit. 19, Ch. 17.

¹⁰³*Id.* §§ 51.776 to 51.785 (West 2012).

¹⁰⁴The following institutions do not appear to be part of a system: Midwestern State University; Stephen F. Austin State University; Texas Southern University; Texas Woman’s University. All are governed by boards of regents. *Id.* § 103.09 (Midwestern); § 101.11 (Stephen F. Austin); § 106.11 (Tex. Southern); § 107.41 (Tex. Woman’s) (has same powers as conferred upon the bd. of regents of the Univ. Tex. System).

¹⁰⁵*See generally* Educ. Code Ch. 65.

¹⁰⁶*Id.* § 65.33. Eminent domain may not be used by an institution of higher education for a “lodging facility.” *Id.* § 51.9045.

¹⁰⁷*Id.* § 65.34.

¹⁰⁸*See generally*, The Univ. of Tex. Sys. Rules and Regs. of the Bd. of Regents. <http://www.utsystem.edu/bor/rules/>.

¹⁰⁹Univ. Tex. Sys. Equip. Fin. Proc., <http://www.utsystem.edu/sites/utsfiles/offices/finance/files/guidelines.pdf>. The Revenue Financing System is a debt program secured by a system-wide pledge of all legally available revenues for debt issued on behalf of all 15 institutions and System Administration (last accessed Oct. 2016).

¹¹⁰*Id.*

¹¹¹<http://www.utsystem.edu/ogc/contracts/specialcontracts.htm>.

¹¹²The Univ. of Tex. Sys. Pol’y UTS126 (Dec. 31, 2002 am Sept 27, 2011).

institutional head or his delegate of the component institution making the expenditures.”¹¹³ Thresholds triggering mandatory contract review by general counsel differ among the system and the individual institutions.¹¹⁴ Contracts relating to the System-wide use of computers may be subject to review and approval by the System Chief Information Officer.¹¹⁵ but do not require board approval if previously identified in a budget approved by the board or if replacement equipment is involved.¹¹⁶ The board of regents retains power generally to review any contract of a cost of more than \$ 1 million dollars.¹¹⁷

Texas Tech University System¹¹⁸ has the power of eminent domain¹¹⁹ and has the power to “acquire” “lands in any manner at prices and under terms and conditions the board deems best for the interest of the institutions.”¹²⁰ Texas Tech University System finances equipment through the Revenue Financing System.¹²¹

The Texas State University System board of regents¹²² has the power of eminent domain¹²³ and may “erect, equip, and repair buildings; [and] purchase . . . apparatus . . . and other necessary supplies.”¹²⁴ The board may acquire land by “purchase, lease.”¹²⁵ The board may delegate its power to any officer, employee or committee.¹²⁶ “The board may enter into contracts with persons, firms, or corporations for the erection of dormitories at a university, and may purchase or lease lands and other appurtenances for the construction of the dormitories, provided that the state incurs no liability for the buildings or the sites.”¹²⁷ “Generally, contracts, purchases, and agreements exceeding \$1 million (including leases of personal property) must be approved by the board of regents. Purchases, and agreements between \$500,000 and \$1 million[*sic*] must be approved by the Chancellor. Leases involving real property may require approval by the board of regents, subject to numerous requirements.”¹²⁸

The Texas A&M University System board of regents¹²⁹ has the power of eminent domain.¹³⁰

All expenditures may be made by order of the board and shall be paid on warrants from the comptroller based on vouchers approved by the president of the board or by some officer or officers designated by him in writing to the comptroller.¹³¹

The board may enter into an agreement with any person for the purchase, sale, lease, lease-purchase, acquisition, or construction of permanent improvements However, no debt or liability shall be incurred by the State of Texas under this section.¹³²

The University of Houston System board of regents¹³³ may acquire real property.¹³⁴

¹¹³Tex Educ. Code § 65.35.

¹¹⁴The Univ. of Tex. Sys. Pol’y UTS145 (Jan. 26, 2006, last am. Aug. 24, 2016).

¹¹⁵The Univ. of Tex. Sys. Pol’y UTS145 § 4.

¹¹⁶The Univ. of Tex. Sys. Rules and Regs. of the Bd. of Regents, Rule 10501 § 2.2 (Dec. 10, 2004, last amend.Oct. 12, 2016).

¹¹⁷*Id.* Rule 10501 § 3.1.

¹¹⁸Tex. Educ. Code § 109.101; § 109.002 (regents).

¹¹⁹*Id.* § 109.051.

¹²⁰*Id.* § 109.054.

¹²¹Tex. Tech. Univ. Regents' Rules, 07.05.4, (ED: Dec. 12, 2008, amended through Oct. 14, 2016).

¹²²Tex. Educ. Code § 95.01.

¹²³*Id.* § 95.30.

¹²⁴*Id.* § 95.21.

¹²⁵*Id.* § 95.31.

¹²⁶*Id.* § 95.21.

¹²⁷*Id.* § 95.32.

¹²⁸Tex. St. Univ. Syst. Rules & Regs ch. III. (Sept. 1, 1980, last am. May 26, 2016).

¹²⁹Tex. Educ. Code § 85.11.

¹³⁰*Id.* § 85.32.

¹³¹*Id.* § 85.22.

¹³²*Id.* § 85.23.

All contracts of the university shall be approved by a majority of the board. However, the board is authorized to adopt reasonable rules that delegate to the president or his authorized representatives the authority to negotiate, approve, and execute contracts.¹³⁵

The board will approve all acquisitions of real property.¹³⁶ It will approve all real estate leases, lease renewals and extensions, and any single procurement of equipment, if the obligation of the lease is equal to or greater than one million dollars.¹³⁷

The University of North Texas System board of regents¹³⁸ may exercise the power of eminent domain¹³⁹ and may “erect, equip, maintain, and repair system buildings” and “purchase . . . equipment”¹⁴⁰ and may “acquire by purchase” real property.¹⁴¹ Contracts must be approved by the board or a board approved delegate.¹⁴²

Energy Performance Contracting

State agencies and institutions of higher education may enter into lease-purchase contracts to finance energy savings measures of a term not to exceed 20 years from the date of installation, subject to numerous restrictions.¹⁴³ State agencies, institutions of higher education, and political subdivisions are required to implement energy efficiency measures in facilities.¹⁴⁴

Debt Limitations

The State, counties, cities and other political subdivisions are constitutionally limited in the amount of debt they may incur.¹⁴⁵

In *Texas Public Building Authority v. Mattox*,¹⁴⁶ revenue bonds issued to finance the construction of a building to be leased by the authority to the state were held to not violate the constitutional debt limitation.¹⁴⁷ The legislative intent for such a result had been expressed in the statute authorizing issuance of bonds by the authority.¹⁴⁸ A nonappropriation clause was included in the lease to the state.¹⁴⁹

In *Bexar County v. Hatley*,¹⁵⁰ a lease agreement with the option to purchase for the acquisition of voting machines was upheld because the rentals were payable out of current revenues.¹⁵¹ By the terms of

¹³³*Id.* § 111.11.

¹³⁴*Id.* § 111.39.

¹³⁵*Id.* § 111.34.

¹³⁶Univ. Houston Bd. of Regents Rule 55.01.1.

¹³⁷*Id.*

¹³⁸Tex. Educ. Code § 105.051.

¹³⁹*Id.* § 105.103

¹⁴⁰*Id.* § 105.101(b).

¹⁴¹*Id.* § 105.107.

¹⁴²*Id.* § 105.108.

¹⁴³*Id.* § 2166.406; Tex. Admin. Code tit 19, § 17.80 (proposed reg.).

¹⁴⁴Tex. Gov’t Code . § 2166.406 (state agencies); Tex. Educ. Code § 51.927 (institutions of higher education). Energy performance contracts by institutions of higher education are subject to approval by the Texas Higher Education Coordinating Board. *Id.*

¹⁴⁵Tex. Const. art. III, § 49, 49-j (State), § 52 (counties, cities or other political corporations or subdivisions).

¹⁴⁶686 S.W.2d 924 (Tex. 1985).

¹⁴⁷*Id.* at 928.

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰150 S.W.2d 980 (Tex. 1941).

¹⁵¹*Id.* at 988-89.

one lease, if the county did not exercise its option to purchase the machines they would be returned to the lessor.¹⁵²

In *Crystal City Independent School District v. Bank of Dallas*,¹⁵³ the school district entered into a 59 month lease to acquire energy management equipment and defaulted three years later. The assignee of the lessor sued the district for rentals. The court held that on remand the bank will have to prove that the district did not allocate funds for the lease period sued upon to be entitled to judgment for the balance of the period for which such funds were allocated.¹⁵⁴ It appears that the bank will also have to prove that the entire balance of lease payments were allocated to recover the entire balance of lease payments.¹⁵⁵ The court also stated that “if the school district allocates the funds for a contract, but later exhausts the funds for other purposes, the contract will remain valid even if the funds are not available at the time of suit.”¹⁵⁶

In *City-County Waste Control Board v. Capital Leasing, Inc.*,¹⁵⁷ an equipment lessor sued the government board when the board terminated the lease after only one year for the total rent it would have paid if it had renewed the lease for each of the remaining three years under the lease. It argued that the board could not terminate the lease without first attempting in good faith to appropriate funds to cover rent payments. The trial court granted judgment in favor of lessor. The court of appeals reversed, holding that the lease created an unconstitutional debt. “While the lease gives the board the right to terminate at the end of each budget period, the board can exercise that right only if it has not obtained an appropriation for the lease payments. By requiring the board to pursue funding before it can terminate, the lease creates a pecuniary obligation . . .”¹⁵⁸ The board’s obligation to make a good faith effort to obtain funding was prefaced with “to the extent permitted by state law.”¹⁵⁹

(a) If a contract for the acquisition, including lease, of real or personal property retains to the governing body of a local government the continuing right to terminate at the expiration of each budget period of the local government during the term of the contract, is conditioned on a best efforts attempt by the governing body to obtain and appropriate funds for payment of the contract, or contains both the continuing right to terminate and the best efforts conditions, the contract is a commitment of the local government's current revenues only.

(b) In this section, “local government” means a municipality, county, school district, special purpose district or authority, or other political subdivision of this state.¹⁶⁰

Interest Rate Limitations

The interest rate on a public security may be fixed, variable, floating, adjustable, or computed by any other method.¹⁶¹ A public security includes “a bond, certificate, note or other type of obligation authorized to be issued by an issuer under a statute, a municipal home rule charter, or the constitution . . .”¹⁶²

MAXIMUM INTEREST RATE. (a) The maximum rate of interest for any issue or series of public securities, including an issue or series that is issued in exchange for property, labor, services, materials, or equipment under another law, is a net effective interest rate of 15 percent.

¹⁵²*Id.* at 984.

¹⁵³727 S.W.2d 762 (Tex. Ct. App. 1987).

¹⁵⁴*Id.* at 764.

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 763.

¹⁵⁷813 S.W.2d 705 (Tex. Ct. App. 1991).

¹⁵⁸*Id.* at 707.

¹⁵⁹*Id.* at 706.

¹⁶⁰Tex. Local Gov’t Code § 271.903.

¹⁶¹Tex. Gov’t Code § 1201.025(a).

¹⁶²*Id.* § 1201.002(2).

(b) Except as provided by Section 1204.007, a public agency may issue and sell any issue or series of its public securities at any price and bearing interest at any rate or rates determined by the agency's governing body that does not exceed the maximum rate under Subsection (a).¹⁶³

The general usury statute provides for a maximum rate of 10% per annum, unless otherwise provided by law.¹⁶⁴

Miscellaneous

For purposes of exemption from taxation, an improvement is owned by the state and is used for public purposes if it is subject to a lease-purchase agreement providing that legal title to the improvement passes to the department at the end of the lease period. Further, tangible personal property is owned by this state or a political subdivision of this state if it is subject to a lease-purchase agreement providing that the state or political subdivision, as applicable, is entitled to compel delivery of the legal title to the property to the state or political subdivision at the end of the lease term.¹⁶⁵

Any instrument, including certificates of participation, evidencing a proportionate interest in payments due to be paid by an issuer under lease-purchase or installment contracts entered into by the state, counties, municipalities or school districts must be approved by the attorney general. The office of the attorney general has stated that in approving certificate of participation lease-purchase financings, absent explicit statutory authority to enter into a certificate of participation transaction, the lessee's involvement can consist only of acknowledging that the lease agreement is to be participated, agreeing to make payment to the party designated by the lessor, such as a trustee, and providing a certificate to the effect that it has reviewed only the information pertaining to itself, and that such information does not contain erroneous information, or fail to contain information that should be disclosed.¹⁶⁶ The authority for the lessee to enter into the trust agreement or to "deem final" the offering document for purposes of SEC Rule 15c2-12 is lacking.¹⁶⁷

In the context of school district financings, the attorney general's office has stated it was not prepared to approve a lease-purchase agreement with a nonsubstitution clause or an annual termination fee.¹⁶⁸

For contracts entered into on or after September 1, 1999, Texas Gov't Code § 2260.001 to .108 is a new administrative process enacted by the legislature to resolve breach of contract claims against the state of Texas. This legislation does not waive sovereign immunity and has been held by the Texas Supreme Court to preclude waiver of sovereign immunity by conduct.¹⁶⁹ It also would seem to be inapplicable in a situation where the contract is alleged to be invalid.

Tex. Gov't Code Sec. 2252.908 requires the disclosure of interested parties when a state agency, municipality, county, public school district, or special-purpose district or authority enters into certain contract, which would include lease-purchase agreements. It is a convoluted statute and the Texas Ethics Commission Rules, Chapter 46 are the implementing regulations, which are found at <https://www.ethics.state.tx.us/legal/ch46.html>. Basically there is a Form 1295 that has to be completed online, filed and then provided to the government entity before they sign the contract. Who must be listed

¹⁶³*Id.* § 1204.006.

¹⁶⁴Tex. Fin. Code § 302.001.

¹⁶⁵Tex. Tax. Code § 11.11.

¹⁶⁶Letter to "All Bond Counsel," dated Jan. 20, 1993, from Jim Thomassen, Asst. Att'y General, Chief, Public Fin. Sect.

¹⁶⁷*Id.*

¹⁶⁸Letter to "All Bond Counsel," dated Aug. 30, 1996, from Jim Thomassen, Asst. Att'y General, Chief, Public Fin. Div.

¹⁶⁹Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 220 (Tex. 2001).

as interested parties is a joy to try and discern. Failure to comply goes to the validity of the lease-purchase transaction. The Texas Ethics Commission has a web stie for electronic filing and other information: https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm. Form 1295 is available at <https://www.ethics.state.tx.us/forms/1295.pdf>. A recent amendment to Tex. Gov't Code Sec. 2252.908(c) added the following exemption from the statute: "(4) a contract with a publicly traded business entity, including a wholly owned subsidiary of the business entity." Note that a transaction originated by a broker who doesn't fit the new exception for publicly traded entities, would still need to comply with the statute, even if they are assigning the lease to a publicly traded entity.

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

UTAH 2018 REVISION

Current with 4, 5, 7 to 21, 25 to 27, 29, 38, 40 to 51, 68, 126, 135, 139, 143, 179, 267, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ A county has the power “[t]o acquire real property by tax sale, purchase, lease, contract, or gift, and hold the real property as necessary and proper for county purposes,”⁴ “to acquire personal property by purchase, lease, contract, or gift,”⁵ “to manage and dispose of its property as the interests of its inhabitants may require,”⁶ and to “purchase, receive, hold, sell, lease, convey or otherwise acquire and dispose of any real or personal property or any interest in such property if the action is in the public interest and complies with other law.”⁷ “With the approval of the sheriff, the county governing body may contract with private contractors for management, maintenance, operation, and construction of county jails.”⁸

Counties may establish Local Building Authorities⁹ from which the county may lease “improvements, facilities, or properties and appurtenances.”¹⁰ The lease contract must not obligate the county to purchase the property or create any obligations to creditors, shareholders or security holders of the authority.¹¹ Upon the authority’s “payment in full of all outstanding bonds . . . title to the project shall vest in the [county].”¹² The term of a lease contract and any renewals may not “extend beyond the estimated useful life of the project” with a maximum term of forty years.¹³ “If a [county] fails to pay any rentals due . . . [it] shall immediately quit and vacate the project, and its rental or lease payment obligation thereunder shall terminate.”¹⁴

Energy Performance Contracting

Counties may enter into a “guaranteed performance efficiency contract” for the implementation of energy savings measures for a period of more than one year, not to exceed the amount of cost savings over 20 years, subject to numerous restrictions.¹⁵

¹Utah Code Ann. § 17-50-302(1)(a).

²*Id.* § 17-50-302(2)(a)(iii); *id.* § 78B-6-501.

³*Id.* § 17-50-304.

⁴*Id.* § 17-50-302(2)(a)(ii).

⁵*Id.* § 17-50-302(2)(a)(iv).

⁶*Id.* § 17-50-302(2)(a)(v).

⁷*Id.* § 17-50-312(1). *See also id.* § 17-50-310 (acquisition of property for water and water rights).

⁸*Id.* § 17-53-311(1)(a).

⁹*Id.* § 17D-2-102(4). Municipalities and school districts may also create and utilize Local Building Authorities. *Id.* §§ 17D-2-101 to -702. This is a detailed statute, much of which is not set forth in this survey. *See, infra*, notes 80 - 82 and accompanying text for discussion of decision approving a financing under this statute.

¹⁰*Id.* § 17D-2-102. The cost of the project includes “the cost of equipment and furnishings.” *Id.* § 17D-2-102(10)(iii). The public body can also lease the ground site to the authority with an option in the authority to purchase the site in the event the public body terminates the lease contract. *Id.* § 17A-2-404.

¹¹*Id.* § 17D-2-506; 17D-2-402(1).

¹²*Id.* § 17D-2-402.

¹³*Id.* § 17D-2-402(2).

¹⁴*Id.* § 17D-2-405.

¹⁵*Id.* §§ 11-44-101 to-302.

Municipalities

Municipalities¹⁶ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁷ eminent domain¹⁸ and police powers.¹⁹ “Municipalities may . . . enter into contracts.”²⁰ “The governing body of a city or town may contract with private contractors for management, maintenance, operation, and construction of city jails.”²¹ Municipalities may “purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the city”²² Municipalities may acquire an historical area or site by direct purchase, contract or lease.²³

Municipalities may also lease property from a Local Building Authority.²⁴

Energy Performance Contracting

Municipalities may enter into a “guaranteed performance efficiency contract” for the implementation of energy savings measures for a period of more than one year, subject to numerous restrictions.²⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁶ and eminent domain powers.²⁷ School districts “may take, hold, lease, sell and convey real and personal property as the interests of the schools may require.”²⁸ School districts may also lease property from a Local Building Authority.²⁹ In limited situations where there has been new or expanded growth in a district because of new industry, a school district may enter into lease-purchase agreements or lease with option to purchase agreements with private builders to furnish the minimal facilities required by the district and approved by the State Board of Education.³⁰

Energy Performance Contracting

School districts may enter into a “guaranteed performance efficiency contract” for the implementation of energy savings measures for a period of more than one year, subject to numerous restrictions.³¹

¹⁶Municipalities for purposes of this discussion are all classes of cities and towns. *Id.* § 10-2-301. Municipalities may adopt a charter form of government. Utah Const. art. XI, § 5.

¹⁷Utah Code Ann. § 10-6-133.

¹⁸*Id.* 78B-6-501.

¹⁹*Id.* tit. 10, ch. 8.

²⁰*Id.* § 10-1-202.

²¹*Id.* § 10-8-58.5(1)(a).

²²*Id.* § 10-8-2(1) (cities); *id.* § 10-8-94 (towns). *See also id.* § 10-7-4 (acquisition of water, water rights and water system).

²³*Id.* § 10-8-85.9.

²⁴*See, supra*, notes 9-14 and accompanying text.

²⁵*Id.* §§ 11-44-101 to -302.

²⁶Utah Code Ann. § 53A-16-106; *id.* § 53A-16-108.

²⁷*Id.* § 78B-6-501.

²⁸*Id.* § 53A-3-401(4).

²⁹*See, supra*, notes 9-14 and accompanying text.

³⁰Utah Code Ann. § 53A-22-103.

³¹*Id.* §§ 11-44-101 to -302. School districts are political subdivisions of the state. Utah Const. art. XI, § 8.

Fire Districts

Certain fire districts³² may qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³³ and eminent domain powers.³⁴ Fire districts may “acquire, by any lawful means, or lease any real property, personal property, or a groundwater right necessary or convenient to the full exercise of the district’s powers.”³⁵ A fire district may enter a contract to purchase supplies or equipment.³⁶ A fire district may “issue bonds, including refunding bonds,” and “Bonds” is defined to include “a lease agreement, installment purchase agreement, or other agreement that: (i) includes an obligation by the district to pay money; and (ii) the district’s board of trustees, in its discretion, treats as a bond for purposes of Title 11, Chapter 14, Local Government Bonding Act, or Title 11, Chapter 27, Utah Refunding Bond Act.”³⁷

Energy Performance Contracting

Local fire protection districts may enter into a “guaranteed performance efficiency contract” for the implementation of energy savings measures for a period of more than one year, subject to numerous restrictions.³⁸

Hospital Districts

Health care districts³⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax and eminent domain powers.⁴⁰ A health care district may acquire real or personal property by lease or dispose of property.⁴¹

State Entities

The Utah Department of Administrative Services Division of Facilities Construction and Management (DFCM), as authorized by the Legislature, manages the acquisition of real property, construction, and non-higher education, non-legislative and non-judicial leases of real property, pursuant to Utah State Building Board rules.⁴² The director of the DFCM may “hold, buy, lease, and acquire . . . , as authorized by the Legislature, whatever real or personal property that is necessary for the discharge of the Director’s duties.”⁴³ The DFCM may enter into facility leases subject to legislative appropriation for terms of up to 10 years, or for longer with the approval of the State Building Board.⁴⁴ The Building Board is responsible for submitting “capital developments” to the Legislature for approval and prioritization.⁴⁵ Legislative approval is not required in certain situations.⁴⁶

³²Fire districts are fire protection districts created as a local district under section 17B-2a-301 to 303 and *id.* title 17B, chapter 1.

³³*Id.* § 17B-1-103(2)(g).

³⁴*Id.* § 17B-1-103(2)(h).

³⁵*Id.* § 17B-1-103(2)(a).

³⁶*Id.* § 17B-1-103(2)(m).

³⁷*Id.* § 17D-1-103(2)(f); *id.* § 17B-1-102.

³⁸*Id.* §§ 11-44-101 to -302.

³⁹Health care districts are special service districts under title 17D ch. 1. *Id.* §§ 17D-1-201, 17D-1-103.

⁴⁰*Id.* § 17D-1-103(2).

⁴¹*Id.*

⁴²*Id.* § 63A-5-204; *id.* § 63G-6a-204 (applicability of Building Board rules); *id.* § 63A-5-302. Institutions of higher education and the State Capitol Preservation Board are exempt from division oversight. *Id.* § 63A-5-204(3)(c); Utah Admin R23-1.

⁴³*Id.* § 63A-5-204(5).

⁴⁴Utah Code Ann. § 63A-5-302.

⁴⁵*Id.* § 63A-5-104. “Capital developments” means a: (i) remodeling, site, or utility project with a total cost of \$3,500,000 or

(1)(a) Certificates of participation for either capital facilities or capital improvements may not be issued by the department, its subdivisions, or any other state agency after July 1, 1985, without prior legislative approval.

(b) Nothing in this section affects the rights and obligations surrounding certificates of participation that were issued prior to July 1, 1985.

(2)(a) As used in this section, “certificate of participation” means an instrument that acts as evidence of the certificate holder's undivided interest in property being lease-purchased, the payment on which is subject to appropriation by the Legislature.

(b)(i) As used in this Subsection (2)(b), “performance efficiency agreement” means the same as that term is defined in [Section 63A-5-701](#).

(ii) “Certificate of participation” does not include a performance efficiency agreement.⁴⁷

The Department of Transportation may lease real property in a manner determined by the department to be in the best interest of the State.⁴⁸

Generally, expenditures of state funds for other than real property by public procurement units,⁴⁹ “under any contract” are subject to code title 63G chapter 6a.⁵⁰

Procurements⁵¹ for the state executive branch are generally under the direction and control of the Division of Purchasing and General Services pursuant to the Utah Procurement Code.⁵² Small purchase thresholds and procedures are described in section 63G-6a-506 and administrative rule R33-5. Leases and lease-purchases for personal property must comply with section 63G-6a-1209:

A procurement unit may lease a procurement item if:

(a) the procurement officer determines that it is in the best interest of the procurement unit to lease the procurement item, after the procurement officer:

(i) investigates alternative means of obtaining the procurement item; and

more; (ii) new facility with a construction cost of \$500,000 or more; or (iii) purchase of real property where an appropriation is requested to fund the purchase. *Id.* Approval requirements may depend upon the source of funding. Legislative approval is not required for capital development projects for the Department of Transportation. *Id.*

⁴⁶*Id.* § 63A-5-104(3)(a).

⁴⁷*Id.* § 63A-1-112.

⁴⁸*Id.* § 72-5-114.

⁴⁹Procurement unit “means: (i) a legislative procurement unit; (ii) an executive branch procurement unit; (iii) a judicial procurement unit; (iv) an educational procurement unit; (v) a local government procurement unit; (vi) a local district; (vii) a special service district; (viii) a local building authority; (ix) a conservation district; (x) a public corporation; or (xi) a public transit district.” *Id.* § 63G-6a-103(60). A local government procurement unit is defined as: (a) a county or municipality, and each office or agency of the county or municipality, unless the county or municipality adopts its own procurement code by ordinance; (b) a county or municipality that has adopted this entire chapter by ordinance, and each office or agency of that county or municipality; or (c) a county or municipality to the extent that the term in the ordinance is used in the adopted portion of this chapter, and each office or agency of that county or municipality. *Id.* § 63G-6a-104(49). *Id.* § 63G-6a-104 has definitions of the other procurement units listed as well.

⁵⁰*Id.* § 63G-6a-105.

⁵¹Procurement means “a procurement unit's acquisition of a procurement item through an expenditure of public funds, or an agreement to expend public funds, including an acquisition through a public-private partnership.” *Id.* § 63G-6a-103(57). “Procurement item” means a supply, a service, or construction. *Id.* § 63G-6a-103(58).

⁵²*Id.* § 63G-6a-108. “(1) A procurement unit with procurement authority under the following provisions has independent procurement authority to the extent of the applicable provisions and for the procurement items specified in the applicable provisions: (a) Title 53B, State System of Higher Education; (b) Title 63A, Chapter 5, State Building Board--Division of Facilities Construction and Management; (c) Title 67, Chapter 5, Attorney General; (d) Title 72, Transportation Code; and (e) Title 78A, Chapter 5, District Court.” *Id.* § 63G-6a-106. Additional exemptions apply for items such as federal monies, gifts, and expenditures for art. *Id.* § 63G-6a-107.

(ii) considers the costs and benefits of the alternative means of obtaining the procurement item;

(b) all conditions for renewal and cost are included in the lease;

(c) the lease is awarded through a standard procurement process, or an exception to a standard procurement process described in Part 8, Exceptions to Procurement Requirements;

(d) for a standard procurement process, the invitation for bids, request for proposals, or request for quotes states:

(i) that the procurement unit is seeking, or willing to consider, a lease; and

(ii) for a lease purchase, that the procurement unit is seeking, or willing to consider, a lease-purchase;

(e) the lease is not used to avoid competition; and

(f) the lease complies to all other provisions of law or rule applicable to the lease.

Lease and lease-purchase contracts are subject to competitive bidding laws applicable to the procurement of supplies.⁵³

A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive bidding or competitive proposals, unless the requirement can be met only by the supply or facility being leased as determined in writing by the procurement officer. Before exercising this option, the procurement officer shall:

(a) investigate alternative means of procuring comparable supplies or facilities; and

(b) compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state of the art data processing equipment compared to the estimated, initial savings associated with exercise of a purchase option.⁵⁴

The Division of Fleet Operations within the Department of Administrative Services manages the procurement of motor vehicles for the state.⁵⁵

The Division of Correctional Industries is exempt from the procurement code in respect to goods and services.⁵⁶

Information Technology

Information technology resources and services for the State executive branch⁵⁷ are consolidated in the Department of Technology Services. The chief information officer is authorized to “negotiate the purchase, lease, or rental of private or public information technology or telecommunication services or facilities” and is required to approve executive branch agency acquisitions of information technology equipment, telecommunications equipment, software, related services, and data acquisition.⁵⁸ “No new

⁵³Utah Admin Code R33-12.

⁵⁴*Id.*

⁵⁵Utah Code Ann. § 63A-9-401.

⁵⁶*Id.* § 64-13-10..

⁵⁷Executive branch” Includes its administrative sub-units, except the State Board of Education, the Board of Regents and institutions of higher education, and elective constitutional offices. Utah Admin. Code R895-5-3.

⁵⁸Utah Code Ann.. § 63F-1-205(1). “Information technology” means all computerized and auxiliary automated information handling, including: (a) systems design and analysis; (b) acquisition, storage, and conversion of data; (c) computer programming;

technology projects may be initiated by an executive branch agency or the department unless the technology project is described in a formal project plan and the business case analysis has been approved by the chief information officer and agency head.”⁵⁹ The chief information officer may delegate authority to make small technology purchases estimated to be less than \$50,000.⁶⁰

Higher Education

The State Board of Regents has control, management and supervision over institutions of higher education,⁶¹ and may “acquire, purchase, construct, improve, remodel, add to, and extend capital facilities projects and buildings including necessary and related utilities” and it may “acquire necessary and suitable equipment, furnishings, and land for institutional projects and buildings” on behalf of institutions.⁶² However, each institution (except the Utah System of Technical Colleges Board of Trustees or a technical college) may do its own purchasing and handle its own financial affairs under the supervision of the board.⁶³ Funding requests for capital facilities and land must be submitted to the legislature as prescribed by the State Building Board.⁶⁴ Institutions of higher education may hold title to any real property, buildings or fixtures,⁶⁵ and may take, hold, lease, sell, and convey real and personal property.⁶⁶ The Board of Regents may purchase or lease facilities with funds not appropriated from the State with payments to be made in installments for a term not to exceed 40 years.⁶⁷ In relation to facilities and real property, the Board of Regents is responsible for establishing written policies and procedures governing leases by institutions of higher education.⁶⁸

The Utah College of Applied Technology has statutory authority to enter into lease-purchase agreements apparently for real property. No similar provisions for other institutions of higher education were found. The statute provides:

(1) In accordance with Subsection 53B-2a-112(2) [duplication of facilities, etc. to be avoided] a college campus may enter into a lease with other higher education institutions, school districts, charter schools, state agencies, or business and industry for a term of:

(a) one year or less with the approval of the campus board of directors; and

(b) more than one year with the approval of the board of trustees and:

(i) the approval of funding for the lease by the Legislature prior to a college campus entering into the lease; or

(d) information storage and retrieval; (e) voice, video, and data communications; (f) requisite systems controls; (g) simulation; and (h) all related interactions between people and machines. *Id.* § 63F-1-102. “Hardware” means physical technology (i.e., equipment) used to process, manage, store, transmit, receive, or deliver information. This term also includes telephony products. Utah Admin. Code R895-5-4.

⁵⁹Utah Code Ann. § 63F-1-205(4).

⁶⁰Utah Admin. Code R895-5-4.

⁶¹Utah Code Ann. § 53B-1-103; *id.* § 53B-1-103. (The State system of education consists of the Utah System of Higher Education and the Utah System of Technical Colleges.)

⁶²*Id.* § 53B-20-103.

⁶³*Id.* § 53B-7-101; Utah Admin. Code R 765-571 (Apr 28, 2015).

⁶⁴Utah Code Ann.. § 53B-7-101(4).

⁶⁵*Id.* § 63A-5-204 (6).

⁶⁶*Id.* § 53B-2-101(2). Institutions within the state system of higher education include: (a) the University of Utah; (b) Utah State University; (c) Weber State University; (d) Southern Utah University; (e) Snow College; (f) Dixie State College of Utah; (g) Utah Valley University; (h) Salt Lake Community College; (i) Bridgerland Technical College; (j) Davis Technical College; (k) Dixie Technical College; (l) Mountainland Technical College; (m) Ogden-Weber Technical College; (n) Southwest Technical College; (o) Tooele Technical College; and (p) Uintah Basin Technical College. *Id.* § 53B-1-102.

⁶⁷*Id.* § 53B-21-108.

⁶⁸*Id.* § 63A-5-305.

(ii) the lease agreement includes language that allows termination of the lease without penalty.

(2) (a) In accordance with Subsection 53B-2a-112(2), a college campus may enter into a lease-purchase agreement if:

(i) there is a long-term benefit to the state;

(ii) the project is included in both the campus and Utah College of Applied Technology master plans;

(iii) the lease-purchase agreement includes language that allows termination of the lease;

(iv) the lease-purchase agreement is approved by the campus board of directors and the board of trustees; and

(v) the lease-purchase agreement is:

(A) reviewed by the Division of Facilities Construction and Management;

(B) reviewed by the State Building Board; and

(C) approved by the Legislature.

(b) An approval under Subsection (2)(a) shall include a recognition of:

(i) all parties, dates, and elements of the agreement;

(ii) the equity or collateral component that creates the benefit; and

(iii) the options dealing with the sale and division of equity.⁶⁹

Purchasing rules for supplies and equipment by individual institutions appear to be based generally on the State Procurement Code, and exhort the use of state contracts. Reference should be made to individual institution's purchasing department policies, rules, regulations (if any) and board of trustee bylaws. For example, The University of Utah discourages equipment leasing and provides the following for leases of real property:⁷⁰

A. Leases of Real Property

1. No lease or rental of real property, including any interest in land, buildings, office space, laboratory space, storage space, or water or mineral rights, may be entered into or will be binding upon the university unless the provisions of this policy and Procedure are satisfied.

2. Any request for leasing, or for the extension or renewal of a lease, of real property for university purposes must be submitted and processed as follows:

a. A written request shall be submitted by the requesting department head, principal investigator, director or other officer through the direct line of administrative authority to the cognizant vice president. This request must include or be accompanied by the following information:

i. A description of the real property proposed to be leased or of its general location and character.

⁶⁹Utah Code Ann. § 53B-2a-113(1), (2).

⁷⁰Univ. Utah Pol'y 3-110A Rev.:8 (February 10, 2011).

- ii. An explanation of the need for such space.
- iii. A detailed factual justification for entering into the lease.
- iv. A statement addressing the adequacies of power supplies, air handling equipment and general physical structure and floor plan. Estimated costs of any modifications or remodeling necessary to meet user needs should also be included, indicating proposed sources of funding for any such modifications or remodeling.
- v. A letter from the director of Space Planning and Management or designee commenting upon and making recommendations relative to the proposed lease and the availability of space in existing facilities to meet the described need in a timely manner.
- vi. A proposed lease agreement (a standard lease form used by landlord may be acceptable) which includes, among other things, the following:

Term of lease

Monthly rental

Responsibility for utilities, maintenance, snow removal, custodial, grounds care, etc.

Parking arrangements

Responsibility for structural and roof maintenance and repairs

Responsibility for insurance of structure, operation and general liability insurance

Responsibility for property taxes, other taxes and assessments, ownership of any improvements made.

b. Upon approval by the cognizant vice president of any lease or extension or renewal of any lease, the cognizant vice president shall forward to the vice president for administrative services for review and evaluation, the following information:

The initial request and other information required under paragraph (a) above.

A letter of approval from the cognizant vice president, including a statement identifying the proposed source of funding for lease costs, if the lease is approved.

c. If the vice president for administrative services, after review and evaluation of the request and supporting justification and documentation, approves the proposed lease, appropriate implementation steps shall be undertaken pursuant to subsection (d) below. If the vice president for administrative services concludes that the proposed lease is not in the best interests of the university, he/she shall discuss the reasons for that conclusion with the vice president who originally approved the request. If the two vice presidents are unable to agree on the disposition of the request, it shall be submitted to the president for decision. The request to lease space must reach the vice president for administrative services at least 30 days before the commencement of the proposed lease term.

d. Any lease duly authorized under subsection (c) above shall be negotiated and executed, under the direction of the vice president for administrative services, in accordance with applicable requirements of the Utah Procurement Code, 1953 Utah Code Annotated sections 63-56-1 et seq., as amended, and implementing university regulations. The lease shall be signed by the vice president for administrative services or designee for and on behalf of the university, and thereafter shall be binding on the university.

e. The vice president for administrative services may prescribe forms and operating instructions relative to leases of real property as may be necessary or appropriate to carry out the purposes of this policy and Procedures statement.

B. Leases of Equipment or Other Types of Property

1. Lease agreements relating to equipment or other types of personal property, and for which the total of all lease payments to be made from university funds during any fiscal year included in whole or in part within the stated term of the lease (exclusive of any extension) does not exceed \$45,000, may be entered into by Procurement & Supply Management (Procurement) on an informal basis pursuant to regular requisition and purchase order Procedures. See Policy 3-191, Section IV.C. Departments other than Procurement are not authorized to enter into such lease agreements.

2. Requests for lease agreements relating to equipment or other types of personal property, and providing for total payments of more than \$45,000 during any fiscal year included in whole or in part within the stated term of the lease, must be submitted and processed as follows:

a. All such requests, together with the written approval of the cognizant vice president, shall be forwarded to Procurement.

b. A written statement must accompany the request, setting forth the following information:

i. The need for the equipment, together with a declaration that after reasonable investigation, the requesting officer has determined that similar equipment, or equipment of equivalent capability, is not currently available for use elsewhere within the university (see Policy 3-045, Equipment Inventory Screening and Requisitioning).

ii. Justification for the proposed lease, including a comparison of lease costs with purchase costs, and stating the estimated interest cost associated with leasing, calculated on a simple interest basis.

iii. Alternate methods of financing, other than leasing, which have been investigated, and the relative merits of such methods.

c. After evaluating the request, the purchasing agent will forward it to the vice president for administrative services, together with his/her comments and recommendations. If the vice president for administrative services concludes that the proposed lease is in the best interests of the university, implementing steps shall be taken pursuant to subsection (d) below. If the vice president for administrative services concludes that the proposed lease is not in the best interests of the university, he/she shall discuss the reasons for that conclusion with the vice president who originally approved the request. If the two vice presidents are unable to agree on the disposition of the request, it shall be submitted to the president for decision.

d. Any lease of equipment or other personal property duly authorized under subsection (c) above shall be negotiated and executed under the direction of the vice president for administrative services, in accordance with applicable requirements of the Utah Procurement Code, 1953 Utah Code Annotated sections 63-56-1 et seq., as amended, and implementing university regulations.

C. General Provisions Relating to Leases

1. All leases for which payments are or may be made, in whole or in part, from funds controlled by the university, including funds derived from federal grants and contracts, shall include the following clause:

2. It is understood and agreed that this agreement does not obligate Lessee to make any payments hereunder except from funds currently available for the purpose, or from time to time appropriated to Lessee by the Utah State Legislature, or allocated by the federal government in the form of grants or contracts for such purpose. This agreement shall not in any way be construed to create a general obligation of the state or

federal government, nor to impose any obligation upon either the state, the federal government or the Lessee not authorized by law.

3. Unless authorized by the vice president for administrative services, or designee, long term (one year or longer) leases to own, or lease purchase plans, are not permitted as substitutes for capital equipment purchases made with general funds provided through regular academic and administrative operating budgets. When funded through federal grants or contracts, an acquisition of capital equipment through a lease purchase plan requires the prior written approval of the funding agency, the vice president for research and the vice president for administrative services.

4. Requests for renewals and extensions of leases that provide for total payments of more than \$45,000 during any fiscal year included in whole or in part within the stated term of the lease shall be submitted and reviewed by the vice president for administrative services in the same manner and under the same standards as original lease requests.

5. The vice president for administrative services shall maintain a complete file of all real property leases entered into by the university. Procurement shall maintain a file of all leases of other property.

6. University operating units other than Procurement are not authorized to enter into leases of real or personal property unless express prior authorization to do so is given in writing by the vice president for administrative services.

Acting as the Policy Owner, the Office of the Director of Procurement & Supply Management is responsible for answering questions and providing information regarding the application of this policy. Acting as the Policy Officer, the Office of the Vice President for Administrative Services has the authority to allow exceptions to this policy.⁷¹

The University of Utah Board of Trustees' approval is required for lease obligations exceeding ten million dollars.⁷²

Utah State University board by-laws are broadly stated. The Vice President for Business and Finance is responsible for executing all property leases, contracts and financial commitments of the University, supervising capital improvements, and acquiring materials in accordance with state statute.⁷³ The university president, vice president and associate vice president for business and finance all have signing authority.⁷⁴ Acquisitions are managed by the purchasing services office which requires the following information for lease-purchases:⁷⁵

All equipment leases or rentals must be supported by a formal purchase order.

All leases or rental contracts must be signed by one authorized to sign lease and rental agreements. Please contact Equipment Management at 435-797-1846 to begin the lease process.

* * *

The following list of information is required for all lease purchases:

Cash price of equipment

⁷¹Univ. Utah Pol'y 3-110. <http://www.regulations.utah.edu/administration/3-110>.

⁷²Univ. Utah Pol'y 3-005 (Sept. 13, 2004).

⁷³Utah St. Univ. Pol'y Manual, No. 104.4 (eff. Jan. 24, 1997, rev. May 28, 2014); <http://www.usu.edu/hr/htm/policies>.

⁷⁴Utah St. Univ. Pol'y Manual, No. 528.

⁷⁵Utah St. Univ. purchasing and contract services office procurement rules and procedures; https://purchasing.usu.edu/procurement_rules_procedures/section_30; see *also* section 29 (leases generally) section 28 (installment payments) (last accessed May, 2018).

Trade in value of old equipment-with USU Inventory number

Down payment, if any

Financing interest rate

Term of financing (number of months/years, etc.)

Amount being financed

Buy out amount at end of agreement

Amortization schedule which shows the beginning balance, payment amount, and the amount of each payment that applies to principal and interest

Copy of lease agreement and Non-appropriation clause

Energy Performance Contracting

The State may enter into a “performance efficiency agreement” for a term of up to 20 years, subject to numerous restrictions.⁷⁶

Debt Limitations

The State, counties, municipalities and school districts are constitutionally limited in the amount of debt that they may incur.⁷⁷

If a county, municipality, or school district sought voter approval for a general obligation bond financing and failed to receive approval, but continues with a lease-purchase financing, notice must be given to local residents pursuant to a detailed statute.⁷⁸

In *Municipal Building Authority v. Lowder*,⁷⁹ the Utah supreme court upheld a county’s lease-purchase of jail facilities authorized by the Municipal Building Authority Act.⁸⁰ The contract allowed the county to terminate the lease at the end of the year without lessor recourse against the county.⁸¹ The court found that the county did not exceed its debt limitation because “the county’s liability is limited to the annual rental installment for the current year.”⁸²

⁷⁶Utah Code Ann. § 63A-5-701(4).

⁷⁷Utah Const. art. XIV, § 1 (State); *id.* § 4 (counties, cities, school districts or other political subdivision of the state). *See also id.* art. XIV, § 3 (requires an election to create debt). In *Bair v. Layton City Corp.*, 307 P.2d 895 (Utah 1957), a contract to furnish disposal of sewage to a city over a fifty-year period, to be paid for periodically as the service was furnished, was held not to create debt for the aggregate amount of the contract, and thus not in violation of constitutional debt limitations. *Id.* at 902. The municipality was not liable to make monthly payments in the event services were not furnished and the contract provided that payments would be made from revenues received by the city for sewer services. *Id.* at 900.

⁷⁸Utah Code Ann. § 11-14a-1.

⁷⁹711 P.2d 273 (Utah 1985). The statute interpreted in this case has been replaced by the similar Local Building Authority Act discussed, *supra*, notes 9-14.

⁸⁰*Id.* at 283.

⁸¹*Id.* at 278.

⁸²*Id.* at 280.

Interest Rate Limitations

“The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money”⁸³

Miscellaneous

Lease-purchase financings may be validated in Utah under the “Utah Bond Validation Act.”⁸⁴

The Utah Supreme Court held that a building authority created pursuant to the Utah Municipal Building Authority Act (§ 17A-3-903) is subject to a corporate franchise tax on its property, rentals, and the bonds and interest thereon issued by the Authority.⁸⁵

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

⁸³Utah Code Ann. § 15-1-1(1).

⁸⁴*Id.* §§ 11-30-1 to -13.

⁸⁵Visitor Information Center Authority of Grand County v. Customer Service Division, Utah State Tax Commission, 930 P.2d 1196 (Utah 1997).

VERMONT 2018 REVISION

The Statutes are current through acts of the Adjourned Session of the 2017-2018 Vermont General Assembly (2018) effective upon passage through April 17, 2018, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties “may acquire and own such lands and rights in lands as . . . are needful for county purposes.”⁴ Counties may lease real estate and “rent or sell and convey unused lands belonging to the county.”⁵ Counties are authorized to “provide and own a suitable courthouse . . . and keep such courthouse suitably furnished and equipped . . .”⁶ “The sheriff’s department shall also be provided with law enforcement equipment . . .”⁷

Municipalities

Municipalities⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,⁹ eminent domain¹⁰ and police powers.¹¹ It appears that municipalities may provide for the acquisition of property in their charters or bylaws.¹²

(a) A municipality, including a fire district, either singly or as a participant in an interlocal contract entered into under sections 4901 and 4902 of this title, may acquire personal property, fixtures, technology and intellectual property by means of leases, lease-purchase agreements, installment sales agreements, and similar agreements wherein payment and performance on the part of the municipality is conditioned expressly upon the annual approval by the municipality of an appropriation sufficient to pay when next due rents, charges, and other payments accruing under such leases and agreements.

(b) The legislative body of the municipality shall enter into leases and agreements identified in subsection (a) of this section on behalf of the municipality and under such terms as it deems to be in the best interest of the municipality.

(c) The undertaking of a municipality to make payments under a lease or agreement identified in subsection (a) of this section shall not be a general or special obligation of the municipality, but shall be treated as a current operating expense. Payments made or to be made under such lease or agreement shall not be taken into account in calculating the debt limit of a municipality for any purpose.¹³

¹Vt. Stat. Ann. tit. 24, § 133.

²*Id.* tit. 24, § 77.

³*Id.* tit. 24, § 290.

⁴*Id.* tit. 24, § 77.

⁵*Id.* tit. 24, § 131.

⁶*Id.* tit. 24 § 71a.

⁷*Id.* tit. 24, § 73.

⁸Municipalities for purposes of this discussion are towns and cities.

⁹*See generally id.* tit. 32, ch. 133.

¹⁰*Id.* tit. 24, § 2805.

¹¹*Id.* tit. 24, § 1931.

¹²*See id.* tit. 24, § 2805. Note also the specific provisions of municipal charters. *See generally*, Vt. Stat. Ann. tit. 24, appendix.

¹³Vt. Stat. Ann. tit. 24, § 1789. *Id.* tit. 24, chap. 53, § 1751, defines “municipal corporation, but not “municipality” for the chapter that includes tit. 24, § 1789. The definition for “municipal corporation” is “a city, town, village, town school district, graded school district or other incorporated, union or unified school district or any entity providing educational services which is eligible to receive state aid under chapter 123 of Title 16, a fire district, a union municipal district created under an intermunicipal agreement entered into and approved as provided in subchapter 3 of chapter 121 of this title, a regional mass transportation authority created under chapter 127 of this title, a local housing authority created under section 4003 of this title, a consolidated water or sewer district, created under chapter 91 or chapter 105 of this title, or the unified towns and gores of Essex County.” Under *id.* tit. 1, chap. 3, § 126, for the construction of statutes, the definition of “municipality” is “a city, town, town school

Municipal corporations may enter into lease-purchase agreements for the construction, operation and maintenance of water systems, with any town, city or village, or any corporation and individuals, not to exceed 40 years or the useful life of the system.¹⁴ Municipal corporations may enter into lease-purchase agreements with the state, the federal government or agency, any town, city or village, or any corporation and individuals for the construction, operation, and maintenance of sewage disposal plants, for a term not to exceed 40 years or the useful life of the plant.¹⁵

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax¹⁶ and eminent domain powers.¹⁷ School districts may “enter into leases of real property for more than three years,” “purchase buildings or sites for school purposes”¹⁸ and may “sell, or otherwise dispose of schoolhouses or sites.”¹⁹ School districts shall provide “text books, learning materials, equipment and supplies.”²⁰

School districts can participate in state contracts.²¹

It appears that school districts would be authorized to enter into lease-purchase agreements under laws applicable to municipalities.²²

Energy performance contracting

Eligible school districts may enter into installment payment contracts or lease-purchase agreements for the installation of cost saving measures for energy conservation, subject to numerous restrictions.²³

Fire Districts

Fire districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁴ and eminent domain powers.²⁵ A fire district may acquire equipment and real estate.²⁶ A fire district may “purchase and hold” apparatus for extinguishing fires and “real and personal estate.”²⁷ Fire districts may lease-purchase personal property.²⁸

district, incorporated school or fire district or incorporated village and all other governmental incorporated units.”

¹⁴*Id.* tit. 24 § 3305. “Municipal corporation” is not defined in chapter 89, Water Works. For a discussion of its definition elsewhere in title 24 *see* note 13.

¹⁵*Id.* tit. 24 § 3611. “Municipal corporation” is not defined in chapter 101, Sewage Disposal System. For a discussion of its definition elsewhere in title 24, *see, supra*, note 13 and accompanying text.

¹⁶*Id.* tit. 16, § 511 (incorporated school districts).

¹⁷*Id.* tit. 16, § 560.

¹⁸*Id.* tit. 16, § 562(7) (requires approval of electorate at a school district meeting).

¹⁹*Id.*

²⁰*Id.* tit. 16, § 563(14).

²¹*Id.* tit. 29 § 905.

²²*Id.* tit. 16, § 551. *See, supra*, note 13 and accompanying text.

²³*Id.* tit. 16, § 3448f; *id.* § 3456.

²⁴*Id.* tit. 20 § 2601

²⁵*Id.* tit. 20 § 2606.

²⁶*Id.* tit. 20 § 2601.

²⁷*Id.* tit. 20 § 2605.

²⁸*See, supra*, note 13 and accompanying text.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

Generally, the commissioner of Buildings and General Services (BGS) supervises and manages matters relating to the construction of state buildings.²⁹ The commissioner is authorized to contract for the construction and equipment of new buildings, unless otherwise provided.³⁰ Construction on properties within the “capitol complex” must be pre-approved by the Capitol Complex Commission.³¹ “The governor may lease any land he or she deems can be used to advantage by the State in connection with any state institution or department.”³² The commissioner of BGS manages and sets up procedures for leasing of real property by state agencies.³³

Generally, the commissioner of the BGS shall contract for and make all purchase of supplies, and equipment for all departments, institutions, and other agencies of the state and counties.³⁴ The commissioner may delegate this authority.³⁵ The commissioner manages the State’s motor vehicle fleet.³⁶ The BGS has delegated blanket authority to all agencies for purchases that are not available under an existing state contract, are not an ongoing need, are not otherwise restricted by statute or administrative bulletin and are less than \$3500.³⁷ BGS statewide contracts must be used by all state government agencies.³⁸ An Equipment Revolving Fund has been established for internal lease purchase of equipment for state agencies.³⁹

No Agency, department or unit of State government is authorized to enter into a Capital Lease without the approval of the Secretary of Administration and the Treasurer. A Contract shall be considered a Capital Lease if it meets *one or more* of the following four criteria: (1) the lease term is greater than 75% of the property’s estimated economic life; (2) the lease contains an option to purchase the property for less than fair market value; (3) ownership of the property is transferred to the lessee at the end of the lease term; (4) the present value of the lease payments equals or exceeds 90% of the fair market value of the property.⁴⁰

Contracts with maximum amounts over \$500,000 must be approved by the Secretary of Administration.⁴¹

Purchase and sales agreements, options, and leases must be signed by heads of organizations within state government.⁴²

²⁹*Id.* tit. 29 § 152.

³⁰*Id.* tit. 29 § 902.

³¹*Id.* tit. 29 § 183.

³²*Id.* tit. 29 § 164.

³³*Id.* tit. 29 § 165. Agency means “every executive agency and the judicial department, every department not within an agency, every board, commission or other entity not attached to an agency or department for administrative purposes, every not-for-profit corporation or entity occupying or using state-owned space, and shall include the offices of the chief justice of the Vermont supreme court, the court administrator’s office, the auditor of accounts, the attorney general, the secretary of state and the state treasurer. “Agency” shall not mean, nor shall this section apply to, an entity not affiliated with the executive or judicial branch of state government and not located in state-owned property, even though the entity may receive state capital funds. This section shall not apply to the Vermont state colleges.” *Id.*

³⁴*Id.* tit. 29 § 902.

³⁵*Id.*

³⁶*Id.*

³⁷<http://bgs.vermont.gov/purchasing/bda>.

³⁸Agency of Admin. Memo (July 1, 2017).

³⁹*Id.* tit. 3 § 2222(j).

⁴⁰Agency of Admin. Bull. 3.5 § VI (C).

⁴¹Agency of Admin. Bull. 3.5 § X.

The Agency of Transportation may purchase or lease land needed for highways.⁴³ Property sought by the agency with an appraised or other estimated value of \$500,000, or above, must be made with the prior approval of the general assembly.⁴⁴

Approvals of the state treasurer and governor may be required:

If a person as defined in section 128 of Title 1,⁴⁵ except a municipality as defined in section 126 of Title 1, pays a majority of its operating expenses, as determined in accordance with generally accepted accounting principles, in any fiscal year with amounts appropriated by the state, either directly or indirectly as a pass-through from a state agency or department, and the person intends to incur any debt in that fiscal year in the cumulative principal amount greater than \$1,000,000.00, including but not limited to debt incurred through the issuance of bonds, notes, bank loans, mortgages, lease-purchase contracts, and capital leases, then the person shall notify and obtain the approval of the state treasurer and the governor prior to incurring the debt. For the purposes of this section, amounts appropriated by the state shall not include nondiscretionary federal funds known as special revenue funds as presented in the state's comprehensive annual financial report.⁴⁶

Information Technology

The secretary of administration and the department of information and innovation must review and approve information technology activities costing in excess of \$500,000.⁴⁷ Independent review is required when the total cost exceeds \$1,000,000.⁴⁸ Agencies have a preference for statewide contracts.⁴⁹

Higher Education

The University of Vermont, governed by a board of trustees, may “hold and convey real and personal estate.”⁵⁰

If a purchase is accompanied by a contract, lease, quote, or purchase agreement that contains narrative provisions governing the terms and conditions of the procurement, the contract must be reviewed and approved prior to execution, as follows:

1. For Contracts, Leases, Quotes, or Purchase Agreements for Goods or Services other than Consulting or Professional Services, equal to or less than five years in length, where the cost of value over contract term is:

⁴²Agency of Admin. Delegation of Authority for Signing Documents Bulletin 3.3 (Eff. July 1, 2002). Organization heads include those officers occupying appointive positions defined in tit. 32 §1003 (b); to include the exempt deputies of agency secretaries and department commissioners, elective officers and their deputies who head operating departments and heads of divisions, boards, committees and commissions not reporting to a department commissioner. *Id.*

⁴³Vt. Stat. Ann. tit. 19 § 26.

⁴⁴*Id.*

⁴⁵The term person “shall include any natural person, corporation, municipality, the state of Vermont or any department, agency or subdivision of the state, and any partnership, unincorporated association or other legal entity.” *Id.* tit. 1 § 128.

⁴⁶*Id.* tit. 32 § 711.

⁴⁷*Id.* tit. 22 § 901. “Information activities” means “(A) the creation, collection, processing, storage, management, transmission, or conversion of electronic data, documents, or records; (B) the design, construction, purchase, installation, maintenance, or operation of systems, including hardware, software, and services that perform or are contracted under Administrative Bulletin 3.5 to perform these activities. *Id.*

⁴⁸*Id.* tit. 3 § 2222(g)(1).

⁴⁹IT Procurement Guidelines (Eff. July 1, 2016; rev'd Dec. 15, 2017).

⁵⁰*Id.* tit. 16, Ch. 75; tit. 16 Appx. 1-1 (education charter) (officially The University of Vermont and State Agricultural College).

- Up to \$50,000: approved by Purchasing Services.
- Between \$50,001 and \$250,000: approved by the University Controller, in addition to Purchasing Services.
- Between \$250,001 and \$500,000: approved by the Vice President for Finance and Treasurer, in addition to all of the above.
- Between \$500,001 and \$1,000,000: approved by the President, in addition to all of the above.

2. For Contracts, Leases, Quotes, or Purchase Agreements for Consulting or Professional Services, equal to or less than five years in length, where the cost or value over contract term is:

- Up to \$50,000: approved by Purchasing Services.
- Between \$50,001 and 250,000: approved by the University Controller, in addition to Purchasing Services.
- \$250,001 and greater: approved by the Vice President for Finance and Treasurer or President, and Board of Trustees, in addition to all of the above.⁵¹

University general counsel provides legal review of contracts.⁵²

The Vermont State Colleges (VSC) may “acquire, hold and dispose of property.”⁵³ VSC is not covered by the state procurement code unless it chooses to opt in to a state contract.⁵⁴ The board of trustees may make bylaws and regulations for each institution under its control⁵⁵ and may control funds for the institutions.⁵⁶ VSC may acquire real estate by purchase or by lease with the approval of the Chancellor or the Chancellor’s designee. Any lease over \$250,000 per year or \$1,000,000 over the life of the lease requires board of trustees’ approval.⁵⁷ Purchase of goods may be made by the Dean of Administration, or designee, at each institution. In addition the VSC Vice President of Finance and Administration, or designee, is responsible for leases, real estate and system-wide contracts, and financing. The Chief Information Officer, or designee, is responsible for system-wide information technology purchases.⁵⁸

Energy Performance Contracting

State agencies and departments are required to incorporate energy efficiency measures into buildings.⁵⁹ Capital requests to the general assembly must include proposed financing mechanisms for energy efficiency measures.⁶⁰ The Commissioner of Buildings and General Services may enter into multiyear contracts for energy cost savings.⁶¹

Debt Limitations

There are no constitutional debt limitations. Statutory limitations are imposed on the amount of debt that municipal corporations may incur.⁶² No cases construing debt limitations and lease-purchases by a governmental unit were found.

⁵¹*Id.* Real property leases are exempt from these provisions.

⁵²*Id.*

⁵³Vt. Stat. Ann. tit. 16 § 2171. The Vermont State Colleges is a public corporation owning Castleton, Johnson, and Lyndon teachers colleges and the Vermont Agricultural and Technical Institute. *Id.*

⁵⁴*Id.* tit. 16 § 2179.

⁵⁵*Id.* tit. 16 § 2174.

⁵⁶*Id.* tit. 16 § 2177.

⁵⁷VSC Pol’y No. 426 (05/26/16). Capital construction is covered by VSC Pol’y No. 428 (05/26/16).

⁵⁸VSC Pol’y No. 429 (05/26/16).

⁵⁹Vt. Stat. Ann. tit. 3 § 2291.

⁶⁰*Id.*

⁶¹*Id.* tit. 29 § 152(a)(27).

⁶²*Id.* tit. 24, § 1762 “Municipal corporations” includes cities, towns, villages, town school districts, graded school districts

In *Conn v. Middlebury Union High School District*,⁶³ the Vermont Supreme Court, although not mentioning lease-purchase financings specifically, applied a Dillon's Rule analysis of school district powers in finding that the school district lacked implicit authority to borrow for longer than one year without observing formal bonding procedures. The court held that a statute recognizing an existing power to borrow money with voter approval was not a specific grant of authority to borrow, nor was such power necessarily implied.⁶⁴

Interest Rate Limitations

The legal rate of interest is generally 12 percent per annum computed by the actuarial method.⁶⁵ However, "obligations of corporations, including municipal and nonprofit corporations" are excluded from this requirement.⁶⁶

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

or other incorporated, union or unified school districts or any entity providing educational services which are eligible to receive specified state aid and fire districts. *Id.* tit. 24, § 1751.

⁶³648 A. 2d. 1385 (1995).

⁶⁴*Id.*

⁶⁵Vt. Stat. Ann. tit. 9, § 41a(a).

⁶⁶*Id.* tit. 9, § 46(1).

VIRGINIA 2017

Through the end of the 2016 Reg. Session, Westlaw¹

Counties

Counties¹ qualify as tax-exempt issuers for purposes of federal income tax purposes due to their tax,² eminent domain³ and police powers.⁴

A locality may acquire by purchase, gift, devise, bequest, exchange, lease as lessee, or otherwise, title to, or any interests in, any real property, whether improved or unimproved, within its jurisdiction, for any public use. Acquisition of any interest in real property by condemnation is governed by Chapter 19 (§§ 15.2-1901 et. seq.). The acquisition of a leasehold or other interest in a telecommunications tower, owned by a nongovernmental source, for the operation of a locality's wireless radio communications systems shall be governed by this chapter.

Subject to any applicable requirements of Article VII, Section 9 of the Constitution, any locality may sell, at public or private sale, exchange, lease as lessor, mortgage, pledge, subordinate interest in or otherwise dispose of its real property . . . provided that no such real property, whether improved or unimproved, shall be disposed of until the governing body has held a public hearing concerning such disposal. However, the holding of a public hearing shall not apply to (i) the leasing of real property to another public body, political subdivision or authority of the Commonwealth or (ii) conveyance of site development easements across public property.⁵

A city or town may also acquire real property for a public use outside its boundaries; a county may acquire real property for a public use outside its boundaries when expressly authorized by law.

A locality may construct, insure and equip buildings, structures and other improvements on real property owned or leased by it.

A locality may operate, maintain and regulate the use of its real property or may contract with other persons to do so.⁶

Counties having adopted a county manager plan of government may

(i) sell, at public or private sale, or exchange, lease (as lessor or lessee), mortgage, pledge, subordinate its interest in, or otherwise dispose of the real property, which includes the superjacent airspace, except airspace provided for in § 15.2-2030, which may be subdivided and conveyed separate from the subjacent land surface, of the county; and (ii) purchase any real estate as may be necessary for the erection of all necessary county buildings. However, no such land shall be disposed of unless and until the governing body has held a public hearing concerning such disposal.

The board may acquire by purchase, gift, devise, bequest, grant, lease, or otherwise title to, or any interests or rights of less than fee-simple title in, any real property within its jurisdiction, for any public purposes.⁷

¹The General Assembly may provide optional forms of government for counties, cities, and towns. Approval by a majority vote of the qualified electors is required. Va. Const. art VII, § 2. A county may adopt one of the optional forms of government (county board form of government, county executive form, county manager form, or county manager plan), but subject to certain limitations, and after voter approval. Va. Code § 15.2-300. Each county board has all the rights and powers conferred on boards of supervisors by general law which are consistent with the particular form of government. *Id.* § 15.2-403.A (county board form); *id.* § 15.2-504 (county executive form); and *id.* § 15.2-604 (county manager form). The provisions of tit. 15.2, Chapter 7 apply only to counties with the county manager plan of government.

²*Id.* § 58.1-3001.

³*Id.* § 15.2-1901.

⁴*Id.* § 15.2-1200.

⁵*Id.* § 15.2-1800.A and .B. "Locality" is defined to include a county, city, or town. *Id.* § 15.2-102. See *County Bd. Of Arlington County v. Brown*, 329 S.E.2d 468 (Va. 1985) concerning an interpretation of a prior law relating to the authority to enter into a ground lease.

⁶Va. Code § 15.2-1800.C, D, and E.

⁷*Id.* § 15.2-734.

....

Localities, for the purposes of exercising any of their powers and duties and performing any of their functions, may acquire by gift, bequest, purchase, lease, or installment purchase contract; and may own and make use of and may grant security interests in, sell and otherwise dispose of, within and outside the localities, personal property, including any interest, right or estate therein.⁸

Counties may participate in statewide agreements for the purchase of “computer, software, supplies and related peripheral equipment and services.”⁹

Counties may enter into conduit financing transactions for revenue producing project as follows:

In addition to other powers granted by law, every local government¹⁰ may, by ordinance, enter into a financing agreement as described in this section and may as part of that financing agreement (i) convey title to any property that is part of a project as defined in this chapter to a conduit or other entity in exchange for consideration provided for under the financing agreement; (ii) assign, pledge to, and create a lien in favor of a conduit or other entity, and permit the conduit or other entity to reassign, pledge to, and create a lien in favor of a private capital funding source, any revenues derived from the project being financed as provided for under the financing agreement; (iii) enter into a lease-leaseback arrangement for a term not to exceed 99 years, under which the private capital funding source will lease from the conduit or other entity, and the conduit or other entity shall lease back from the private capital funding source, the conveyed project. In addition, the conduit or other entity has the power to contribute to the local government any funds received by it in excess of the payments it is required to make to the private capital funding source under the lease-leaseback arrangement and has the power to convey the conveyed property back to the local government when the property is no longer encumbered by any lien or lease in favor of the funding source. The local government and the conduit or other entity may enter into agreements or contracts under which the local government may maintain or administer the conveyed property under the project or may collect rents or fees on behalf of the conduit or other entity. The parties may modify or extend the financing agreement subject to approval by the local government. The local government may enter into a financing agreement under this section either through a competitive selection process or by direct negotiations with a private capital funding source, as determined by the local government or as otherwise provided by law.¹¹

Energy Performance Contracting

Subject to numerous restrictions, counties may enter into an energy performance contract, the term of which “shall expire at the end of each fiscal year” and include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational savings measures.¹² The contract may also provide for energy conservation and facility and technology infrastructure upgrades that cannot be totally funded by energy and operational savings.¹³

⁸*Id.* § 15.2-951.

⁹*Id.* § 2.2-1102 (applies to cities and towns also).

¹⁰““Locality” or “local government” shall be construed to mean a county, city, or town as the context may require.” *Id.* § 15.2-102.

¹¹*Id.* § 15.2-1816. Definitions are provided in *id.* § 15.2-1815. Such conveyed property under a project is subject to real property taxation. *Id.* § 15.2-1817.

¹²*Id.* §§ 11-34.1 to -34.4 (2011). The provisions do not apply to new construction.

¹³*Id.* § 11-34.3.

Municipalities

Municipalities¹⁴ may qualify as tax-exempt issuers for federal income tax purposes due to their tax,¹⁵ eminent domain,¹⁶ and police powers.¹⁷

Municipalities have the same power as counties with respect to the acquisition (including the authority to lease as lessee) of improved or unimproved real property.¹⁸ A city or town may acquire real property for a public use outside its boundaries.¹⁹

A Municipality

shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power. The exercise of the powers conferred under this section is specifically limited to the area within the corporate limits of the municipality, unless otherwise conferred in the applicable sections of the Constitution and general laws, as amended, of the Commonwealth.²⁰

Municipalities may participate in statewide agreements for the purchase of “computer, software, supplies and related peripheral equipment and services.”²¹

Municipalities may enter into conduit financing transactions for revenue producing project under the same statutes as counties.²²

Energy Performance Contracting

Subject to numerous restrictions, municipalities may enter into an energy performance contract, the term of which “shall expire at the end of each fiscal year” and include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational savings measures.²³ The contract may also provide for energy conservation and facility and technology infrastructure upgrades that cannot be totally funded by energy and operational savings.²⁴

¹⁴Municipalities include cities and towns. Va. Code § 15.2-102.

¹⁵*Id.* § 15.2-1104.

¹⁶*Id.* § 15.2-1901.

¹⁷*See generally Id.* art. 15.2, ch. 11.

¹⁸*See, supra*, note 5.

¹⁹Va. Code § 15.2-1800.C.

²⁰*Id.* § 15.2-1102.

²¹*Id.* § 2.2-1102 (applies to counties also).

²²*See, supra*, notes 10-11 and accompanying text.

²³Va. Code §§ 11-34.1 to -34.4. The provisions do not apply to new construction.

²⁴*Id.* § 11-34.3.

School Districts

School districts²⁵ qualify as tax-exempt issuers for federal income tax purposes due to their tax²⁶ and eminent domain powers.²⁷ School districts may “. . . purchase, take, hold, lease and convey school property, both real and personal.”²⁸ School boards shall “. . . (c)are for, manage and control the property of the school division and provide for the erecting, furnishing, equipping and noninstructional operating of necessary school buildings and appurtenances and the maintenance thereof by purchase, lease, or other contracts.”²⁹

A school board shall have the power to exchange real and personal property, to lease real and personal property either as lessor or lessee, to grant easements on real property, to convey real property in trust to secure loans, to convey real property to adjust the boundaries of the property and to sell personal property in such manner and upon such terms as it deems proper. As lessee of real property, a school board shall have the power to expend funds for capital repairs and improvements on such property, provided that the lease is for a term equal to or longer than the useful life of such repairs or improvements.³⁰

Whenever a school board determines that it has no use for some of its real property, the school board may sell such property . . . or may convey the title to such real property to the county or city or town comprising the school division or, if the school division is composed of more than one county or city, to the county or city in which the property is located. To convey the title, the school board shall adopt a resolution that such real property is surplus and shall record such resolution along with the deed to the property with the clerk of the circuit court for the county or city where such property is located. Upon the recording of the resolution and the deed, the title shall vest in the appropriate county, city or town.³¹

Energy Performance Contracting

Subject to numerous restrictions, school districts may enter into an energy performance contract, the term of which “shall expire at the end of each fiscal year” and include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational savings measures.³² The contract may also provide for energy conservation and facility and technology infrastructure upgrades that cannot be totally funded by energy and operational savings.³³

Fire Districts

Fire districts do not appear to have requisite sovereign powers to qualify as tax-exempt entities under federal tax law.³⁴

Hospital Authorities

Hospital authorities³⁵ qualify as tax-exempt issuers for federal income tax purposes due to their eminent domain powers.³⁶ Hospital authorities have the power “to purchase, lease, obtain options upon,

²⁵School districts as used for purposes of this discussion are school boards. *Id.* § 22.1-28.

²⁶Va. Code § 22.1-95 (duty of county and municipality to tax for school district). *See also id.* § 22.1-97 (mandamus provided for enforcing appropriation).

²⁷*Id.* § 22.1-127.

²⁸*Id.* § 22.1-71.

²⁹*Id.* § 22.1-79.

³⁰*Id.* § 22.1-129.B.

³¹*Id.* § 22.1-129.A.

³²*Id.* §§ 11-34.1 to -34.4. The provisions do not apply to new construction.

³³*Id.* § 11-34.3.

³⁴*Id.* § 27-23.1.

³⁵Hospital authorities are political subdivisions of the Commonwealth located in each city. *Id.* § 15.2-5302.

³⁶*Id.* § 15.2-5343.

acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, locality or government.”³⁷ Hospital authorities may “take over” by purchase or lease “any hospital project located within its boundaries undertaken by any government or by any city.”³⁸

Energy Performance Contracting

Subject to numerous restrictions, authorities may enter into an energy performance contract, the term of which “shall expire at the end of each fiscal year” and include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational savings measures.³⁹ The contract may also provide for energy conservation and facility and technology infrastructure upgrades that cannot be totally funded by energy and operational savings.⁴⁰

State Entities

Real Property

The Department of General Services (DGS) Division of Engineering and Buildings is required to establish performance standards for the acquisition, lease and disposition of property⁴¹ and is responsible for the construction or lease of office buildings for state agencies, departments and institutions throughout the state.⁴² Generally, any acquisition of real property by lease or purchase sought by any department, agency or institution shall comply with guidelines established by the DGS; the DGS will review proposed acquisitions and recommend approval or disapproval of the transaction(s) to the Governor.⁴³ The DGS Division of Engineering and Building shall be responsible for buildings in the Capitol Square area of Richmond, subject to approval by the Governor.⁴⁴ Agency and public institution projects may be completed pursuant to a six-year capital outlay plan enacted into law after approval by the Director of DGS and Director of the Department of Planning and Budget.⁴⁵ Public agencies of the State have the power of eminent domain.⁴⁶

³⁷*Id.* § 15.2-5337.

³⁸*Id.* § 15.2-5334.

³⁹*Id.* §§ 11-34.1 to -34.4. The provisions do not apply to new construction.

⁴⁰*Id.* § 11-34.3.

⁴¹*Id.* § 2.2-1131.1. Property means “an interest in land and any improvements thereon held by the Commonwealth and under the control of or occupied by any of its departments, agencies or institutions, but shall not include (i) real estate or rights-of-way acquired by the Department of Transportation for the construction of highways and (ii) ungranted shores of the sea, marsh and meadowlands.” *Id.* (citing § 2.2-1147). The Commonwealth of Virginia Construction and Professional Services Manual (CPSM) sets forth the standards, policies, terms, conditions, and procedures to be followed by Commonwealth of Virginia agencies and institutions in procuring professional design and construction services.

<http://www.dgs.virginia.gov/DivisionofEngineeringandBuildings/BCOM/CPSM/201>

⁴²Va. Code § 2.2-1137.

⁴³*Id.* § 2.2-1149. The acquisition of real property by the Department of Transportation for offices or correctional facilities is subject to review by the DGS and approval by the Governor; acquisition of real property for highways and transportation facilities is not. *Id.* Certain capital leases by public institutions of higher education for real property are also exempted. *See infra* notes 97-98 and accompanying text.

⁴⁴Va. Code § 2.2-1138.

⁴⁵*Id.* § 2.2-1519. Capital outlay project “means acquisition of real property, including buildings or plant or machinery or equipment, or new construction or improvements related to state-owned real property, buildings, plant, or machinery or equipment including plans therefor. It shall include any improvements to real property leased for use by a state agency or public educational institution and not owned by the Commonwealth, when such improvements are financed by public funds and become state property upon the expiration of the lease. Capital outlay projects do not include projects that have been included in the Commonwealth Transportation Board’s Six-Year Improvement Program.” *Id.* § 2.2-1515.

⁴⁶Va. Const. Art. I § 11; Va. Code . § 1-219.1.

Personal Property

Generally, the purchasing of equipment and supplies, except telecommunications and information technology goods and services, by every using agency⁴⁷ is made through the Division of Purchases and Supply (DPS)⁴⁸ and shall comply with provisions of the Virginia Public Procurement Act, Sections 2.2-4300 et seq.⁴⁹ Equipment and supplies needed by the Commonwealth Transportation Board, except office equipment, may be procured directly by the board.⁵⁰

Both construction⁵¹ and the purchase or lease of goods⁵² are subject to competitive bidding or competitive negotiation under the Virginia Public Procurement Act.⁵³ Small purchase procedures have been established by DGS/DPS for use by state agencies and institutions when acquiring supplies and equipment, up to \$100,000, excluding information technology and telecommunications goods and services.⁵⁴ A table of DGS/DPS delegated purchasing authority for various agencies is posted on the DGS website.⁵⁵

The Agency Procurement and Surplus Property Manual provides the following regarding leases and installment contracts for goods:

a. Rental or Lease. The procurement process for the rental or lease of any equipment will be handled in the same manner as the procurement of goods. Note, however, that hiring a contractor to provide equipment and personnel (operators) to perform a task is a contractual service subject to the guidance in 4.21 and 4.22. The following examples are offered to clarify the difference:

(1) Renting a bulldozer to be operated by state employees to perform grading work is an acquisition of goods. Hiring a contractor to use his bulldozer and operator to perform the same grading work is a contractual service.

(2) Renting 1,000 folding chairs to be picked up by state employees in state vehicles at the contractor's place of business, used and returned is an acquisition of goods. Hiring a contractor to deliver, setup, remove, and haul away the same 1,000 folding chairs is a labor intensive contractual service. The solicitation should, at a minimum, in addition to other terms and conditions, specify:

(1) Length of time;

(2) Number and types of equipment;

(3) Who will provide maintenance and repair service and insurance coverage; and

⁴⁷Using agency means "every authority, department, division, institution, officer, agency, and other unit of state government." Va. Code § 2.2-1110. The judicial and legislative branches agencies are exempt from administrative rule and have unlimited delegation of purchasing authority. *Id.* § 2.2-1111(C); Agency Proc. And Surplus Prty Man. 1.4 (Sept. 1998, updated July 9, 2012).

⁴⁸Va. Code § 2.2-1110. The Virginia Retirement System is exempted from the requirement of this provision. Information technology and telecommunications are procured pursuant to section 2.2-2012.

⁴⁹*Id.* § 2.2-1111.

⁵⁰*Id.* § 2.2-1119.

⁵¹Construction means "building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property. *Id.* § 2.2-4301.

⁵²Goods means "means all material, equipment, supplies, printing, and automated data processing hardware and software." *Id.*

⁵³*Id.* § 2.2-4303. Rules and regulations concerning procurement are published in the Agency Procurement and Surplus Property Manual (eff. Sept. 1998, updated to July 6, 2015); the Vendors Manual (Dec. 2015); Construction and Personal Services Manual (available on the eVa procurement website. <http://www.eva.virginia.gov>); and the IT Procurement Manual: BUY IT (available at www.vita.virginia.gov).

⁵⁴Va. Code § 2.2-4303(G).

⁵⁵*Id.* § 2.2-1120 (authority to delegate and provide exemptions); <http://www.eva.state.va.us/dps/Buyers/docs/purdela.htm>.

(4) Inspection at time of delivery and return.

b. Installment Purchase. The procurement process for the installment purchase of any materials, equipment or supplies must be handled in the same manner as the procurement of goods. A purchase order is issued in the full amount but only encumbering the amount to be paid in the current fiscal year. The solicitation should contain an Availability of Funds provision (see Appendix B, Section I). If the purchase is being financed by a third party, the purchase order must name both the vendor and the third party, and use the third party's address.

Installment purchases must also be made in accordance with the CAPP Manual, which gives a detailed discussion of the types and classification of leases and installment purchases. All solicitations for purchase of personal property, including personal property to be fixed to realty which provides for installment purchase where payment of purchase price is deferred through installment payments, includes the payment of interest, or is otherwise financed by the seller, lessor, or third parties shall have prior approval of the Treasury Board. Contact the Director of Debt Management, Department of the Treasury at 804-371-0341 (Code of Virginia, § 2.2-2417).⁵⁶

The Treasury Board approves the financial terms of lease-purchases for state agencies.⁵⁷ It coordinates leasing activity by agencies through a Master Equipment Leasing Program (MELP) or VA Energy Leasing Program (VELP), which agencies are not required to use if the alternative financing arrangement, involving a minimum amount of \$10,000, is first approved by the Treasury Board.⁵⁸

The Virginia Public Building Authority finances projects relating to major information technology projects in excess of \$1 million and buildings and capital projects authorized by the general assembly.⁵⁹

Motor Vehicles

All purchases and leases of motor vehicles with public funds, except those acquired by the Department of Transportation are subject to prior approval by the Director of DGS.⁶⁰ Institutions of higher education are also exempt by rule.⁶¹ The Governor is required to approve purchase of passenger vehicles for the state.⁶²

Information Technology

The Virginia Information Technologies Agency (VITA) oversees the procurement of information technology goods and services and telecommunications equipment by state agencies not specifically exempted from VITA's authority.⁶³ The Chief Information Officer (CIO) is authorized to acquire, lease, or construct such land, facilities, and equipment as necessary to deliver comprehensive information

⁵⁶Agcy Proc. & Surplus Prty. Man. § 4.18.

⁵⁷Va. Code § 2.2-2417.

⁵⁸Details are provided at the Treasury Board website.

<http://www.trs.virginia.gov/documents/debt/MELP/MELP%20Description.pdf> (last updated Feb. 1.2012). Guidelines published by the Treasury Board do not have the force and effect of law. <http://www.trs.virginia.gov/Debt/MELP%20Guides.aspx>.

⁵⁹Va. Code § 2.2-2261.

⁶⁰*Id.* § 2.2-1176.

⁶¹Agcy Proc. & Surplus Prty Man. § 2.1(h).

⁶²Va. Code § 2.2-121.

⁶³*Id.* § 2.2-2005; § 2.2-2012. Exemptions include certain institutions of higher education operating under a management agreement. *Id.* §23.1-1002. Information technology means "communications, telecommunications, automated data processing, applications, databases, data networks, the Internet, management information systems, and related information, equipment, goods, and services. *Id.* § 2.2-2006 (However, printers and copiers may be within delegated authority for acquisition through the electronic procurement system eVA. IT Procurement Policy Manual: Buy IT, Ch. 1 (2012). Other exceptions apply.); State agency means "any agency, institution, board, bureau, commission, council, public institution of higher education, or instrumentality of state government in the executive branch listed in the appropriation act. However, the terms 'state agency,' 'agency,' 'institution,' 'public body,' and 'public institution of higher education,' shall not include the University of Virginia Medical Center." Va. Code § 2.2-2006. The judicial and legislative branches and independent agencies are not subject to VITA's procurement authority.

technology services.⁶⁴ The CIO is authorized to enter into contracts and is responsible for reviewing budget requests for data processing or related projects for an amount exceeding

\$250,000 for which the contract or proposed contract would, as a means of payment for the project, require the Commonwealth to forgo certain revenue collections or would allow another party to collect fees, charges, or other revenues on behalf of the Commonwealth. For each information technology project, the agency shall provide the CIO (i) a summary of the terms, (ii) the anticipated duration, and (iii) the cost or charges to any user, whether a state agency or other party not directly a party to the project arrangements. The description shall also include any terms or conditions that bind the Commonwealth or restrict the Commonwealth's operations and the methods of procurement employed to reach such terms.⁶⁵

Projects with an estimated cost of less than \$1 million will be reviewed by the Division of Project Management and may be subject to disapproval by the CIO.⁶⁶ Major information technology projects⁶⁷ or projects considered to have high risk and high complexity may be subject to review and approval by the CIO and the Secretary of Technology.⁶⁸ The division has authority to delegate direct procurement authority to individual agencies.⁶⁹ VITA is authorized to enter into statewide contracts for communications services, telecommunications facilities, and information technology goods and services and must make such contracts available for participation by counties, cities, and towns.⁷⁰ Use of statewide contracts is required. Agencies generally have delegated authority to make small purchases (those whose aggregate of all phases of procurement is not expected to exceed \$100,000) if the goods are “out of scope” of VITA.⁷¹

Higher Education

Generally, individual institutions of higher education are governed by boards of visitors that have been granted general authority over their respective colleges and universities. The boards of visitors of each baccalaureate public institution of higher education or its designee may make regulations and policies and manage the funds of the institution.⁷² Individual institutions may or may not adopt policies authorized but not mandated by legislation. Institutions have been granted the powers of corporations under Title 13.1, which include the power to “purchase . . . lease, or otherwise acquire real or personal property.”⁷³ It is not clear whether institutions of higher education are public agencies of the State for purposes of eminent domain.⁷⁴

Where not otherwise exempted, institutions of higher education may be subject to the Virginia Procurement Code⁷⁵ and oversight of the Department of General Services and other appropriate agencies in a manner like other state entities.

⁶⁴*Id.* § 2.2-2011.

⁶⁵*Id.* § 2.2-2007.

⁶⁶*Id.* § 2.2-2017; § 2.2-2018.1.

⁶⁷Major information technology project means “any Commonwealth information technology project that has a total estimated cost of more than \$1 million or that has been designated a major information technology project by the CIO pursuant to § 2.2-2016.1.” *Id.* § 2.2-2006.

⁶⁸*Id.* § 2.2-225 (duties of secretary); § 2.2-2018.1 (Division of Project Management).

⁶⁹*Id.* § 2.2-1120.

⁷⁰*Id.* § 2.2-2012; § 2.2-1102. Counties, cities, and towns and local school divisions are authorized “to purchase information technology goods and services of every description from VITA and its vendors, provided that such purchases are not prohibited by the terms of the contracts for such goods and services.” *Id.* § 2.2-2012(c).

⁷¹IT Procurement Manual: BUY IT § 1.3. A list of in scope services may be found online. <http://www.vita.virginia.gov/scm/default.aspx?id=85>.

Once at this site, select “VITA’s IT Goods and Service List (Infrastructure/Non-Infrastructure).”

⁷²Va. Code § 23.1-1301.

⁷³*Id.* §§ 13.1-826 (powers of nonstock corporations); see generally title 23.1, subtitle IV, Public Institutions of Higher Education.

⁷⁴*Id.* § 1-219.1 .

⁷⁵*Id.* § 2.2-4343.

All institutions are authorized to “acquire” real or personal property under the broadly stated powers granted in Title 23.1, Chapter 11 relating to “bonds and other obligations,” subject to approval by the governor.⁷⁶

Leases, lease-purchases and other financing arrangements involving state funds are generally subject to approval of the Treasury Board.⁷⁷

However, a public institution of higher education may seek coverage by the Restructured Higher Education Financial and Administrative Operations Act, Title 23.1, Chapter 10. This act provides covered institutions increased authority with less oversight or regulation by other governmental agencies and bears on the authority of institutions to enter into capital leases and to procure equipment, including technology, by “deferred purchase financing arrangements.”⁷⁸

In addition to those powers granted in each covered institution's enabling statutes and the general appropriation act, each covered institution, subject to the express provisions of the management agreement, may exercise all the powers necessary or convenient to carry out the purposes and provisions of this article and:

1. Make and execute contracts, guarantees, or any other instruments and agreements necessary or convenient to the exercise of its powers, authority, and functions, . . . provided, however, that no covered institution may pledge the faith and credit of the Commonwealth . . .⁷⁹

Covered institutions may “acquire, . . . equip, and maintain . . . any project.”⁸⁰

It appears that institutions have been classified into one of three levels of authority.⁸¹ However, it is a complicated act and a discussion of it and its full application to particular institutions is beyond the scope of this survey.

⁷⁶*Id.* §§ 23.1-1103; 23.1-1104.

⁷⁷*Id.* § 2.2-2416.

⁷⁸*Id.* § 23.1-1000. ““Covered institution” means a public institution of higher education that has entered into a management agreement with the Commonwealth to be governed by the provisions of Article 4 (§ 23.1-1004 et seq.)” *Id.*

⁷⁹*Id.* § 23.1-1008.

⁸⁰*Id.* § 23.1-1009. ““Project” means (i) any research program, research facility, or educational facility of a covered institution or equipment necessary or convenient to or consistent with the purposes of such institution, whether or not owned by the institution, including (a) research, training, teaching, dormitory, and classroom facilities and all related and supporting facilities and equipment necessary or desirable in connection with such facilities or incidental to such facilities; (b) office, parking, kitchen, laundry, laboratory, wellness, pharmaceutical, administrative, communications, computer, and recreational and athletics facilities; (c) hotels and related facilities; (d) power plants and equipment; (e) storage space; (f) hospitals; (g) nursing homes; (h) continuing care facilities; (i) self-care facilities; (j) health maintenance centers; (k) medical office facilities; (l) clinics; (m) outpatient clinics; (n) surgical centers; (o) alcohol, substance abuse, and drug treatment centers; (p) sanitariums; (q) hospices; (r) facilities for the residence or care of the elderly, handicapped, or chronically ill; (s) residential facilities for nurses, interns, and physicians; (t) other facilities for the treatment of sick, disturbed, or infirm individuals, the prevention of disease, or the maintenance of health; (u) colleges, schools, or divisions offering undergraduate, graduate, professional, or extension programs, or any combination of such programs, for such courses of study as may be appropriate; (v) vehicles, mobile medical facilities, and other transportation equipment; and (w) air transport equipment, including equipment necessary or desirable for the transportation of medical equipment, medical personnel, or patients; and (ii) all lands, buildings, improvements, approaches, and appurtenances necessary or desirable in connection with or incidental to any such program, facility, or equipment.” *Id.* § 23.1-1000.

⁸¹Level I institutions have minimal operational authority. It appears all institutions entered Level I authority in 2005. Level II institutions have increased autonomy and are called “memoranda of understanding” institutions. (The Virginia Community College System apparently entered into a memorandum of understanding for information technology and capital outlay.) Level III institutions have the greatest autonomy: Management Agreements have been established between the Commonwealth and Virginia Polytechnic Institute and State University, The College of William and Mary in Virginia, and the University of Virginia. Chapter 933 [H1502](approved May 18, 2006); 2008 Management Agreement Between the Commonwealth of Virginia and Virginia Commonwealth University Chapter 594 (H1124)(Approved March 12, 2008). For an overview go to the Council on Higher Education website <http://www.schev.edu/Restructuring/restructuring.asp>. For additional institutions *see, infra*, note 82.

Covered institutions⁸² operating under management agreements are exempt from the Virginia Public Procurement Act.⁸³ It appears that such covered institutions have adopted uniform rules and regulations governing the procurement of goods and of construction for leases or installment purchases valued over \$50,000.⁸⁴ These are published by the Virginia Association of State College & University Purchasing Professionals (VASCUPP), under the title *Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and their Vendors*.⁸⁵ The manual says that the rental, lease, or installment purchase of goods or equipment, is handled in the same manner as the purchase of goods.⁸⁶ Purchases valued at \$50,000 or less are covered by procedures developed by individual institutions.⁸⁷ Institutional procurements of information technology and telecommunications goods and services are exempt from review and approval by the Chief Information Officer, and federal General Services Administration contracts may be used.⁸⁸ The use of term contract sources is preferred but not mandatory.⁸⁹ Purchases of at a cost of \$50,000 or over are subject to competitive sealed bidding or negotiations.⁹⁰ Records of persons authorized to sign contracts are kept on file in each institution's purchasing department.⁹¹ Pursuant to the purchasing manual, capital outlay projects related to "property, plant or equipment are governed by the rules of the *Construction and Professional Services Manual* (CPSPM), issued by the DGS, Division of Engineering and Buildings or other policies authorized by legislation and adopted by an institution."⁹² Construction projects under \$1 million "not specifically identified as professional services may be procured under methods of procurement for Goods and Services."⁹³

In regard to the acquisition of property the Restructured Higher Education Financial and Administrative Operations Act provides:

C. After the effective date of the initial management agreement, a covered institution may acquire any real property, construct improvements on real property pursuant to § 23.1-1016, and acquire any personal property, tangible or intangible, and hold, possess, operate, and dispose of such real and personal property as follows:

1. For real property, including land, buildings, and improvements to land and buildings, acquired or constructed with funds appropriated by the General Assembly for that purpose or with proceeds from a general obligation bond issue under Article X, Section 9 (a) or 9 (b) of the Constitution of Virginia, the covered institution shall (i) hold, possess, and operate such property in accordance with the institution's enabling statutes, this article, and any policies adopted by the governing board of the institution pursuant to this article, and (ii) dispose of such property in accordance with general law applicable to state-owned property and with the covered institution's enabling statutes.

2. For real property, including land, buildings, and improvements to land or buildings, acquired with any funds in the covered institution's possession other than funds appropriated by the General Assembly or proceeds from a general obligation bond issue under Article X, Section 9 (a) or 9 (b) of the Constitution of Virginia, the institution shall hold, possess, operate, dispose of, and otherwise deal with such property, or any right, easement, estate, or interest in such property, acquired by purchase, exchange, gift, assignment, transfer,

⁸²The member institutions of VASCUPP operating under Management Agreements are George Mason University, James Madison University, Longwood University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth Univ., Virginia Military Inst., Virginia Tech, and The College of William & Mary. <https://vascupp.org/>. Purchasing Manual for Inst. of Higher Ed. & their Vendors (Rev. May 2016). These are sometimes referred to as Level III institutions.

⁸³Va. Code §2.2-4300 et seq.

⁸⁴*Id.*; *Id.* § 23.1-1017; Purchasing Manual for Inst. of Higher Ed. & their Vendors (Rev. May 2016) §§ 2, 8.

⁸⁵Available and maintained by VASCUPP at <https://vascupp.org/>. Purchasing Manual for Inst. of Higher Ed. & their Vendors.

⁸⁶*Id.* § 8(H). Goods means "material, equipment, supplies, printing, and automated data processing hardware and software." *Id.* p.44.

⁸⁷<http://www.vascupp.org/>; Purchasing Manual for Inst. of Higher Ed. & their Vendors § 2.

⁸⁸Purchasing Manual for Inst. of Higher Ed. & their Vendors *l.* § 8(A); Va. Code § 23.1-1002; § 23.1-1018.

⁸⁹Purchasing Manual for Inst. of Higher Ed. & their Vendors, § 6(F).

⁹⁰*Id.* § 2(A).

⁹¹*Id.* § 1(D).

⁹²*Id.* § 8(B)(1).

⁹³*Id.*

foreclosure, lease, bequest, devise, operation of law, or other means, in accordance with the covered institution's enabling statutes, notwithstanding the provisions of this article, the approval requirements of subdivision B 1 of [§ 23.1-1301](#), and any policies adopted by the governing board of the institution pursuant to this article.

3. For personal property, the institution shall hold, possess, operate, and dispose of such property in accordance with the institution's enabling statutes, this article, and any policies adopted by the governing board of the institution pursuant to this article.

D. With the approval of the Governor or as otherwise provided by law, and consistent with subsections B and C, a covered institution may (i) sell, assign, encumber, mortgage, demolish, or otherwise dispose of any project, any other real, personal, tangible, or intangible property, any right, easement, estate, or interest in any such project or property, or any deed of trust or mortgage lien interest owned by it, under its control or custody or in its possession, and may release or relinquish any right, title, claim, lien, interest, easement, or demand however acquired, including any equity or right of redemption in property foreclosed by it, and (ii) do any of the foregoing by public or private transaction.

E. A covered institution may accept loans, grants, contributions, or other assistance from the federal government, the Commonwealth, any political subdivision of the Commonwealth, or any other public or private source to carry out its mission as a public institution of higher education and any of the purposes of this article. A covered institution may enter into any agreement or contract regarding the acceptance, use, or repayment of any such loan, grant, contribution, or assistance and may enter into other agreements with any such entity in furtherance of the purposes of this article.

F. Localities may lend or donate money or other property to a covered institution for any of the institution's purposes. Any local government making a grant or loan may restrict the use of the grant or loan to a specific project, within or outside such locality.

G. Notwithstanding any other provision of this chapter, no covered institution shall take action with regard to any real or personal property if such action would be deemed to be in violation of any requirement or covenant contained in any outstanding bonds, notes, or other obligations.⁹⁴

Regarding leases of real property the Restructured Higher Education Financial and Administrative Operations Act provides:

The governing body of a covered institution shall adopt such policies relating to the leasing of real property, including capital or operating/income leases, that reasonably ensure that such leases are efficiently procured on appropriate terms and for appropriate purposes. With respect to capital or operating/income leases for real property to be used for academic purposes, or for real property owned by the institution or a foundation related to the institution to be used for non-academic purposes in accordance with the institution's land use plan pursuant to § 2.2-1153, other than applicable policies adopted by a covered institution's board of visitors and provisions of general law that expressly apply to covered institutions, such institutions shall be exempt from any state or local statutes or ordinances, rules, regulations, and guidelines relating to operating/income leases of real property by public entities and, except as otherwise provided in §§ 23.1-1016 [capital projects] and 23.1-1019 [acquisition of property], to capital leases.⁹⁵

Regarding the power to issue obligations the Restructured Higher Education Financial and Administrative Operations Act provides:

A. Notwithstanding the provisions of § 23.1-1119, a covered institution may (i) issue bonds, notes, or other obligations for any purpose that is consistent with its institutional mission, including to (a) finance or refinance any project, (b) appropriately manage operational cash flows, (c) provide for short-term financing, (d) refund bonds, notes, or other obligations issued by or on behalf of such institution, or otherwise, including bonds, notes, or other obligations or obligations not then subject to redemption, and (ii) guarantee, assume, or otherwise agree to pay, in whole or in part, indebtedness issued by such institution or any affiliated entity for managing operational cash flows or resulting in the acquisition or construction of facilities for the benefit of such institution or the refinancing thereof.

⁹⁴Va. Code 23.1-1019.

⁹⁵*Id.* § 23.1-1028.

B. Nothing in this article shall preclude a covered institution from participation in any financing program or bond issue established and implemented by the Commonwealth or any agency of the Commonwealth, including (i) any financing program or bond issue under Article X, Section 9 (b) or 9 (c) of the Constitution of Virginia and (ii) any financing program or bond issue under Article X, Section 9 (d) of the Constitution of Virginia undertaken by the Treasury Board, the Virginia College Building Authority, or the Virginia Public Building Authority if such institution is otherwise eligible and approved to participate and is otherwise able to fulfill any requirements that may be imposed upon it by virtue of its participation.

C. Notwithstanding Article 8 (§ 2.2-2415 et seq.) of Chapter 24 of Title 2.2, Chapter 11 (§ 23.1-1100 et seq.), and § 23.1-2205, each covered institution may issue bonds, notes, or other obligations consistent with debt capacity and management policies and guidelines established by its governing board without (i) obtaining the consent of any legislative body, elected official, commission, board, bureau, political subdivision, or agency of the Commonwealth; (ii) any proceedings or conditions other than those specifically required by this article; (iii) the approval required by the provisions of Article 8 (§ 2.2-2415 et seq.) of Chapter 24 of Title 2.2; or (iv) any regulation or procedure, including a review or approval procedure, adopted pursuant to Chapter 11 (§ 23.1-1100 et seq.).

D. Each covered institution may issue such types of bonds, notes, or other obligations as it determines are appropriate and consistent with debt capacity and management policies and guidelines established by its governing board, including bonds, notes, or other obligations payable as to principal and interest from any one or more of the following sources: (i) its revenues generally; (ii) income and revenues derived from the operation, sale, or lease of a particular project, whether or not it is financed or refinanced from the proceeds of such bonds, notes, or other obligations; (iii) funds realized from the enforcement of security interests or other liens or obligations securing such bonds, notes, or other obligations; (iv) proceeds from the sale of bonds, notes, or other obligations; (v) payments under letters of credit, policies of municipal bond insurance, guarantees, or other credit enhancements; (vi) any reserve or sinking funds created to secure such payment; (vii) accounts receivable of such institution; or (viii) other available funds of such institution.

E. Any bonds, notes, or other obligations may be supported by any grant, contribution, or appropriation from a participating political subdivision, the covered institution, the Commonwealth, any political subdivision, agency, or instrumentality of the Commonwealth, any federal agency, or any unit, private corporation, partnership, association, or individual.

F. Bonds, notes, or other obligations of a covered institution are for an essential public and governmental purpose.

G. It is lawful for any bank or trust company within or outside the Commonwealth to serve as depository of the proceeds of bonds, notes, or other obligations or other revenues of a covered institution, furnish indemnifying bonds, notes, or other obligations, or pledge such securities as may be required by such institution, provided that any such deposits are collateralized in accordance with the Security for Public Deposits Act (§ 2.2-4400 et seq.) in the case of a bank or savings institution or Article 3 (§ 6.2-1047 et seq.) of Chapter 10 of Title 6.2 in the case of a trust company.⁹⁶

Generally, the acquisition of real property by purchase or lease by public institutions of higher education is subject to oversight by the Department of General Services (DGS) (and its Division of Engineering and Buildings) as well as approval by the Governor except where a public institution of higher education has entered into a management agreement with the state, as discussed above, or if it has in effect a signed “memorandum of understanding” with the Secretary of Administration regarding participation in a nongeneral fund decentralization program as set out in an appropriation act for a specific project and provided such institution is in compliance with the Virginia Public Procurement Act and uses the general terms and conditions approved by the DGS and the Office of the Attorney General.⁹⁷ An institution may

⁹⁶*Id.* § 23.1-1015. “Bonds, notes, or other obligations” means bonds, notes, commercial paper, bond anticipation notes, revenue certificates, capital leases, lease participation certificates, or other evidences of indebtedness or deferred purchase financing arrangements. *Id.* § 23.1-1000. “Facilities” means all (i) real, personal, tangible, and intangible property, including all (a) infrastructure suitable for supporting a covered institution's mission and ancillary activities and (b) structures, buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, furnishings, landscaping, approaches, roadways, and other related and supporting facilities held, possessed, owned, leased, operated, or used, in whole or in part, by a covered institution and (ii) rights in such property.” *Id.*

⁹⁷*Id.* § 2.2-1132; *id.* §23.1-1002.B.3..

enter into an operating/income lease or a capital lease for real property to be used for academic purposes provided that:

(i) the capital lease does not constitute tax-supported debt of the Commonwealth, (ii) the institution meets the conditions prescribed in subsection A of § 23.1-1002[eligibility], and (iii) for purposes of entering into a capital lease, the institution shall have in effect a signed memorandum of understanding with the Secretary of Administration regarding participation in the nongeneral fund decentralization program as set forth in the appropriation act. For the purposes of this subdivision, an operating/income lease or a capital lease shall be determined using generally accepted accounting principles.⁹⁸

Certain capital projects may be completed pursuant to a six year capital outlay plan.⁹⁹

The University of Virginia Medical Center has laws and regulations governing its acquisitions separate from the University of Virginia; its capital leases and leases are subject to review by the state treasurer.¹⁰⁰

The Virginia Community College System is controlled by the State Board for Community Colleges, which is empowered to promulgate necessary rules and regulations pursuant to Title 23.1, Chapter 29 to provide a community college system.¹⁰¹ The State Board has all the powers of public institutions of higher education set forth in title 23.1 chapter 13.¹⁰² Procurement procedures are set forth in the system policy manual.¹⁰³ General goods and services purchases follow the DGS Agency Procurement and Surplus Property Manual.¹⁰⁴ The State Board for Community Colleges must specifically authorize the following contracts: contracts, leases, or other documents by which the System leases or acquires a leasehold interest in real estate for more than one year with an annual cost exceeding \$250,000; contracts or other documents for the expenditure of funds appropriated for capital outlay; and contracts or other agreements by which the System acquires goods, equipment, or supplies exceeding a one-time or annual cost of \$250,000, excluding capital outlay.¹⁰⁵ Additional approvals of state agencies such as the Treasury board may be required.¹⁰⁶ Capital outlay projects for educational and general major capital projects are subject to approval by the legislature and may include state funding for equipment.¹⁰⁷ The Chancellor and each community college president have signature authority, which may be delegated.¹⁰⁸

Energy Performance Contracting for State Entities and Institutions.

Subject to numerous restrictions, state agencies may enter into an energy performance contract, the term of which “shall expire at the end of each fiscal year” and include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational savings measures.¹⁰⁹ The contract may also provide for energy conservation and facility and technology infrastructure upgrades that cannot be totally funded by energy

⁹⁸*Id.* § 2.2-1149.

¹⁰⁷*Id.* tit. 2.2, ch. 15.1. ““Capital project” means the acquisition of any interest in land, including (i) capital leases and (ii) improvements on the acquired land consisting of (a) new construction of at least 5,000 square feet, (b) new construction costing at least \$2 million, or (c) improvements or renovations costing at least \$2 million.” *Id.* § 23.1-1000.

¹⁰⁰*Id.* § 23.1-2213; *id.* 2.2-2416.

¹⁰¹*Id.* §. The chief executive officer of the system is the Chancellor. *Id.* § 23.1-2908..

¹⁰²*Id.* § 23.1-2905.

¹⁰³VA. Cmty Colleges Pol’y Man. <http://www.boarddocs.com/va/vccs/Board.msf/Public>. (revised July, 2016).

¹⁰⁴VA. Cmty Colleges Pol’y Man. § 4.2.2.

¹⁰⁵*Id.* § 4.0.2.

¹⁰⁶*Id.* § 10.0.0.4 Such agencies might include the DGS, Division of Engineering and Buildings, and the Department of Planning and Budget.

¹⁰⁷*Id.*

¹⁰⁸*Id.* § 4.0.3.

¹⁰⁹VA. Code. §§ 11-34.1 to -34.4. The provisions do not apply to new construction.

and operational savings.¹¹⁰ An agency, institution, board, or authority which receives appropriations from the Commonwealth shall procure state agency energy efficiency projects [of \$100,000 or more through the Virginia Energy Leasing Program (VELP) of the Treasury Board].¹¹¹ “State agency energy efficiency projects may include personal property, the installation or modification of an installation in a building, and professional, management, and other special services which are primarily intended to reduce energy consumption and demand, or allow the use of an alternative energy source, and which may contain integral control and measurement devices.”¹¹² Additionally, the energy performance contracts are subject to numerous restrictions.

Debt Limitations

The State, counties, municipalities, and school districts are constitutionally limited in the amount of debt that they may incur.¹¹³ Excluded from this limitation are “[c]ontract obligations of a city or town to provide payments over a period of more than one year to any publicly owned or controlled regional project, if the project has been authorized by an interstate compact or if the General Assembly by general law or special act has authorized an exclusion for such project purposes.”¹¹⁴

Counties and municipalities are statutorily limited in the amount of bonded indebtedness they may incur.¹¹⁵

In *Board of Supervisors v. Massey*,¹¹⁶ payments due under an installment service contract did not create a present indebtedness for the aggregate amount of the installments when the payments were paid as services were rendered.¹¹⁷ The court clearly limited this holding to contracts for services to be paid as rendered.¹¹⁸

In *Baliles v. Mazur*,¹¹⁹ the court upheld a lease financing between the state and a public building authority because the state’s full faith and credit were not pledged. The bonds issued by the authority were payable from the revenues received from the state as user of the buildings under the lease agreements. The buildings could only be leased to the state or any of its political subdivisions and only with the approval of the governor. The leases contained clauses providing for early termination should funds for rental payments ever become unavailable. The source of rentals is solely from funds appropriated by the state legislature. The court in upholding the financing stated that, “[t]he overriding consideration, therefore, is whether the legislative body is obligated to appropriate funds, not the source of funds.”¹²⁰

¹¹⁰*Id.* § 11-34.3.

¹¹¹*Id.* § 2.2-2417(D) (2011); <http://www.trsvirginia.gov/documents/debt/MELP/EnergyDescription.pdf> (last updated July 1, 2011).

¹¹²*Id.*

¹¹³Va. Const. art. X, § 9 (State); art. VII, § 10 (counties, municipalities, and districts of any county or regional government thereof). See also Comment, Municipal Lease-Purchase Agreements: A Virginia Perspective, 21 U. Rich. L. Rev. 413 (1987).

¹¹⁴Va. Const. art. VII, § 10(a)(4).

¹¹⁵See generally Va. Code tit. 15.2, ch. 26. See also *id.* § 15.2-2642 relating to school district bonds.

¹¹⁶173 S.E.2d 869 (Va. 1970).

¹¹⁷*Id.* at 871.

¹¹⁸*Id.* at 872.

¹¹⁹297 S.E.2d 695 (Va. 1982).

¹²⁰*Id.* at 700.

In 1989 the attorney general opined that lease payments made by a county or school district to an “industrial development authority”¹²¹ with respect to “authority facilities”¹²² would not constitute debt of the county or school district since the payments would be subject to appropriation by the governing body.¹²³

The Supreme Court of Virginia upheld, in *Dykes v. Northern Virginia Transportation District*,¹²⁴ the validation of bonds to be issued by a transportation district. The principal and interest on the bonds were to be paid by a county. The county’s obligation to pay was “subject to and contingent upon annual appropriations by the County of moneys for such purpose.” The court focused on whether there was a legal obligation to pay in determining whether debt was created by the county. Mere expectations of bondholders, the county or rating agencies that the payments would continue is not sufficient to create debt. The office of the attorney general of Virginia had previously approved the proposed bond issue.¹²⁵

Interest Limitations

Bonds of counties and municipalities “. . . may bear interest payable at . . . such rate or rates as determined by the governing body or in such manner as the governing body may provide, including the determination by reference to indices or formula or by agents designated by the governing body under guidelines established by it.”¹²⁶

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

¹²¹Former Va. Code § 15.1-1374(a) (Supp. 2003).

¹²²*Id.* former § 15.1-1374(d)(ix) includes facilities for use by a “county, a municipality, the Commonwealth and its agencies or other governmental organizations.”

¹²³LEXIS, States library, 1995 Va. AG LEXIS 28. *But see* Concerned Residents of Gloucester County v. Board of Supervisors, 449 S.E. 2d 787 (1994), where court held that a contract clause requiring county to pay fair market value of a solid waste management facility in the event of termination did not constitute debt because the clause acted as a liquidated damages clause.

¹²⁴411 S.E.2d 1 (Va. 1991) (upon rehearing).

¹²⁵1989 Op. Att’y Gen. Va. 55 (Dec. 29, 1989).

¹²⁶Va. Code § 15.2-2612.

WASHINGTON 2017

The statutes and constitution are current with all Laws from the 2016 Regular and Special Sessions and Laws 2017, chs. 1 to 4 of the Washington Legislature¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties are authorized to “. . . purchase and hold lands; . . . and to purchase and hold such personal property, as may be necessary to their corporate or administrative powers”⁴ Counties may sell or convey “property, whether real, personal, or mixed, belonging to the county”⁵

A county [with population exceeding 600,000] may lease space and provide for the leasing of such space through leases with an option to purchase and the acquisition of buildings erected upon land owned by the county upon the expiration of lease of such land. For the purposes of this section, “building,” as defined in RCW 35.42.020 shall be construed to include any building or buildings used as part of, or in connection with, the operation of the county. The authority conferred by this section is in addition to and not in lieu of any other provision authorizing counties to lease property.⁶

Any . . . county . . . may execute an executory conditional sales contract with . . . any private party for the purchase of any real or personal property . . . if the entire amount of the purchase price specified in such contract does not result in a total indebtedness in excess of three-fourths of one percent of the value of the taxable property in such . . . county If such a proposed contract would result in a total indebtedness in excess of this amount, a proposition in regard to whether or not such a contract may be executed shall be submitted to the voters for approval or rejection in the same manner that bond issues for capital purposes are submitted to the voters.⁷

Energy Performance Contracting

Counties may enter into guaranteed performance-based contracts for equipment and services for the purpose of conserving energy and water in publicly owned buildings, subject to numerous requirements.⁸

Municipalities

Municipalities⁹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁰ eminent domain¹¹ and police powers.¹²

¹See generally Wash. Rev. Code tit. 84, ch. 52 .

²*Id.* § 8.08.010.

³Wash. Const. art. XI, § 11.

⁴Wash. Rev. Code § 36.01.010.

⁵*Id.* § 36.34.010. There are restrictions, including public notice. See generally *id.* tit. 36, ch. 34.

⁶*Id.* § 36.34.205.

⁷*Id.* § 39.30.010. These provisions also apply to municipalities. See also *id.* § 36.34.320 (allowing counties to make executory conditional sales contracts via § 39.30.010).

⁸*Id.* §§ 39.35A.020 to .040. See, *infra*, note 89 and accompanying text.

⁹Municipalities for purposes of this discussion are first and second class cities and towns. *Id.* §§ 35.01.010 to .040. Cities with a population of 10,000 or more may frame charters. Wash. Const. § 10 (amend. 40). Cities may elect to become charter or noncharter code cities under the Optional Municipal Code. Wash. Rev. Code tit. 35A.

¹⁰Wash. Rev. Code § 35.22.280(2) (first class); *id.* § 35.23.440(46) (second class); *id.* § 35.27.370(8) (towns).

¹¹*Id.* § 8.12.030.

¹²Wash. Const. art. XI, § 11.

First class cities have the power “to acquire, by purchase or otherwise, such lands and other property as may be necessary . . . and to dispose of any such property as the interests of the corporation may, from time to time, require.”¹³

Second class cities “may acquire, hold, lease, use and enjoy property of every kind and control and dispose of it for the common benefit”¹⁴

Towns also have the power “to purchase, lease, receive hold and enjoy real and personal property, and control, lease, sublease, convey or otherwise dispose of the same for the common benefit”¹⁵

Noncharter code cities and charter code cities “. . . may purchase, lease, receive, or otherwise acquire real and personal property of every kind, and use, enjoy, hold, lease, control, convey or otherwise dispose of it for the common benefit.”¹⁶

The provision regarding executory conditional sales contracts by counties also applies to municipalities.¹⁷

Any [municipality] may execute leases for a period of years with or without an option to purchase with the state or any of its political subdivisions, with the government of the United States, or with any private party for the lease of any real or personal property, or property rights: *PROVIDED*, that with respect only to leases that finance the acquisition of property by the lessee, the aggregated portions of lease payments over the term of the lease which are allocable to principal shall constitute debt, which shall not result in a total indebtedness in excess of one and one-half percent of the taxable property of such [municipality] computed in accordance with RCW 39.36.030, unless a proposition in regard to whether or not such a lease may be executed is submitted to the voters for their approval or rejection in the same manner that bond issues for capital purposes are submitted, and the voters approve the same.¹⁸

If at the time an option to purchase is exercised the remaining amount to be paid in order to purchase the real or personal property lease after crediting the rental payments toward the total purchase price therefor does not result in a total indebtedness in excess of one and one-half percent of the taxable property of such [municipality] . . . such a [municipality] may exercise its option to purchase such property. If such remaining amount to be paid to purchase such leased property will result in total indebtedness in excess of one and one-half percent of the taxable property of such [municipality], a proposition in regard to whether or not to purchase the property shall be submitted to the voters for approval or rejection in the same manner that bond issues for capital purposes are submitted to the voters.¹⁹

“The annual budget of a *city* shall provide for the payment of rental that falls due in the year for which the budget is applicable.”²⁰

“Any [municipality] may, as lessee, lease a building for its use for a term of not to exceed fifty years.”²¹ “[Such a] lease . . . may grant the lessee [municipality] an option to renew for a further term on like conditions, or an option to purchase the building covered by the lease at any time prior to the expiration of the term.”²² “A lease with an option to purchase shall provide that all sums paid as rent up to the time of exercising the option shall be credited toward the payment of the purchase price as of the

¹³Wash. Rev. Code § 35.22.280(3).

¹⁴*Id.* § 35.23.010.

¹⁵*Id.* § 35.27.010.

¹⁶*Id.* § 35A.11.010.

¹⁷*See, supra*, note 7 and accompanying text. Noncharter code cities and charter code cities also have this power. Wash. Rev. Code § 35A.64.010.

¹⁸*Id.* § 35.42.200.

¹⁹*Id.* § 35.42.210.

²⁰*Id.* § 35.42.220 (emphasis added). Certain exceptions are set forth. *Id.*

²¹*Id.* § 35.42.030.

²²*Id.* § 35.42.040.

date of payment.”²³ “[Such a] lease may provide that as a part of the rental, the lessee [municipality] may pay taxes and assessments on the leased building, maintain insurance thereon . . . and assume responsibilities for repair, replacement, alternations, and improvements during the term of the lease.”²⁴

Any [municipality] desiring to have a building for its use erected on land owned, or to be acquired by it, may, as lessor, lease the land for a reasonable rental for a term of not to exceed fifty years: Provided, that the [municipality] shall lease back the building or a portion thereof for the same term.²⁵

Energy Performance Contracting

Municipalities may enter into guaranteed performance-based contracts for equipment and services for the purpose of conserving energy and water in publicly owned buildings, subject to numerous requirements.²⁶

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁷ and eminent domain powers.²⁸ “A school district . . . shall possess all the usual powers of a public corporation.”²⁹ “[A]ny school district may enter into contracts . . . with public and private persons, organizations, and entities . . . (1) to rent or lease building space and portable buildings for periods not exceeding ten years in duration; (2) to rent security systems, computers, and other equipment . . . for periods not exceeding five years in duration; and (3) to provide pupil transportation services for periods not exceeding five years in duration.”³⁰

Any school district may execute an executory conditional sales contract with . . . any private party for the purchase of any real or personal property . . . if the entire amount of the purchase price specified in such contract does not result in a total indebtedness in excess of the limitation authorized by [section 39.36.020(3)]³¹ . . . to be incurred without the assent of the voters: Provided, that if such a proposed contract would result in a total indebtedness in excess of the limitation authorized by [section 39.36.020(3)] . . . to be incurred without the assent of the voters, a proposition in regard to whether or not such a contract may be executed shall be submitted to the voters for approval or rejection in the same manner that bond issues for capital purposes are submitted to the voters³² School districts may use the proceeds of voter approved bond, levies, or other funds available to the district for the payment of an installment purchase contract for facilities or for payments under any financing lease of a term ten years or longer containing an option to purchase to the extent allowed by the constitution.³³

A school district “is authorized to permit the rental, lease, or occasional use of all or any portion of any surplus [or] real property owned . . . by the district” subject to numerous restrictions.³⁴ A school

²³*Id.*

²⁴*Id.* § 35.42.050.

²⁵*Id.* § 35.42.070. Such leases must include certain enumerated terms. *Id.* A lease and lease-back agreement must be publicly bid pursuant to certain procedures. *Id.* § 35.42.080.

²⁶*Id.* §39.35A.020 to .040. *See, infra*, note 89 and accompanying text.

²⁷*Id.* § 28A.535.070.

²⁸*Id.* § 28A.335.220.

²⁹*Id.* § 28A.320.010.

³⁰*Id.* § 28A.335.170.

³¹School districts are limited to an indebtedness amount not exceeding three-eighths of one percent of the value of the taxable property in such district without the assent of three-fifths of the voters therein voting at an election held for that purpose. In cases requiring such assent school districts are limited to a total indebtedness of two and one-half percent of the value of the taxable property therein. *Id.* § 39.36.020(3).

³²*Id.* § 28A.335.200.

³³*Id.* § 28A.525.310 (citing Art. VII, §2).

³⁴*Id.* §§ 28A.335.040 to .090.

district may “sell . . . real property of the district which is no longer required for school purposes,” subject to numerous restrictions.³⁵

Energy Performance Contracting

School districts may enter into guaranteed performance-based contracts for equipment and services for the purpose of conserving energy and water in publicly owned buildings, subject to numerous requirements.³⁶

Fire Districts

Fire districts³⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³⁸ and eminent domain³⁹ powers. Fire districts may “acquire, purchase, . . . lease, . . . and sell real and personal property.”⁴⁰

Any fire protection district organized under this title may: (1) Lease, acquire, own, maintain, operate, and provide fire and emergency medical apparatus and all other necessary or proper facilities, machinery, and equipment for the prevention and suppression of fires, the providing of emergency medical services and the protection of life and property; (2) Lease, acquire, own, maintain, and operate real property, improvements, and fixtures for housing, repairing, and maintaining the apparatus, facilities, machinery, and equipment described in subsection (1) of this section.⁴¹

Fire protection districts may execute executory conditional sales contracts, installment promissory notes secured by a deed of trust, or mortgages with a governmental entity or a private party for the purchase or sale of any real or personal property, or property rights: PROVIDED, That the purchase price specified in a contract or promissory note to purchase property does not result in a total indebtedness in excess of three-eighths of one percent of the value of the taxable property in the fire protection district: PROVIDED FURTHER, That if a proposed purchase contract or promissory note would result in a total indebtedness in excess of that amount, a proposition to determine whether that contract or promissory note may be executed shall be submitted to the voters for approval or rejection in the same manner that bond issues for capital purposes are submitted to the voters. . . . The term “value of the taxable property” shall have the meaning set forth in RCW 39.36.015.⁴²

Fire districts are required to purchase equipment and public works based on competitive bids.⁴³

Energy Performance Contracting

Fire districts may enter into guaranteed performance-based contracts for equipment and services for the purpose of conserving energy and water in publicly owned buildings, subject to numerous requirements.⁴⁴

Hospital Districts

Hospital districts⁴⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax⁴⁶ and eminent domain⁴⁷ powers. Hospital districts may “purchase, acquire, [and] lease . . . all

³⁵*Id.* §§ 28A.335.120 to .130.

³⁶*Id.* § 39.35A.020 to .040. *See, infra*, note 89 and accompanying text.

³⁷Fire districts are municipal corporations and possess the usual powers of a public corporation. *Id.* § 52.12.011.

³⁸*Id.* § 52.16.130.

³⁹*Id.* § 52.12.041.

⁴⁰*Id.* § 52.12.021.

⁴¹*Id.* § 52.12.031.

⁴²*Id.* § 52.12.061.

⁴³*Id.* §§ 52.14.110, 52.14.120. Certain threshold limits apply.

⁴⁴*Id.* § 39.35A.020 to .040. *See, infra*, note 89 and accompanying text.

lands, property, . . . [and] equipment.”⁴⁸ They may “lease existing hospital and other health care facilities and equipment and/or other property used in connection therewith, including ambulances, and to pay such rental therefor as the commissioners shall deem proper.”⁴⁹

Any public hospital district may execute an executory conditional sales contract with any other municipal corporation, the state, or any of its political subdivisions, the government of the United States, or any private party for the purchase of any real or personal property, or property rights, in connection with the exercise of any powers or duties which such districts now or hereafter are authorized to exercise, if the entire amount of the purchase price specified in such contract does not result in a total indebtedness in excess of the limitation imposed by RCW 39.36.020,⁵⁰ as now or hereafter amended, to be incurred without the assent of the voters of the district: PROVIDED, That if such a proposed contract would result in a total indebtedness in excess of three-fourths of one percent of the value of taxable property in such public hospital district, a proposition in regard to whether or not such a contract may be executed shall be submitted to the voters for approval or rejection in the same manner that bond issues for capital purposes are submitted to the voters. The term “value of taxable property” shall have the meaning set forth in RCW 39.36.015.⁵¹

Energy Performance Contracting

Hospital districts may enter into guaranteed performance-based contracts for equipment and services for the purpose of conserving energy and water in publicly owned buildings, subject to numerous requirements.⁵²

State Entities

The State maintains a comprehensive lease-purchase program for financing real and personal property by state agencies, including with some variation, public institutions of higher education.⁵³

The purposes of this chapter are to confirm the authority of the state, its agencies, departments, and instrumentalities, the state board for community and technical colleges, and the state institutions of higher education to enter into contracts for the acquisition of real and personal property which provide for payments over a term of more than one year and to exclude such contracts from the computation of indebtedness under Article VIII, section 1 of the state Constitution. It is further the purpose of this chapter to permit the state, its agencies, departments, and instrumentalities, the state board for community and technical colleges, and the state institutions of higher education to enter into financing contracts which make provision for the issuance of certificates of participation and other financing structures. Financing contracts of the state, whether or not entered into under this chapter, shall be subject to approval by the state finance committee⁵⁴ except as provided in this chapter.

This chapter shall be liberally construed to effect its purposes.⁵⁵

⁴⁵Hospital districts are municipal corporations. *Id.* § 70.44.010.

⁴⁶*Id.* § 70.44.060(6).

⁴⁷*Id.* § 70.44.060(2), (4).

⁴⁸*Id.* § 70.44.060(2).

⁴⁹*Id.* § 70.44.060(3).

⁵⁰*Id.* § 39.36.020(2)(a)(i), which provides: “Public hospital districts are limited to an indebtedness amount not exceeding three-fourths of one percent of the value of the taxable property in such public hospital districts without the assent of three-fifths of the voters therein voting at an election held for that purpose.”

⁵¹*Id.* § 70.44.44.260.

⁵²*Id.* § 39.35A.020 to .040. *See, infra*, note 89 and accompanying text.

⁵³*Id.* tit. 39, Ch. 94. A guide and forms may be found at <http://www.tre.wa.gov/government/leasePurchaseProgram.shtml>.

⁵⁴The state finance committee has delegated administrative responsibility for the lease-purchase program to the office of the state treasurer. Wash. Admin. Code § 210-03-010.

⁵⁵Wash. Rev. Code. § 39.94.010.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) “Credit enhancement” includes insurance, letters of credit, lines of credit, or other similar agreements which enhance the security for the payment of the state's or an other agency's obligations under financing contracts.

(2) “Financing contract” means any contract entered into by the state for itself or on behalf of an other agency which provides for the use and purchase of real or personal property by the state and provides for payment by the state over a term of more than one year, and which provides that title to the subject property may secure performance of the state or transfer to the state or an other agency by the end of the term, upon exercise of an option, for a nominal amount or for a price determined without reference to fair market value. Financing contracts include, but are not limited to, conditional sales contracts, financing leases, lease purchase contracts, or refinancing contracts, but do not include operating or true leases. For purposes of this chapter, the term “financing contract” does not include any nonrecourse financing contract or other obligation payable only from money or other property received from private sources and not payable from any public money or property. The term “financing contract” includes a “master financing contract.”

(3) “Master financing contract” means a financing contract which provides for the use and purchase of property by the state, and which may include more than one financing contract and appropriation.

(4) “Other agency” means any commission established under Title 15 RCW, a library or regional library, an educational service district, the superintendent of public instruction, the school directors' association, a health district, a public facilities district, or any county, city, town, school district, or other municipal corporation or quasi-municipal corporation.

(5) “State” means the state, agency, department, or instrumentality of the state, the state board for community and technical colleges, and any state institution of higher education.

(6) “State finance committee” means the state finance committee under chapter 43.33 RCW.⁵⁶

(7) “Trustee” means a bank or trust company, within or without the state, authorized by law to exercise trust powers.⁵⁷

(1) The state may enter into financing contracts for itself or on behalf of an other agency for the use and acquisition for public purposes of real and personal property. Payments under financing contracts of the state shall be made by the state from currently appropriated funds or funds not constituting “general state revenues” as defined in Article VIII, section 1 of the state Constitution. Except as provided in subsection (4)(b) of this section, payments under financing contracts of the state on behalf of any other agency shall be made solely from the sources identified in the financing contract, which may not obligate general state revenues as defined in Article VII, section 1 of the state Constitution. The treasurer of an other agency shall remit payments under financing contracts to the office of the state treasurer or to the state treasurer's designee. In the event of any deficiency of payments by an other agency under a financing contract, the treasurer of the other agency shall transfer any legally available funds of the other agency in satisfaction of the other agency's obligations under the financing contract if such funds have been obligated by the other agency under the financing contract and, if such deficiency is not thereby cured, the office of the state treasurer is directed to withdraw from that agency's share of state revenues for distribution or other money an amount sufficient to fulfill the terms and conditions of the financing contract. The term of any financing contract shall not exceed thirty years or the remaining useful life of the property, whichever is shorter. Financing contracts may include other terms and conditions agreed upon by the parties.

⁵⁶The finance committee is made up of the state treasurer, the lieutenant governor, and the governor, ex officio. *Id.* § 43.33.010.

⁵⁷*Id.* § 39.94.020.

(2) The state for itself or on behalf of an other agency may enter into contracts for credit enhancement, which limits the recourse of the provider of credit enhancement solely to the security provided under the financing contract secured by the credit enhancement.

(3) The state or an other agency may grant a security interest in real or personal property acquired under financing contracts. The security interest may be perfected as provided by the uniform commercial code - secured transactions, or otherwise as provided by law for perfecting liens on real estate. Other terms and conditions may be included as agreed upon by the parties. An other agency that is authorized by applicable law to enter into a financing contract may make payments due under such a contract from the proceeds of annual tax levies approved by the voters under RCW 84.52.056, among other sources.

(4)(a) Financing contracts and contracts for credit enhancement entered into under the limitations set forth in this chapter do not constitute a debt or the contracting of indebtedness under any law limiting debt of the state. It is the intent of the legislature that such contracts also do not constitute a debt or the contracting of indebtedness under Article VIII, section 1 of the state Constitution. Certificates of participation in payments to be made under financing contracts also do not constitute a debt or the contracting of an indebtedness under any law limiting debt of the state if payment is conditioned upon payment by the state under the financing contract with respect to which the same relates. It is the intent of the legislature that such certificates also do not constitute a debt or the contracting of indebtedness under Article VIII, section 1 of the state Constitution if payment of the certificates is conditioned upon payment by the state under the financing contract with respect to which those certificates relate.

(b) An other agency authorized by law to issue bonds, notes or other evidences of indebtedness or to enter into conditional sales contracts or lease obligations, may participate in a program under this chapter in which the state enters into a financing contract on behalf of that other agency, and the other agency's obligations to the state under the program may be evidenced by an agreement, lease, bond, note, or other appropriate instrument. A financing contract made by the state on behalf of an other agency may be secured by the pledge of revenues of the other agency or other agency's full faith and credit or may, at the option of the state finance committee, include a contingent obligation by the state for payment under such financing contract.⁵⁸

(1) Except as provided in RCW 28B.10.022,⁵⁹ the state may not enter into any financing contract for itself if the aggregate principal amount payable thereunder is greater than an amount to be established from time to time by the state finance committee or participate in a program providing for the issuance of certificates of participation, including any contract for credit enhancement, without the prior approval of the state finance committee. Except as provided in RCW 28B.10.022, the state finance committee shall approve the form of all financing contracts or a standard format for all financing contracts. The state finance committee also may:

(a) Consolidate existing or potential financing contracts into master financing contracts with respect to property acquired by one or more agencies, departments, instrumentalities of the state, the state board for community and technical colleges, or a state institution of higher learning; or to be acquired by another agency;

(b) Approve programs providing for the issuance of certificates of participation in master financing contracts for the state or for other agencies;

⁵⁸*Id.* § 39.94.030.

⁵⁹Section 28B.10.022 provides: "(1) The boards of regents of the state universities and the boards of trustees of the regional universities, The Evergreen State College, and the state board for community and technical colleges, are severally authorized to enter into financing contracts as provided in chapter 39.94 RCW. Except as provided in subsection (2) of this section, financing contracts shall be subject to the approval of the state finance committee. (2) The board of regents of a state university may enter into financing contracts which are payable solely from and secured by all or any component of the fees and revenues of the university derived from its ownership and operation of its facilities not subject to appropriation by the legislature and not constituting 'general state revenues,' as defined in Article VIII, section 1 of the state Constitution, without the prior approval of the state finance committee. (3) Except for financing contracts for facilities or equipment described under chapter 28B.140 RCW [relating to the financing of research facilities at research universities], the board of regents shall notify the state finance committee at least sixty days prior to entering into such contract and provide information relating to such contract as requested by the state finance committee."

(c) Enter into agreements with trustees relating to master financing contracts; and

(d) Make appropriate rules for the performance of its duties under this chapter.

(2) In the performance of its duties under this chapter, the state finance committee may consult with representatives from the department of general administration, the office of financial management, and the office of the chief information officer.

(3) With the approval of the state finance committee, the state also may enter into agreements with trustees relating to financing contracts and the issuance of certificates of participation.

(4) Except for financing contracts for real property used for the purposes described under chapter 28B.140 RCW [relating to the financing of research facilities at research universities, the state may not enter into any financing contract for real property of the state without prior approval of the legislature. For the purposes of this requirement, a financing contract must be treated as used for real property if it is being entered into by the state for the acquisition of land; the acquisition of an existing building; the construction of a new building; or a major remodeling, renovation, rehabilitation, or rebuilding of an existing building. Prior approval of the legislature is not required under this chapter for a financing contract entered into by the state under this chapter for energy conservation improvements to existing buildings where such improvements include: (a) Fixtures and equipment that are not part of a major remodeling, renovation, rehabilitation, or rebuilding of the building, or (b) other improvements to the building that are being performed for the primary purpose of energy conservation. Such energy conservation improvements must be determined eligible for financing under this chapter by the office of financial management in accordance with financing guidelines established by the state treasurer, and are to be treated as personal property for the purposes of this chapter.

(5) The state may not enter into any financing contract on behalf of another agency without the approval of such a financing contract by the governing body of the other agency.⁶⁰

(1) It is the intent of the legislature that the financing program authorized by this chapter be self-supporting.

(2) The state treasurer is authorized to levy fees and apply specified investment earnings from time to time in amounts not to exceed sums sufficient to pay program expenses including, but not limited to, costs of issuance, and to create reserves to assure timely payment of financing contracts. The investment earnings available for this purpose represent the earnings on payments received from state and other agencies.⁶¹

The provisions of this chapter shall apply to all financing contracts entered into following July 23, 1989.⁶²

The following regulations apply.

The office of the state treasurer classifies financing transactions as operating leases (true leases) or financing contracts based upon the criteria established by the Governmental Accounting Standards Board (based upon FASB 13). If any one of the following criteria is met, the lease is considered a financing contract subject to chapter 39.94 RCW:

(1) Present value of lease payments > 90% of fair market value.

(2) Lease term > 75% of useful life.

(3) Lease includes a bargain purchase option.

(4) Lease provides for transfer of ownership.

If a lease satisfies any one of the above criteria, it is a financing contract subject to chapter 39.94 RCW.⁶³

⁶⁰*Id.* § 39.94.040.

⁶¹*Id.* § 39.94.050.

⁶²*Id.* § 39.94.900.

A state agency or other agency may apply to the financing program by submitting a notice of intent on the approved form. State finance committee approved forms are available from the office of the state treasurer.

The signed notice of intent should be mailed to:

Office of the State Treasurer
Debt Management
P.O. Box 40200
Olympia WA 98504-0200

(1) For state agency participation, additional forms may be required, including, but not limited to, the following:

(a) Equipment financing forms provided by the office of the state treasurer:

(i) Notice of intent - Notifies the office of the state treasurer of dollar amounts, dates and contact person(s) for upcoming financings.

(ii) Certificate of authorized signers - This document is to be prepared on agency letterhead. An original certificate may be filed with the state treasurer so that photocopies may be submitted with future equipment financing transactions.

(iii) State agency financing addendum - Establishes the contractual obligations of the state agency in the transaction and confirms the intent of the agency to acquire equipment through installment purchase agreements and remit installment payments to the office of the state treasurer.

(iv) Personal property certificate - Describes the equipment, the vendor(s), and the amount to be financed and directions for disbursement.

(v) Certificate of insurance - This document is prepared by the office of risk management and sent directly to the state treasurer.

(b) Real estate financing forms provided by the office of the state treasurer:

(i) Notice of intent - Notifies the office of the state treasurer of dollar amounts, dates and contact person(s) for upcoming financings.

(ii) Real estate worksheet - To be completed by the state agency - This document provides information about the real property to be financed.

(iii) Certificate of authorized signers - This document is to be prepared on agency letterhead when someone other than the agency director will be signing on behalf of the state agency.

(iv) Financing contract real property - Agreement between the state agency and the nominal lessor that provides for the use of the land and facility in exchange for lease payments to be made by the agency. The office of the state treasurer appoints a nominal lessor.

(v) Site lease - State agency - Agreement between the state agency and the nominal lessor that provides for the lease of the land for a period that usually extends five years beyond the term of the financing lease. The site lease provides security for the financing lease.

(vi) Tax certificate - Information about compliance with IRS regulations to ensure the tax-exempt status of the financing. By signing the tax certificate, the agency acknowledges it has read, understands and will comply with the IRS regulations.

(2) For other agency participation, additional forms may be required, including, but not limited to, the following:

⁶³Wash. Admin. Code § 210-03-010.

- (a) Equipment financing forms provided by the office of the state treasurer:
- (i) Notice of intent - Notifies the office of the state treasurer of dollar amounts, dates and contact person(s) for upcoming financings.
 - (ii) Credit form - Information to judge the agency's legal ability to incur the debt (assessment of debt capacity) and its ability to repay the debt (assessment of debt affordability).
 - (iii) Form of reimbursement resolution - Required if agency is planning to seek reimbursement through the LOCAL program.
 - (iv) Authorizing resolution or, for cities, authorizing ordinance - Authorizes the financing of the property through the LOCAL program and designates the number of individuals required to execute the financing with the office of the state treasurer.
 - (v) Certificate of authorizing resolution or ordinance - To certify a true copy of a resolution.
 - (vi) Certificate of authorized agency representatives - Designates the agency representatives authorized to execute the financing and states the number of signatures required.
 - (vii) Financing contract personal property - Local agency - Establishes the contractual obligations of the local agency in the transaction and confirms the intent of the agency to acquire equipment through installment purchase agreements and remit installment payments to the office of the state treasurer.
 - (viii) Personal property certificate - Describes the equipment, the vendor(s), and the amount to be financed and directions for disbursement.
 - (ix) Opinion of local agency counsel - Legal opinion on behalf of the local agency verifying its authority to enter into the contract. It is not the intent of this requirement to solicit a local counsel opinion on the financing documents.
 - (x) Tax certificate - Information about compliance with IRS regulations to ensure the tax-exempt status of the financing. By signing the tax certificate, the agency acknowledges it has read, understands and will comply with the IRS regulations.
 - (xi) Certificate of compliance with agency debt limits.
- (b) Real estate financing forms provided by the office of the state treasurer:
- (i) Notice of intent - Notifies the office of the state treasurer of upcoming financing dollar amounts, dates and contact person(s).
 - (ii) Real estate worksheet - Provides information about the real property to be financed.
 - (iii) Credit form - Provides the information needed to analyze the agency's legal ability to incur the debt (assessment of debt capacity) and its ability to repay the debt (assessment of debt affordability).
 - (iv) Form of reimbursement resolution - Required if agency is planning to seek reimbursement through the LOCAL program.
 - (v) Authorizing resolution or authorizing ordinance - Authorizes the financing of the property through the LOCAL program and designates the number of individual(s) required to execute the financing with the office of the state treasurer.
 - (vi) Certificate of authorizing resolution or ordinance - To certify a true copy of a resolution.
 - (vii) Certificate of authorized agency representatives - Designates the agency representatives authorized to execute the financing and states the number of signatures required.

(viii) Financing contract real property - Local agency - Agreement between the local agency and the nominal lessor that provides for the use of the land and facility in exchange for lease payments to be made by the agency. The office of the state treasurer appoints a nominal lessor.

(ix) Site lease - Local agency - Agreement between the local agency and the nominal lessor that provides for the lease of the land for a period that usually extends five years beyond the term of the financing lease. The site lease provides security for the financing lease.

(x) Opinion of local agency counsel - Legal opinion on behalf of the local agency verifying its authority to enter into the contract and that the agency has legally adopted the resolution(s). It is not the intent of this requirement to solicit a local counsel opinion on the financing documents.

(xi) Tax certificate - Information about compliance with IRS regulations to ensure the tax-exempt status of the financing. By signing the tax certificate, the agency acknowledges it has read, understands and will comply with the IRS regulations.

(xii) Certificate of compliance with agency debt limits

(c) Information to be provided by the local agency:

(i) Evidence of insurance - A local agency should contact its insurance agent to obtain a certificate of insurance on the property to be financed. At a minimum, hazard insurance for the amount of the financing (or guaranteed replacement) and a one million dollar liability policy are required. The local agency may be asked to list the fiscal agent and/or nominal lessor as additional insureds.

(ii) Title insurance - The agency should provide a copy of its title insurance policy for real property transactions. A new title policy may be ordered for the financing.

(iii) Evidence of incumbency of governing body and elected officials - School districts obtain a certificate from their ESD identifying the district, names and terms of office of board members and superintendent; other districts obtain a certificate from county auditor, identifying the governing body, with names and terms of office; all districts should include copy of minutes showing election of current officers, and, in the case of cities, a certificate of the mayor, identifying the city clerk.

(2) The local government is responsible for completing all required documentation and providing it to the office of the state treasurer with original signatures by the cutoff date to be included in the next financing.⁶⁴

The office of the state treasurer staff will review the notice of intent for completeness, essentiality of equipment/real estate project, length of finance term, amount of financing, useful life of equipment and compliance with other financing requirements and tax laws.⁶⁵

Department of Enterprise Services

The state consolidated procurement services for state agencies⁶⁶ and institutions of higher education in the Department of Enterprise Services (DES),⁶⁷ which may enter into master contracts on behalf of the state.⁶⁸ The director is authorized to enter into contracts or delegate the authority to enter

⁶⁴Wash. Admin. Code § 210-03-030.

⁶⁵*Id.* § 210-03-030.

⁶⁶Agency “means any state office or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards, commissions, institutions of higher education as defined in RCW 28B.10.016, and correctional and other types of institutions.” Wash. Rev. Code § 39.26.010. Exemptions apply for the legislature, the state data center, higher education where procurement concerns the purchase of specialized equipment, Universities operating hospitals, and certain other health care programs, agency purchases for resale, purchase of insurance and bonds, certain interpreter services by the department of health and human services. *Id.* § 39.26.100. Certain exemptions also apply for the department of corrections. *Id.* § 39.36.102.

⁶⁷Wash. Rev. Code Ch. 39.26.

⁶⁸*Id.* § 39.26.080.

into contracts on behalf of the state to facilitate the purchase, lease, rent, or otherwise acquire all goods and services and equipment needed for the support, maintenance, and use of all state agencies.⁶⁹ State agencies must purchase wireless devices or services through a state master contract.⁷⁰

The DES is also responsible for managing the capitol buildings and grounds subject to approval of the capitol committee⁷¹ and for the acquisition, by purchase or lease, of real property on behalf of state agencies.⁷²

Information Technology

The director of the DES is required to establish procurement processes for information technology goods and services using standards, policies, and procurement processes established in consultation with the Office of the Chief Information Officer (OCIO).⁷³ Authority to enter into contracts may be delegated to state agencies and educational institutions. Agencies must seek review of and approval by the OCIO of any “major information technology project.”⁷⁴

Energy Performance Contracting

State agencies⁷⁵ may use financing contracts under chapter 39.94, discussed supra, to fund all or part of conservation projects where repayments are sufficient to pay the principal and interest on the contracts.⁷⁶

Debt Limitations

The State, counties, municipalities, school districts, fire districts and hospital districts are constitutionally⁷⁷ and statutorily⁷⁸ limited in the amount of debt they may incur. In *State ex rel. Washington State Building Finance Authority v. Yelle*,⁷⁹ the state entered into a lease-purchase agreement with the State Building Financing Authority for the lease-purchase of real property.⁸⁰ The state’s rental payments were to be made from general tax revenues.⁸¹ The court found the relationship of the state and the authority was not the ordinary landlord and tenant relationship, that the authority did not deal at arms length with the state, and that the authority was not a “body politic and corporate,” but was an agency of the state.⁸² The agreement was viewed as an installment purchase agreement in violation of the

⁶⁹*Id.* § 39.26.090(4).

⁷⁰*Id.* § 39.26.235.

⁷¹*Id.* § 43.19.125 (2012); *id.* § 43.82.020.

⁷²*Id.* § 43.82.010. Public works contracts are governed by code chapter 39.04.

⁷³Wash. Rev. Code. § 39.26.090 (duties of director of DES); *id.* § 43.105.054(OCIO); <http://ocio.wa.gov>. Information technology “includes, but is not limited to, all electronic technology systems and services, automated information handling, system design and analysis, conversion of data, computer programming, information storage and retrieval, telecommunications, requisite system controls, simulation, electronic commerce, radio technologies, and all related interactions between people and machines.” Telecommunications “includes, but is not limited to, wireless or wired systems for transport of voice, video, and data communications, network systems, requisite facilities, equipment, system controls, simulation, electronic commerce, and all related interactions between people and machines.” *Id.* § 43.105.020.

⁷⁴*Id.* § 43.105.255; *id.* § 43.105.287.

⁷⁵State agency “means every state office or department, whether elective or appointive, state institutions of higher education, and all boards, commissions, or divisions of state government, however designated.” Wash. Rev. Code § 39.35C.010 (13).

⁷⁶*Id.* § 39.35C.060.

⁷⁷Wash. Const. art. VIII, § 1 (State); *id.* § 6 (counties and municipal corporations).

⁷⁸Wash. Rev. Code § 39.36.020 (taxing districts); § 39.42.130 (state).

⁷⁹289 P.2d 355 (Wash. 1955). See also *City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77 (1898) (annual rental for gas and water did not become indebtedness, within meaning of charter debt limit, until the water and gas for that year had been furnished).

⁸⁰289 P.2d at 360.

⁸¹*Id.* at 360-361.

⁸²*Id.*

constitutional debt limitation.⁸³ The court noted that the state could enter into a long-term lease arrangement “with a body politic and corporate” so long as rentals could be paid when due from current appropriations.⁸⁴

Subsequently, in *Department of Ecology v. Finance Committee*,⁸⁵ the court upheld a real property lease financing agreement containing a non-appropriation clause. Here, a bank as trustee held the property in trust for the state.

Recently, the Attorney General provided advice for analyzing whether a municipality’s lease-purchase agreement for a performance-based energy contract under Wa. Rev. Code § 39.35A with a nonappropriation clause would create constitutional debt or need to be included in limits for statutory debt limits. Although a decision on whether such a contract violates debt limits would require looking at the specific terms and statutory authority for the municipality in question, the Attorney General noted that most likely it would not create debt under the constitution, but would need to be counted under statutory debt limitations.⁸⁶ This is the first time we have seen legal analysis by the courts or the Attorney General as to whether use of a nonappropriation clause could be used to avoid the non-voted statutory debt limits in Washington. In entering into a nonappropriation lease of any type, it is best to require the lessee to confirm that the lease is within nonvoted statutory debt limits.

Interest Rate Limitations

“Each local government authorized to issue bonds is authorized to . . . pay interest. The interest rates on such bonds or other obligations may be a fixed rate or rates set periodically or a variable rate or rates determined by agreement of the parties.”⁸⁷

State agency lease-purchase interest rates are determined by the competitive bids received on the date of sale.⁸⁸

Miscellaneous

In *Priorities First v. City of Spokane*, the plaintiff [a political action committee] sought to place an initiative on the ballot to prevent the city from creating a Public Development Authority to provide off-street parking facilities, and from pledging certain funds for the payment of the project.⁸⁹ The Court held that “the authority vested by statute in the city’s legislative body is not subject to the initiative process.”

In *King County v. Taxpayers of King County*,⁹⁰ the court approved the issuance of bonds by the county to finance the construction of a baseball stadium for the Seattle Mariners baseball team, against the argument that the use of public funds is an unconstitutional gift of public monies to the team. The court also held that the lease of the stadium with the team did not violate constitutional prohibitions against lending of credit (Wash. Const. art VIII, §§ 5 and 7).

⁸³*Id.* at 361-362.

⁸⁴*Id.* at 360.

⁸⁵804 P.2d 1241 (Wash. 1991).

⁸⁶Op. Att’y Gen. 2016 No. 2 (Wash. 2016), available at 2016 WL 1315315.

⁸⁷Wash. Rev. Code § 39.46.050. “‘Local government’ means any county, city, town . . . political subdivision, municipal corporation, or quasi municipal corporation including any public corporation created by such an entity.” *Id.* § 39.46.020(3). “‘Bond’ means any agreement . . . where the . . . local government agrees to pay a specified amount of money . . .” *Id.* § 39.46.020(1). “‘Obligation’ means an agreement that evidences an indebtedness of . . . a local government, other than a bond, and includes, but is not limited to, conditional sales contracts, lease obligations, and promissory notes.” *Id.* § 39.46.020(4).

⁸⁸<http://www.tre.wa.gov> (Rpt. Date May 22, 2016).

⁸⁹968 P.2d 431 (Wash. App. Div. 3 1998).

⁹⁰949 P.2d 1260 (Wash. 1997).

Legislation provides relative to the acquisition of real property through leasing by the Department of Enterprise Services:

Except as permitted under chapter 39.94 RCW, no lease for or on behalf of any state agency may be used or referred to as collateral or security for the payment of securities offered for sale through a public offering. Except as permitted under chapter 39.94 RCW, no lease for or on behalf of any state agency may be used or referred to as collateral or security for the payment of securities offered for sale through a private placement without the prior written approval of the state treasurer. However, this limitation shall not prevent a lessor from assigning or encumbering its interest in a lease as security for the repayment of a promissory note provided that the transaction would otherwise be an exempt transaction under RCW 21.20.320. The state treasurer shall adopt rules that establish the criteria under which any such approval may be granted. In establishing such criteria the state treasurer shall give primary consideration to the protection of the state's credit rating and the integrity of the state's debt management program. If it appears to the state treasurer that any lease has been used or referred to in violation of this subsection or rules adopted under this subsection, then he or she may recommend that the governor cause such lease to be terminated. The department of enterprise services shall promptly notify the state treasurer whenever it may appear to the department that any lease has been used or referred to in violation of this subsection or rules adopted under this subsection.⁹¹

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

⁹¹Wash. Rev. Code § 43.82.010.

WEST VIRGINIA 2018 REVISION

Current with Legislation of the 2018 Regular Session effective through May 31, 2018 except HB 4020 and HB 4175, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Counties are “. . . empowered to purchase, lease, rent, control, supervise, inspect, maintain and erect public parks, playgrounds and recreational facilities, [and] to purchase, lease or rent equipment therefor”⁴

County commissions may execute lease agreements for equipment or material:

A lease agreement shall be void, unless the lease agreement provides that the county commission has the following options, during each fiscal year of the lease agreement: (1) The option to terminate the lease agreement and return the equipment or material without any further obligation on the part of the county commission; and (2) the option to continue the lease agreement for an additional rental period not to exceed one year in length.⁵

Counties are authorized to “acquire real estate and to convey real estate and to enter into a contract, or lease, or both, with . . . any bank or financial institution, or with any individual or persons for the erection, construction, equipment . . . of a courthouse, hospital, other public buildings, or jail, with an option to purchase the building.”⁶ The “yearly rentals” under the lease are to “be paid out of levies laid within the constitutional debt limitations.”⁷ The county is authorized to “levy and collect annually an amount sufficient to pay said rental or rentals for that particular year.”⁸

Counties may purchase “radio mobile communications equipment”⁹ and “photocopying equipment.”¹⁰ Counties are empowered “to acquire, by purchase . . . lease . . . or otherwise . . . sewerage systems and sewage treatment plants”¹¹ Counties are empowered “to construct, reconstruct, establish, acquire . . . [and] equip transportation terminals, county and other public facilities and motor vehicle parking facilities”¹²

The sale or disposal of county property must be by public sale.¹³

Authority exists for a municipality or county to establish a building commission as a public corporation. The commission has the power to acquire, purchase and own real or personal property and to construct and operate public buildings, with specific authority to lease its property for public purposes.¹⁴ The Supreme Court of Appeals held that the Charleston Building Commission, which was created pursuant to this statute, has the authority to enter into a lease-purchase agreement with the State

¹W.Va. Const. art. 9, § 11, art. 10, § 7.

²W.Va. Code § 54-1-1.

³W.Va. Const. art. 9, § 11.

⁴W.Va. Code § 7-1-5. These provisions also apply to the acquisition of “stone quarries and sand deposits,” “buildings for emergency services,” “dog pounds,” “public markets,” “county mental health clinics” *etc.* *Id.*

⁵*Id.* § 7-1-3gg.

⁶*Id.* § 7-3-5.

⁷*Id.*

⁸*Id.* § 7-3-6.

⁹*Id.* § 7-1-3b.

¹⁰*Id.* § 7-1-3c.

¹¹*Id.* § 7-1-3g.

¹²*Id.* § 7-1-3o.

¹³*Id.* § 7-3-3. They may also submit the conveyance or demolition of public property to a vote of the people. *Id.* § 7-3-3a.

¹⁴*Id.* §§ 8-33-1; *id.* 8-33-4.

and to issue bonds or certificates of participation to finance the acquisition and renovation of a building. The rental payments by the State to the Commission did not violate the State Constitution's prohibition against state contracting debt.¹⁵

A county building commission also had authority to refund outstanding obligations.¹⁶

Energy Performance Contracting

Counties "may enter into a 'lease with an option to purchase' contract for the purchase and installation of energy-conservation measures if the term of the lease does not exceed fifteen years;" "the agreement provides that the county shall have the option during each fiscal year of the contract to terminate the agreement;" and the agreement "meets federal tax requirements for tax-exempt municipal leasing or long-term financing."¹⁷

Municipalities

Municipalities¹⁸ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁹ eminent domain²⁰ and police powers.²¹ Municipalities may "take, purchase, hold and lease as lessee (on an annual fiscal year basis where tax revenues are to be used to make the rental payments required under any such lease, with or without an option to renew such lease each year for another such period), for any municipal purpose, real or personal property"²²

Municipalities may lease-purchase "equipment or material."²³ The lease may provide that "title to the equipment or material shall vest in the municipality at or before the expiration of the leasehold term,"²⁴ "for application of the annual rental payments . . . toward the purchase price, . . . for interest or a time-price differential,"²⁵ "and that the risk of loss of the equipment or material shall be borne by the municipality."²⁶ If the lease-purchase provides the municipality the above, then the municipality may have the "option to pay in advance at any time during any fiscal year the balance due under such agreement, with appropriate rebate of the unearned interest or time-price differential."²⁷ All lease-purchase agreements by municipalities for equipment or material must give the municipality an "option to terminate the agreement . . . without any further obligation" and an "option to continue the agreement for an additional rental period not to exceed one year in length . . . during each fiscal year of the agreement."²⁸

¹⁵State ex. rel. Charleston Building Commission v. Dial, 479 S.E. 2d 695 (W.Va. 1996).

¹⁶County Commission of Boone County v. Hill, 460 S.E. 2d 727 (W.Va. 1995).

¹⁷W.Va. Code § 7-1-300(h). "Energy conservation measures" is defined to mean "goods or services, or both, to reduce energy consumption operating costs of county facilities." *Id.* § 7-1-300(a).

¹⁸Municipalities for purposes of this discussion are any first, second or third class city and any fourth class town or village. *Id.* §§ 8-1-2(1), 8-1-3. All may adopt charter government as home rule. *Id.* § 8-12-2.

¹⁹*Id.* § 8-13-1.

²⁰*Id.* § 8-16-8.

²¹*Id.* § 8-12-5(44).

²²*Id.* § 8-12-1(4).

²³*Id.* § 8-12-11.

²⁴*Id.* § 8-12-11(a).

²⁵*Id.* § 8-12-11(b).

²⁶*Id.* § 8-12-11(c).

²⁷*Id.* § 8-12-11(3).

²⁸*Id.* § 8-12-11(1), (2).

Municipalities may sell real or personal property pursuant to public auction²⁹ and lease real or personal property, as lessor, at fair market value and for adequate consideration for a maximum term of fifty years pursuant to public notice and hearing.³⁰

Energy Performance Contracting

Municipalities “may enter into a ‘lease with an option to purchase’ contract for the purchase and installation of energy-conservation measures if the term of the lease does not exceed fifteen years;” “the agreement provides that the municipality shall have the option during each fiscal year of the contract to terminate the agreement;” and the agreement “meets federal tax requirements for tax-exempt municipal leasing or long-term financing.”³¹

School Districts

School districts³² qualify as tax-exempt issuers for purposes of federal income tax law due to their tax³³ and eminent domain powers.³⁴ School districts are required to “provide [b]y purchase, lease, building or otherwise, a sufficient number of suitable schoolhouses and other buildings to meet the educational needs of its district.”³⁵ In addition, school districts are to provide the “necessary furniture, fixtures, apparatus, fuel and all necessary supplies for the schools.”³⁶

A county board of education may “sell, dismantle, remove or relocate any such buildings and sell the land on which they are located, at public auction, after proper notice, and on such terms as it orders, to the highest responsible bidder.”³⁷

The School Building Authority of West Virginia is authorized to lease-purchase real property for a term not to exceed twenty-five years and, subject to numerous requirements, may assist county boards of education with the lease-purchasing of “land, buildings and capital improvements to existing school buildings and property for use as public school facilities.”³⁸

The West Virginia Department of Education had a Policies and Procedures page with their purchasing policy. It notes that a WV-96 is required when a vendor’s contract contains terms and conditions. The terms are quite troublesome. It modifies any terms which might be contrary to the West Virginia Code.³⁹

Energy Performance Contracting

School districts “may enter into a ‘lease with an option to purchase’ contract for the purchase and installation of energy conservation measures if the term of the lease does not exceed fifteen years” and

²⁹*Id.* § 8-12-18(b).

³⁰*Id.* § 8-12-18(c).

³¹*Id.* § 8-12-5e(h). “Energy conservation measures” is defined to mean “goods or services, or both, to reduce energy consumption operating costs of municipality facilities.” *Id.* § 8-12-5e(a).

³²“A school district shall include all the territory in one county.” *Id.* § 18-1-3. Each county school district is under the supervision of a county board of education. *Id.* § 18-5-1.

³³*Id.* § 18-9-1.

³⁴*Id.* § 18-5-8.

³⁵*Id.* § 18-5-9(1).

³⁶*Id.* § 18-5-9(2).

³⁷*Id.* § 18-5-7. There are limited exceptions to the public sale requirement.

³⁸*Id.* § 18-9D-3.

³⁹*See, infra*, note 61 and accompanying text. The link to the West Virginia Department of Education site is no longer available. The 2016 version of form WV-96 is attached at the end of this Survey. Form WV-96 is contrary to standard provisions in a governmental lease-purchase agreement.

provides the school board the option to terminate the agreement and the agreement “meets federal tax requirements for tax-exempt municipal leasing or long-term financing.”⁴⁰

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

Executive department⁴¹ secretaries are authorized to “(a)cquire by lease or purchase property of whatever kind or character and convey or dispose of any property of whatever kind or character as authorized by law” subject to provisions of the purchasing and real estate codes and any other legislative limitations.⁴²

Generally, leases of real property by state agencies and departments⁴³ are managed by the Real Estate Division of the Department of Administration.⁴⁴

The executive director may enter into long-term agreements for buildings, land and space for periods longer than one fiscal year: *Provided*, That such long-term lease agreements are not for periods in excess of forty years, except that the secretary may, in the case of the Adjutant General’s department, enter into lease agreements for a term of fifty years or a specific term of more than fifty years so as to comply with federal regulatory requirements and shall contain, in substance, all the following provisions:

(1) That the Department of Administration, as lessee, has the right to cancel the lease without further obligation on the part of the lessee upon giving thirty days’ written notice to the lessor, such notice being given at least thirty days prior to the last day of the succeeding month;

(2) That the lease shall be considered canceled without further obligation on the part of the lessee if the state Legislature or the federal government should fail to appropriate sufficient funds therefor or should otherwise act to impair the lease or cause it to be canceled; and

(3) That the lease shall be considered renewed for each ensuing fiscal year during the term of the lease unless it is canceled by the Department of Administration before the end of the then current fiscal year.⁴⁵

Additional provisions require:

Leases and other instruments for grounds, buildings, office or other space shall be signed by the Executive Director of the Real Estate Division in the name of the state. They shall be approved as to form by the

⁴⁰W.Va. Code § 18-5-9a(f). “Energy conservation measures” is defined to mean “goods or services, or both, to reduce energy consumption operating costs of school facilities.” *Id.* § 18-5-9a(a)(1).

⁴¹Executive departments include: (1) Department of Administration; (2) Department of Environmental Protection; (3) Department of Health and Human Resources; (4) Department of Military Affairs and Public Safety; (5) Department of Revenue; (6) Department of Transportation; (7) Department of Commerce; and (8) Department of Veterans’ Assistance. *Id.* § 5F-1-2.

⁴²*Id.* § 5F-2-2. *See id.* Ch. 5a, article 3 (purchasing); article 10 (real estate).

⁴³The following are exempted from the Department of Administration’s authority relating to real property: the Division of Highways for leases other than for office space; Division of Natural Resources lands; the Higher Education Policy Commission; the west Virginia Council for Community and Technical College Education; institutional boards of governors; the Department of Agriculture; West Virginia State Conservation Committee real property; the Adjutant General’s Department and the West Virginia National Guard. *Id.* § 5A-10-2.

⁴⁴*Id.* § 5A-10-3; § 5A-10-4.

⁴⁵*Id.* § 5A-10-5.

Attorney General. A lease or other instrument for grounds, buildings, office or other space that contains a term, including any options, of more than six months for its fulfillment shall be filed with the State Auditor.⁴⁶

The state building commission of West Virginia may acquire real property or rights in its name or in the name of the state by lease-purchase.⁴⁷ Generally, lease-purchase contracts exceeding \$1 million must be submitted by the Secretary of Administration to the Joint Committee on Government and Finance.⁴⁸ The construction, equipping and furnishing of buildings, involving an expenditure of \$10,000 or more require public bidding.⁴⁹

Contracts resulting in physical changes to the state capitol, governor's mansion and state office buildings near the capitol require approval of the capitol building commission.⁵⁰

The purchase of commodities⁵¹ is centralized in the purchasing division of the Department of Administration.⁵² The provisions of Ch. 5, article 3 apply to all of the spending units⁵³ of state government except the judicial branch, the legislative branch, the state police, and the office of laboratory services.⁵⁴ The director of purchasing is generally required to review and approve every contract requiring the expenditure of money by the state.⁵⁵

The threshold amount triggering involvement of the purchasing division and competitive bidding in the acquisition of commodities is \$25,000.⁵⁶ Use of open-end contracts is mandatory.⁵⁷ The director may cancel a contract if “(f)unds are not appropriated or an appropriation is discontinued by the legislature for the acquisition.”⁵⁸ “All purchases must be approved by the secretary or head of the spending unit, or a designee, whose name shall be filed with the Purchasing Director.”⁵⁹

The purchasing division procedures manual provides:

A lease purchase contract is a contract that includes periodic lease payments, and in some cases a final lump sum payment, with ownership of the equipment being vested in the agency immediately or at the lease term expiration. The minimum purchase cost to consider a lease-purchase as an option is \$500,000.00, unless the Director of the Purchasing Division grants an exception to this minimum amount. A letter of justification

⁴⁶*Id.* § 5A-10-7; W. Va. Code of St Rules § 148-19-9.

⁴⁷W.Va. Code . § 5-6-4(3).

⁴⁸*Id.* § 5-6-4a (but excepting the transactions of the Higher Education Policy Commission, Council for Community and Technical College Education, state institutions of higher education and the Division of Highways for state road purposes).

⁴⁹*Id.* § 5-6-7.

⁵⁰*Id.* §§ 4-8-4, 4-8-5.

⁵¹Commodities means “supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of state government.” *Id.* § 5A-1-1(1).

⁵²*Id.* § 5A-3-1. See also W.Va. Code R. § 148 CSR 1.

⁵³Spending unit means “a department, bureau, department, division, office, board commission, authority, agency or institution of the state government for which an appropriation is requested of the Governor, or to which an appropriation is made by the Legislature, unless a specific exemption from this chapter is provided in this code.” W.Va. Code § 5A-1-1(21).

⁵⁴*Id.* § 5A-3-1. Purchases of stock made by the Alcohol Beverage Control Commissioner, and purchases of textbooks and instructional technology, hardware and software for the State Board of Education are also exempt.

⁵⁵*Id.* § 5A-3-3(9). Miscellaneous statutory exemptions from the West Virginia Purchasing Division approved by state legislature can be found on the state website. <http://www.state.wv.us/>.

⁵⁶W.Va. Code § 5A-3-10(b); W. Va. Code of St Rules § 148-1-7.2, 3. The following are not subject to the review and approval requirement: construction or repair contracts entered into by the Division of Highways of the Department of Transportation; to construction or reclamation contracts entered into by the Department of Environmental Protection; to contracts entered into by the University of West Virginia Board of Trustees or by the board of directors of the state College System, except to the extent that such boards request the facilities and services of the director under the provisions of this subdivision; to the West Virginia State Police and the West Virginia Office of Laboratory Services.

⁵⁷*Id.* § 148-1-7.4 (contracts to supply repetitive needs in the form of statewide contracts).

⁵⁸*Id.* § 148-1-5.a.5.

⁵⁹*Id.* § 148-1-3.

must be prepared, signed by the agency head, and submitted to the Purchasing Division prior to any attempt to enter into a Lease Purchase.

The State has a statewide Master Lease Purchase Financing Agreement issued by the Finance Division of the Department of Administration. Any request to enter into a lease purchase agreement other than the Master Lease Purchasing Financing Agreement must be approved in advance by the Purchasing Division. The Master Lease Purchase Financing Agreement is administered as described below.

If the agency is approved to utilize the Master Lease Purchase Financing Agreement, the agency will solicit bids for the equipment to be financed through normal procurement methods. The agency must provide a copy of the approved letter of justification with its *Requisition* and note that the resulting purchase will be financed under the Master Lease Purchase Financing Agreement. This requisition must also be routed through the Finance Division. Please note that no financial document will be generated for the purchase order.

After the contract is prepared and approved as to form, by the Attorney General's Office, the contract is held in the Purchasing Division while the release order is generated and approved. A copy of the unencumbered contract will be submitted to the Finance Division in order to execute the Appendix to the Master Lease. The agency will work directly with the Finance Division to facilitate the execution of the Lease Appendix. As time schedules are very sensitive in the execution of the Lease Appendix, the agency and the Finance Division should inform the Purchasing Division Buyer of any deadlines with issuing the documents.⁶⁰

Where a master contract has not been negotiated, purchasing officers are directed to use an Agreement Addendum or an Agreement Addendum for Software that provides terms and conditions for amending vendor contracts. These are generally not negotiable.⁶¹

Any person who authorizes or approves a purchase or contract in violation of the code, rules, policies or procedures adopted by the purchasing division is personally liable for the cost of the purchase or contract and such contract is void.⁶²

Motor Vehicles

The secretary of the Department of Administration is authorized to purchase new vehicles and aircraft.⁶³

Information Technology

All information technology⁶⁴ and data processing procurements for state agencies⁶⁵ must be reviewed and approved by the Chief Technology Office (CTO) in conjunction with the Information Services & Communications Division (IS&C) of the Department of Administration.⁶⁶

⁶⁰Purchasing Div. Proc. Hdbk, §7.6 (2015) .

⁶¹WV-96A (Rev. 5/16) (for software); WV-96 (Rev. 5/16); <http://www.state.wv.us/admin/purchase/forms.html> (last accessed May, 2018) Memorandum from WV Purch. Div. Counsel to St Proc. Officers dated Jan. 1, 2018, W. Va. Purch. Div. Proc. Hdbk App. Q, <http://www.state.wv.us/admin/purchase/handbook/2015r7/WV96instructions.pdf> (last accessed May, 2018). The 2016 version of form WV-96 is attached at the end of this Survey. Form WV-96 is contrary to standard provisions in a governmental lease-purchase agreement.

⁶²W.Va. Code Rules § 148-1-9.

⁶³W.Va. Code Ann. § 5A-3-50.

⁶⁴Information technology "means data processing and telecommunications hardware, software, services, supplies, personnel, maintenance, training and includes the programs and routines used to employ and control the capabilities of data processing hardware." *Id.* § 5A-6-2 (b).

⁶⁵Excluding the legislature, the judiciary or any state constitutional officer and the West Virginia Board of Education, the West Virginia Department of Education and the county boards of education, or the West Virginia Division of Homeland Security and Emergency Management relating to the technology used with the Statewide Interoperable Radio Network. (However, the West Virginia Board of Education, the West Virginia Department of Education and the county boards of education will attempt to cooperate and collaborate with the Chief Technology Officer to the extent feasible.) *Id.* § 5A-6-8.

All infrastructure technology equipment procurement requests, regardless of dollar value, that will connect to the state network requires CTO approval prior to submission of a request to the Purchasing Division, as the CTO may require changes by the agency. All state entities, with the exception of Constitutional Officers, Higher Education and K-12, shall request approval for, at a minimum, but not limited to, the purchase of servers, storage devices, computers, tablets, routers, wireless access points (WAPS), hubs, switches, firewalls, video conferencing and telephone equipment, including PBX system. The applicable information technology purchases also include software of all types, whether it is e-mail applications, anti-virus software or any other interoperability application, if the software will be used in systems that connect to the state network.

State agencies may procure IT consulting services with an estimated value of less than \$10,000 without CTO approval.⁶⁷

Higher Education

West Virginia statutes express a multilayered system of oversight and institutional authority related to procurement. The Higher Education Policy Commission (the “commission”) oversees the establishment of policy concerning higher education, and the evaluation of institutional requests for capital project and facility financing pursuant to Chapter 18A, article 19.⁶⁸ The West Virginia Council for Community and Technical College Education (the “council”) oversees community and technical colleges.⁶⁹ The governing board of each individual institution of higher education⁷⁰ is empowered to manage the financial affairs of the institution under its jurisdiction, subject to the supervision of the commission or the council.⁷¹ The commission’s vice chancellor for administration is authorized to carry out policies of the commission and council relating to the purchasing systems of the commission council and governing boards, however, the authority over purchasing systems may be delegated to institution presidents.⁷² The scope of authority may vary from one institution to another.⁷³ The commission, council, and each governing board are authorized to “purchase or acquire all materials, . . . [and] equipment” for their needs.⁷⁴ All contracts are reviewed by the Attorney General as to form.⁷⁵ All acquisitions must be made “within limits of available appropriations.”⁷⁶ Contracts requiring competitive bidding⁷⁷ must be filed with the State Auditor.⁷⁸ Governing boards are authorized to purchase or acquire materials and equipment without approval from the commission or the Vice Chancellor for

⁶⁶*Id.* §§ 5A-6-4 (3), 5A-6-4b, 5A-6-5 (including telecommunications systems).

⁶⁷Purchasing Div. Proc. Hdbk, § 7.3 (July 1, 2015, rev. Jan. 1, 2018).

⁶⁸W.Va. Code Ann. § 18B-1B-4.

⁶⁹*Id.* § 18B-2B-6.

⁷⁰Bluefield State College, Blue Ridge Community and Technical College, Bridgemont Community and Technical College, Concord University, Eastern West Virginia Community and Technical College, Fairmont State University, Glenville State College, Kanawha Valley Community and Technical College, Mountwest Community and Technical College, Marshall University, New River Community and Technical College, Pierpont Community and Technical College, Shepherd University, Southern West Virginia Community and Technical College, West Liberty University, West Virginia Northern Community and Technical College, the West Virginia School of Osteopathic Medicine, West Virginia State University, West Virginia University and West Virginia University at Parkersburg. *Id.* § 18B-2A-1. The University Hospital and Health System is operated by a non-profit corporation and is beyond the scope of this survey. *Id.* § 18-11C-2.

⁷¹*Id.* § 18B-2A-4(a); § 18B-2A-3. The following institutions are under the governance of West Virginia Board of Governors: West Virginia University Institute of Technology, West Virginia University at Parkersburg, and Potomac State College of West Virginia University. <https://bog.wvu.edu/powers-duties>.

⁷²*Id.* § 18B-4-2(j).

⁷³*Id.* § 18B-2A-8. Certain institutions are “exempted schools” within the application of various provisions. Exempted schools means West Virginia University, including West Virginia University Potomac State College and West Virginia University Institute of Technology; Marshall University; and the West Virginia School of Osteopathic Medicine. *Id.* § 18B-1-2 (17).

⁷⁴*Id.* § 18B-5-4.

⁷⁵*Id.* § 18B-5-4(c), (m).

⁷⁶*Id.* § 18B-5-4(k).

⁷⁷General acquisitions exceeding \$50,000 require competitive bidding. W. Va. Code Rules § 133-30-8. The statutory minimum for construction projects is \$100,000. W. Va. Code Ann. § 18B-5-4, § 18B-5-4a.

⁷⁸W.Va. Code Ann. § 18B-5-4(m).

Administration.⁷⁹ Governing boards may “acquire by contract or lease all grounds, buildings, office space or other space, and capital improvements, including equipment, if the rental is necessarily required by the governing board.”⁸⁰ Contracts contrary to code provisions 18B-5-4 through 18B-5-7 or associated rules are void.⁸¹ Governing boards of individual institutions “may fund capital improvements on a cash basis, through bonding or through another financing method that is approved by the commission and by the council, if appropriate.”⁸²

If the cost of an improvement project for any institution under the jurisdiction of the council, exceeds \$1 million, the governing board first shall obtain the approval of the council, as appropriate. If the cost of an improvement project at an institution under the jurisdiction of the commission, other than the exempted schools, exceeds \$3 million, the governing board shall first obtain the approval of the commission.⁸³

Subject to exceptions in the capital projects law, “any purchase of real estate, any lease-purchase agreement and any construction of new buildings or other acquisition of buildings, office space or grounds resulting from these transactions, shall be approved by the Commission or Council, and provided to the Joint Committee on Government and Finance for prior review, if the transaction exceeds \$1 million.”⁸⁴

There exist procedure rules to be followed by the Commission and Council in entering into lease-purchase agreements for capital improvements, including equipment, on behalf of, or for the benefit of, a state institution of higher education or the Commission or Council.”⁸⁵

The commission and the governing boards of West Virginia University and Marshall University have authority to enter into lease-purchase agreements for capital improvements and equipment:

(a) The commission or council may enter into lease-purchase agreements for capital improvements, including equipment, on behalf of, or for the benefit of, a state institution of higher education, the commission or council.

(b) After the commission or council, as appropriate, has granted approval for a lease-purchase agreement by a governing board, the board may enter into a lease-purchase agreement for capital improvements, including equipment.

(c) The governing boards of the exempted schools may enter into lease-purchase agreements without seeking the approval of the commission. The governing boards, subject to the jurisdiction of the commission, may enter into lease-purchase agreements of less than \$1.5 million, without obtaining approval of the commission.

(d) A lease-purchase agreement constitutes a special obligation of the State of West Virginia. The obligation may be met from any funds legally available to the commission, council or the institution and shall be cancelable at the option of the commission, council, or governing board at the end of any fiscal year. The obligation, or any assignment or securitization of the obligation, never constitutes an indebtedness of the State of West Virginia or any department, agency or political subdivision of the state, within the meaning of any constitutional provision or statutory limitation, and may not be a charge against the general credit or taxing powers of the state or any political subdivision of the state. The facts shall be plainly stated in any lease-purchase agreement.

(e) A lease-purchase agreement shall prohibit assignment or securitization without consent of the lessee and the approval of the agreement as to form by the Attorney General. Proposals for any agreement shall be

⁷⁹*Id.* § 18B-5-4(d)(3).

⁸⁰*Id.*; *id.* subsection (e).

⁸¹*Id.* § 18B-5-4(n) (relating to purchasing, prequalification of vendors, financial interests, disposition of obsolete equipment).

⁸²*Id.* § 18B-19-6(c).

⁸³*Id.*

⁸⁴W. Va. Code Rules § 133-12-14. The statute has requirements of information and procedures to follow.

⁸⁵*Id.* § 133-12-12.

requested in accordance with the requirements of this section and rules of the commission and council. In addition, any lease-purchase agreement that exceeds \$100,000 total shall be approved as to form by the Attorney General.

(f) The interest component of any lease-purchase obligation is exempt from all taxation of the State of West Virginia, except inheritance, estate and transfer taxes. It is the intent of the Legislature that if the requirements set forth in the Internal Revenue Code of 1986, as amended, and any regulations promulgated pursuant thereto are met, the interest component of any lease-purchase obligation also is exempt from the gross income of the recipient for purposes of federal income taxation and may be designated by the governing board or the president of the institution as a bank-qualified obligation.⁸⁶

Lease-purchase agreements exceeding \$1 million must be approved by the commission or council and provided to the Joint Committee on Government and Finance for review thirty days before the completion of a transaction.⁸⁷ A governing board may sell any building that is on unencumbered real property to which the board holds title and may lease back the same building if the governing board obtains approval of the commission or council.⁸⁸ A governing board may construct and equip auxiliary facilities.⁸⁹ The commission or council and governing boards may acquire land or buildings by condemnation.⁹⁰

The Board of Governors of West Virginia University is in the process of reviewing policies and rules relating to the acquisition of property by lease.⁹¹

The Board of Governors of Marshall University (MUBOG) delegates purchasing authority to the chief procurement officer.⁹² Leases that exceed \$1 million over the lease term must have prior approval of the governing board.⁹³ The chief operations officer approves leases that involve less than \$1 million.⁹⁴ Approved leases may be signed by the President, the chief operations officer or the Chief Procurement Officer.⁹⁵

8.8.1 The University may enter into lease-purchase arrangements for capital improvements, including equipment, regardless of value, without the approval of the Higher Education Policy Commission in accordance with West Virginia Code §18B -19-11(c).

8.8.2 Lease-purchase arrangements shall be made in accordance with West Virginia Code §18B-5- 4 (d and e) and §18B -19-11.

8.8.3 Lease-purchase agreements exceeding the minimum value stated in WV Code §18B -19- 11(e) (or its subsequent amended section) must be approved as to form by the Attorney General in accordance with WV Code §18B -19-11(e).⁹⁶

⁸⁶W.Va. Code Ann. § 18B-19-11. See also W. Va. Code Rules §§ 133-30-12 (capital improvements and equipment), 133-30-13 (leases), 133-30-14 (real property), 133-30-8 (purchasing).

⁸⁷W.Va. Code Ann. § 18B-19-13.

⁸⁸*Id.* § 18B-19-14.

⁸⁹*Id.* § 18B-19-15. Auxiliary facility “means a building or structure that is used for an auxiliary enterprise including, but not limited to, residence halls, food services, parking, intercollegiate athletics, faculty and staff housing, student unions, bookstores and other service centers.” *Id.* § 18B-19-2(c).

⁹⁰*Id.* § 18B-19-16.

⁹¹W.Va. Univ. Bd of Gov. Pol’y. <https://bog.wvu.edu/policies>.

⁹²MUBOG Policy No. FA-9 § 8.8 (Eff. June 12, 2015). Board policies and a purchasing handbook are available on the Marshall University office of purchasing website. <https://www.marshall.edu/purchasing/>.

⁹³*Id.* § 8.9.4.⁹⁴*Id.* ⁹⁵*Id.* See, *supra*, note 86 and accompanying text relating to section 18B-19-11.

⁹⁴*Id.* ⁹⁵*Id.* See, *supra*, note 86 and accompanying text relating to section 18B-19-11.

⁹⁵*Id.* ⁹⁶*Id.* See, *supra*, note 86 and accompanying text relating to section 18B-19-11.

⁹⁶*Id.* See, *supra*, note 86 and accompanying text relating to section 18B-19-11.

Energy Performance Contracting

State agencies “may enter into a ‘lease with an option to purchase’ contract for the purchase and installation of energy-conservation measures if the term of the lease does not exceed fifteen years;” “the agreement provides that the agency shall have the option during each fiscal year of the contract to terminate the agreement;” and the agency provides 30 days’ written notice to the joint committee on government and finance, subject to other restrictions.⁹⁷

Debt Limitations

The State, counties, municipalities and school districts are constitutionally limited in the amount of debt which they may incur.⁹⁸ County bonded indebtedness is statutorily limited as well.⁹⁹

In *Appalachian Electric Power Co. v. State Road Commission*,¹⁰⁰ the court held that payments due under long-term service contracts by municipalities were excluded from constitutional limits on indebtedness as long as the payments were made from the current year’s tax levies.¹⁰¹

In *State ex rel. Kanawha County Building Commission v. Paterno*,¹⁰² a lease by a building authority to a county of a judicial annex was upheld.¹⁰³ The county pledged certain tax levies for payment of rentals to the authority.¹⁰⁴ The court said that no debt was created in the county because the county could terminate the agreement during any county fiscal year covered by the lease.

Under an attorney general opinion, a lease-purchase agreement by the state did not violate constitutional debt limitations, where the lease-purchase agreement provided an option in the state to renew each fiscal year and where the agreement was entered into in “good faith.”¹⁰⁵

In 1991 the attorney general reversed an earlier opinion and opined that a nonsubstitution clause was illegal and against public policy.¹⁰⁶ The issue arose from the state’s twenty-year lease of office space to house the Division of Workers’ Compensation. The agreement included a nonappropriation clause relating to state revenue and a clause which prohibited the state, upon cancellation of the lease, from housing the Division of Workers’ Compensation anywhere else for a period of three months. The agreement violated public policy because it (i) fails to provide “the statutorily-required right of the lessee to terminate the lease in the event that the Federal Government should ever fail to appropriate sufficient funds necessary for the payment of the rent” and it (ii) “contracts away the statutory duty of the Division of Workers’ Compensation to provide a public service.”¹⁰⁷ “If the Division of Workers’ Compensation were required at some time in the future to discontinue operations for three months in order to comply with a strict application on the nonsubstitution clause in the lease, the agency could not discharge its

⁹⁷W.Va. Code Ann. § 5A-3B-2. “Agency” means any state department, division, office, commission, authority, board or other unit authorized by law to enter into contracts for the provision of goods or services. *Id.* § 5A-3B-1.

⁹⁸W.Va. Const. art. 10, § 4 (state), § 8 (county, city, school district).

⁹⁹W.Va. Code Ann. § 7-3-13.

¹⁰⁰185 S.E. 223 (Va. 1936).

¹⁰¹*Id.* at 225.

¹⁰²233 S.E.2d 332 (W.Va. 1977). *See also State ex rel. West Virginia Resource Recovery-Solid Waste Disp. Auth. v. Gill*, 323 S.E.2d 590 (W.Va. 1984) (mere expectation of continued appropriation by the state legislature does not create prohibited state debt or lending of credit, if the legislature is not obligated to appropriate payments), *overruled on other grounds by Winkler v. State School Bldg. Authority*, 434 S.E.2d 420 (1993).

¹⁰³*Id.* at 334.

¹⁰⁴*Id.*

¹⁰⁵59 Op. Att’y Gen. 158 (W.Va. Jan. 22, 1980).

¹⁰⁶Op. Att’y Gen. (W.Va. July 9, 1991) (Ag Lexis 4; available on Lexis, States library, W.Va. file).

¹⁰⁷*Id.*

statutorily-mandated duties.”¹⁰⁸ The nonsubstitution clause was considered severable from the remainder of the agreement, even though the lease was silent on the issue of severability.¹⁰⁹

In *Winkler v. School Building Authority*,¹¹⁰ the Supreme Court of Appeals of West Virginia held that revenue bonds containing nonappropriation clauses violated constitutional debt limitations. Taxpayers challenged the School Building Authority’s issuance of revenue bonds to fund building construction and capital improvements. The financing arrangement was not a term lease-purchase. The court noted that certain lease-financing arrangements to construct buildings are valid,¹¹¹ but held that this arrangement differed in that moneys would be coming from the general revenue fund without restriction as to amount; they were not being taken from lease payments or a special fund dedicated to the purpose for which they were issued. The court said the arrangement had the practical effect of creating long-term debt because the legislature would not dare fail to make appropriations and thereby impair the state’s credit. The court bolstered its opinion by finding a legislative commitment to make payments under the bonds within the code.¹¹² The ruling is prospective only.¹¹³ Refunding of existing bonds is permitted because it does not create new indebtedness.¹¹⁴

In *McGraw v. Caperton*,¹¹⁵ the Supreme Court of Appeals of West Virginia held that “one year contracts with multiple renewals and non-binding cancellation clauses . . . [do] not create a present indebtedness for the aggregate of all the installments”¹¹⁶ for the state. The court stated that the contract could be “cancelled at any point in the remaining years left in the installments” and the contract would not be renewed by the state at the end of each installment period by the state “simply refusing to appropriate additional funds,” with all equipment, training and maintenance then becoming the property of the State.”¹¹⁷

In *State v. Spelsberg*¹¹⁸ the court held that revenue bonds issued by a municipal building commission and payable from rental payments from a municipality to the building commission pursuant to a lease agreement did not violate debt limitations in the West Virginia constitution as the agreement provided for periodic payment as services were furnished, and incorporates non-binding cancellation clauses such that there is no present indebtedness for the aggregate of all the installments.¹¹⁹ The court noted that the agreement involved “quasi-revenue” bonds, a measurable need could be met cheaply and efficiently, and that the security for the bonds was the building itself, and the municipality was free to go elsewhere if it found cheaper facilities, leaving the bondholders without recourse.¹²⁰

In 1996, citing *Winkler* and *Spelsberg*, the Supreme Court of Appeals, in *Dial*,¹²¹ decided that the rental payments of the State to a county building commission under a lease-purchase arrangement did not violate sections 4 or 6, Article X of the West Virginia constitution. The Court noted that the “current

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰434 S.E.2d 420 (W.Va. 1993). *See also* *State v. Wagoner*, 438 S.E. 2d 810 (W.Va. 1993) (if legislature creates new tax source, increases amount to be paid on existing tax account, or utilizes existing special revenue source to liquidate revenue bonds, bonds do not represent increased burden on state’s existing indebtedness in violation of restriction on creation of debt in West Virginia Constitution), *overruled on other grounds* by *State v. West Virginia Inv. Management Bd.*, 508 S.E.2d 130 (1998).

¹¹¹*Id.* at 428.

¹¹²*Id.* at 435.

¹¹³*Id.* at 436-37.

¹¹⁴*Id.* at 437-38.

¹¹⁵446 S.E. 2d. 921 (1994).

¹¹⁶*Id.* at 929.

¹¹⁷*Id.*

¹¹⁸447 S.E. 2d. 16 (1994).

¹¹⁹*Id.* at 20.

¹²⁰*Id.*

¹²¹*See, supra*, note 15 and accompanying text.

scenario mirrors . . . general characteristics of the constitutional lease-purchase agreements as the rental payments apparently will be determined by the cost to the Commission to acquire and renovate the . . . building and will be due at intervals contemporaneous with the State's use of the property . . . [and] the State will not be obligated to continue to lease the property indefinitely as the proposed lease-purchase agreement apparently will contain a provision whereby the State may terminate the lease upon thirty days' notice."¹²²

Interest Rate Limitations

"[P]arties may contract for and charge interest for a secured or unsecured loan, repayable in installments at a rate not in excess of (a) six percent per annum upon the principal amount of the loan, for the entire period of the loan, . . . or (b) six percent per annum upon the face amount of the instruments evidencing the obligation to repay the loan . . . but in no case shall the interest on such a discount loan exceed . . . an annual percentage rate of fifteen percent per annum calculated according to the actuarial method."¹²³

No provisions were found limiting the rate of interest paid on a lease-purchase agreement with a governmental unit.

Miscellaneous

On February 26, 2004, the State Tax Commissioner ruled that a county assessor properly classified a finance lessor's interest in tangible personal property under a tax-exempt lease-purchase agreement with the State of West Virginia as a "chattel interest" subject to property taxation. The statute under which the county assessor found authority for assessing is W.Va. Code §11-1C-1a, which is still in effect. The ruling would not be limited to lease-purchasing to the State.

In 2005, the legislature enacted the following provisions most likely in response to the State Tax Commissioner ruling that exempts the following real and personal property from taxation:

All property belonging to the state, any county, district, city, village, town or other political subdivision or any state college or university which is subject to a lease purchase agreement and which provides that, during the term of the lease purchase agreement, title to the leased property rests in the lessee so long as lessee is not in default or shall not have terminated the lease as to the property. . . .

[This amendment to subdivision (27), subsection (a)], passed during the two thousand five regular session of the Legislature, shall apply to all applicable lease purchase agreements in existence upon the effective date of the amendment.¹²⁴

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AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES** – Any references in the agreement to arbitration or to the jurisdiction of any court are hereby deleted. Disputes arising out of the agreement shall be presented to the West Virginia Court of Claims.

¹²²479 S.E. 2d 695 at 710.

¹²³W. Va. Code Ann. § 47-6-5a.

¹²⁴*Id.* § 11-3-9(27).

2. **HOLD HARMLESS** – Any provision requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** – The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** – Provisions in the agreement requiring the Agency to pay taxes are deleted. As a State entity, the Agency is exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor.
5. **PAYMENT** – Any reference to prepayment are deleted. Payment will be in arrears.
6. **INTEREST** – Any provision for interest or charges on late payments is deleted. The Agency has no statutory authority to pay interest or late fees.
7. **NO WAIVER** – Any language in the agreement requiring the Agency to waive any rights, claims or defenses is hereby deleted.
8. **FISCAL YEAR FUNDING** – Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATIONS** – Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** – Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **FEES OR COSTS** – The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** – Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to another State of West Virginia agency, board or commission upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** – The Agency, as a State entity, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** – Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services rendered or goods received prior to the effective date of termination.
15. **TERMINATION CHARGES** – Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** – Any references to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** – Any provision requiring the Agency to purchase insurance for Vendor's property is deleted. The State of West Virginia is insured through the Board of Risk and Insurance Management, and will provide a certificate of property insurance upon request.
18. **RIGHT TO NOTICE** – Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** – Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.

20. **CONFIDENTIALITY** – Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. State contracts are public records under the West Virginia Freedom of Information Act.

21. **AMENDMENTS** – All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Purchasing Division and the Attorney General.

22. **DELIVERY** – All deliveries under the agreement will be FOB destination unless otherwise stated in the State's original solicitation. Any contrary delivery terms are hereby deleted.

ⁱ The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

WISCONSIN 2018 REVISION

Current through April 17, 2018 Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Each county is . . . “authorized . . . to acquire and hold, lease or rent real and personal estate for public uses or purposes . . . , to sell, lease, and convey the same . . . , to make such contracts and to do such other acts as are necessary and proper”⁴ Counties may “acquire, lease or rent property, real and personal, for public uses or purposes of any nature.”⁵

Construct, purchase, acquire, lease, develop, improve, extend, equip, operate and maintain all county buildings, structures and facilities hereinafter in this subsection referred to as “projects”, including without limitation because of enumeration swimming pools, stadiums, golf courses, tennis courts, parks, playgrounds, bathing beaches, bathhouses and other recreational facilities, exhibition halls, convention facilities, convention complexes, including indoor recreational facilities, dams in county lands, garbage incinerators, courthouses, jails, schools, hospitals and facilities for medical education use in conjunction with such hospitals, homes for the aged or indigent, regional projects, sewage disposal plants and systems, and including all property, real and personal, pertinent or necessary for such purposes.⁶

Energy Performance Contracting

Any local government unit “may enter into a lease-purchase agreement for the purchase and installation of energy conservation or facility improvement measures,” subject to numerous restrictions.⁷

Towns

Towns qualify as tax-exempt issuers for purposes of federal tax law due to their tax,⁸ eminent domain⁹ and police powers.¹⁰

Towns may “[a]cquire and hold real and personal property for public use and convey and dispose of the property.”¹¹

Villages

Villages¹² qualify as tax-exempt issuers for purposes of federal tax law due to their tax,¹³ eminent domain¹⁴ and police powers.¹⁵

Villages may “acquire property, real and personal . . . and may sell and convey such property.”¹⁶

¹Wis. Stat. Ann. § 67.05(10).

²Wis. Const. art. 11, § 3a.

³See generally Wis. Stat. Ann. § 59.70.

⁴*Id.* § 59.01.

⁵*Id.* § 59.52(6)(a).

⁶*Id.* § 59.52(6)(d).

⁷*Id.* § 66.0133(4).

⁸*Id.* § 60.10(1)(a)).

⁹*Id.* § 32.02(1).

¹⁰See generally *id.* ch. 60.

¹¹*Id.* § 60.01(2)(b).

¹²Villages may adopt home rule powers. Wis. Const. art. 11, § 3; Wis. Stat. Ann. § 66.0101.

¹³*Id.* § 61.34(4).

¹⁴*Id.* § 61.34(3).

¹⁵*Id.* § 61.34(1).

Municipalities

Municipalities¹⁷ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹⁸ eminent domain¹⁹ and police powers.²⁰ “[A]ny city may by . . . purchase or . . . acquire property, real or personal, . . . for any . . . public purpose.”²¹ Cities may “construct, own, lease and maintain buildings . . . and may sell and convey such property.”²²

Energy Performance Contracting

Any local government unit “may enter into a lease-purchase agreement for the purchase and installation of energy conservation or facility improvement measures,” subject to numerous restrictions.²³

School Districts

School districts²⁴ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁵ and eminent domain powers.²⁶ Common, union high and unified school districts may “[p]urchase or otherwise acquire . . . equipment, school apparatus and materials for the use of the schools.”²⁷ Common, union high and unified school districts may “provide for the erection . . . or for the lease of suitable buildings for a period not exceeding twenty years with annual rentals.”²⁸

First class city school systems may “purchase [or] lease . . . buildings and purchase furniture and sites for the public schools . . . and may contract for carrying out any of these purposes.”²⁹

All school districts may “lease school sites, buildings and equipment not needed for school purposes . . . at a reasonable rental for a term not exceeding fifteen years”³⁰

If permitted by the state department of education, school districts may, but are not required, to lease, with an option to purchase, technology materials, supplies, and equipment for education from the state department of administration.³¹

¹⁶*Id.* § 61.34(3).

¹⁷Municipalities for purposes of this discussion are all four classes of cities. *Id.* § 62.05. These provisions may not be applicable to a first class city with a special charter. *See id.* § 62.03. Cities may be home rule. Wis. Const. art. 11, § 3; Wis. Stat. Ann. § 66.0101.

¹⁸*Id.* § 67.05(10).

¹⁹Wis. Const. art. 11, § 3a.

²⁰Wis. Stat. Ann. § 62.11(5).

²¹*Id.* § 62.22(1).

²²*Id.*

²³*Id.* § 66.0133(4).

²⁴School districts are classified as common school districts, union high school districts, unified school districts and first class city school systems (Milwaukee). *Id.* § 115.01(3). Unified school districts “have the powers and duties of . . . a common school district.” *Id.* § 120.44.

²⁵*Id.* § 119.46 (first class city schools); *id.* § 120.10(6) to (11) (common, union high and unified school districts).

²⁶*Id.* § 32.02(1).

²⁷*Id.* § 120.13(5).

²⁸*Id.* § 120.10(5). For an opinion on the borrowing procedures school districts must follow in the construction of buildings, *see* Op. Att’y Gen. 37-90 Revised (Wis. 1991).

²⁹Wis. Stat. Ann. § 119.16(3).

³⁰*Id.* § 120.13(25) (need approval at annual meeting or special school district meeting for common, union high and unified school districts); *id.* § 119.18(15) (first class city school districts need only board approval).

³¹*Id.* § 16.993(8).

Energy Performance Contracting

Any local government unit “may enter into a lease-purchase agreement for the purchase and installation of energy conservation or facility improvement measures,” subject to numerous restrictions.³²

Fire Districts

There appears to be no statutory framework for fire districts.

Hospital Districts

There appears to be no statutory framework for hospital districts.

State Entities

The Department of Administration is generally responsible for purchasing materials, supplies, equipment, and all other permanent personal property for all state agencies.³³ The department has the authority to delegate its procurement power for most property.³⁴ For supplies, equipment, or contractual services relating to information technology or telecommunications, the department of administration retains the responsibility of prior review and approval for all agency requests except those by the University of Wisconsin System and the University of Wisconsin-Madison.³⁵ The Department of Administration is required to delegate procurement authority to the Department of Corrections,³⁶ the University of Wisconsin System and the University of Wisconsin-Madison, and may delegate authority to the Department of Revenue.³⁷

Agencies, except those in the judicial or legislative branches,³⁸ generally must request purchase approval through a requisition process.³⁹

Where the estimated cost of a contract does not exceed \$25,000, awards may be made pursuant to simplified procedures established by the department. Bids are required where estimated cost exceeds \$50,000.⁴⁰

Any contract entered into by an officer contrary to the procurement statutes or rules promulgated thereunder (code sections 16.705 to 16.82) is void.⁴¹

Statutes for “continuing contracts” require:

(1) All contracts for materials, supplies, equipment or contractual services to be provided to any agency shall run to the state of Wisconsin. Such contracts shall be signed by the secretary or an individual authorized by the

³²*Id.* § 66.0133(4).

³³*Id.* § 16.71. The term “agencies” includes “an office, department, agency, institution of higher education, association, society or other body in state government created or authorized to be created by the constitution or any law, which is entitled to expend moneys appropriated by law, including the legislature and the courts, but not including an authority.” *Id.* § 16.70(1e). The legislative and judicial branches are not required to procure goods through the Department of Administration. *Id.* § 16.74.

³⁴*Id.* § 16.71.

³⁵*Id.* § 16.71(1m).

³⁶The department of corrections is statutorily authorized to enter into leases for the financing of new buildings, subject to approval by the DOA, governor and building commission. *Id.* § 301.235(2).

³⁷*Id.*

³⁸Requisitions by judicial and legislative branches are governed by section 16.74.

³⁹*Id.* § 16.72

⁴⁰*Id.* § 16.75(1)(b).

⁴¹*Id.* § 16.77(2).

secretary, except that contracts entered into directly by the legislature, the courts or a legislative service or judicial branch agency shall be signed by an individual authorized under s. 16.74 (2) (b).

...

(4) (a) In this subsection, “master lease” means an agreement entered into by the department on behalf of one or more agencies to obtain property or services under which the department makes or agrees to make periodic payments.

(ag) The department may pay or agree to pay under a master lease a sum substantially equivalent to or in excess of the aggregate value of property or services obtained and it may be agreed that the department or one or more agencies will become, or for no other or nominal consideration has the option to become, the owner of property obtained or to be obtained under a master lease upon full compliance with its terms.

(b) Except as provided in par. (h), the department may enter into a master lease whenever the department determines that it is advantageous to the state to do so. If the master lease provides for payments to be made by the state from moneys that have not been appropriated at the time that the master lease is entered into, the master lease shall contain the statement required under s. 16.75 (3).⁴²

(c) Payments under a master lease may include interest payable at a fixed or variable rate as the master lease may provide. The department may enter into agreements and ancillary arrangements which the department determines to be necessary to facilitate the use of a master lease.

(d) The department may delegate to other persons the authority and responsibility to take actions necessary and appropriate to implement agreements and ancillary arrangements under par. (c).

(e) The department may grant a perfected security interest in property obtained or to be obtained under a master lease. The department shall record and preserve evidence of the security interest in its offices at all times during which the master lease is in effect.

(f) The department may appoint one or more fiscal agents for each master lease. Each fiscal agent shall be an incorporated bank or trust company authorized by the laws of the United States or of the state in which it is located to do business as a banking or trust company. The department shall periodically require competitive proposals, under procedures established by the department, for fiscal agent services under this paragraph. There may be deposited with a fiscal agent, in a special account for such purpose only, a sum estimated to be sufficient to enable the fiscal agent to make all payments which will come due under the master lease not more than 15 days after the date of deposit. The department may make such other provisions respecting fiscal agents as it considers necessary or useful and may enter into a contract with any fiscal agent containing such terms, including compensation, and conditions in regard to the fiscal agent as it considers necessary or useful.

(g) Sections 16.705 and 16.75 do not apply to agreements or ancillary agreements under par. (c) or contracts for fiscal agent services under par. (f).

(h) A master lease may not be used to obtain a facility for use or occupancy by the state or an agency or instrumentality of the state or to obtain an internal improvement.

(j) If a master lease is used to finance payments to be made under an energy conservation construction project as provided in s. 16.858 (2), payments under the lease may not be conditioned upon any payment required to be made by the contractor pursuant to an energy conservation audit.⁴³

⁴²“The department may let contracts in excess of funds available. Except in the cases to which s. 18.10 (1) [see below] applies, any such contract shall state in substance that its continuance beyond the limits of funds already available is contingent upon appropriation of the necessary funds. Contracts may be for any term deemed to be in the best interests of the state but the terms and provisions for renewal or extension, if any, shall be incorporated in the bid specifications and the contract document.” Wis. Stat. Ann. § 16.75(3). Section 18.10(1) provides: “After adoption of an authorizing resolution for a purpose which is to be accomplished wholly or in part through performance of an executory contract by some other contracting party, such contract may be entered into prior to the contracting of the debt authorized by such resolution with like effect as if the funds necessary for payments on the contract were already available. In such cases the debt authorized by such resolution shall be deemed to have been contracted pursuant to such resolution in the amount necessary to make such payments on the date such contract is entered into and the authority of such resolution shall promptly thereafter be exercised.”

⁴³*Id.* § 16.76.

Copiers, laser printers and other graphic reproduction equipment costing over \$50,000 and not on a statewide contract require notification of the State Bureau of Procurement.⁴⁴

Motor vehicle purchases require approval of the State Bureau of Procurement and such requests for vehicle approval will be transmitted to the governor.⁴⁵

The Department of Administration and municipalities are authorized to enter into cooperative purchasing agreements for “the purchase of materials, supplies, equipment, permanent personal property, miscellaneous capital or contractual services.”⁴⁶

The Department of Administration is generally responsible for managing state real estate and facilities⁴⁷ and is responsible for all functions relating to the leasing and acquisition of real property except where otherwise provided by statute or the governor.⁴⁸ Leases involving an annual rent of more than \$500,000 are subject to approval by the joint committee on finance.⁴⁹ The Department of Administration must submit proposed leases to the Building Commission.⁵⁰ The building commission may authorize the lease purchase of facilities in lieu of state construction of and project enumerated in an authorized state building program.⁵¹ The commission will review leases of new construction, or leases where the space requested exceeds 10,000 square feet or if the proposed term of a lease would exceed 5 years.⁵² Subject to limitations, the building commission may acquire and lease property for housing state agencies.⁵³ Building projects which involve a cost in excess of \$185,000 are subject to approvals by the building commission.⁵⁴ Installation of fixtures or repairs to the grounds or buildings of the capitol or executive residence must be approved by the state capitol and executive residence board.⁵⁵

Higher Education

The Department of Administration has delegated to the University of Wisconsin System Board of Regents⁵⁶ and to the University of Wisconsin-Madison the authority to enter into contracts for materials, supplies, equipment and services “that relate to higher education and that agencies other than the University of Wisconsin System do not commonly purchase.”⁵⁷ This delegated authority extends to information technology.⁵⁸

High-cost projects. (a) Except as provided in par. (b), the Board of Regents shall projected cost greater than

⁴⁴State Procurement Manual, No. PRO-D-5 (Eff. 11-05-13). “Graphic reproduction equipment” means all photocopiers, laser printers, proofing equipment, prepress equipment, CTP (computer to plate) equipment.

⁴⁵*Id.* No. PRO-D-16 (Eff. 10-01-88).

⁴⁶Wis. Stat. Ann. § 16.73.

⁴⁷*Id.* § 16.84(1).

⁴⁸*Id.* § 16.84(4) [variously numbered 16.84(5) in some sources].

⁴⁹*Id.*

⁵⁰The building commission oversees the state's long range building program, renovation and maintenance of existing properties. *Id.* § 13.48.

⁵¹*Id.* § 13.48(19).

⁵²Wisconsin Building Commission Policy and Procedures Manual, Pt. VIII. Real Estate Guidelines, p. 28, para. I. (Updated: Aug., 2011).

⁵³Wis. Stat. Ann. § 13.482; § 20.914 (governor's approval required).

⁵⁴*Id.* § 13.48.

⁵⁵*Id.* § 16.83.

⁵⁶The board governs state public institutions of higher education. *Id.* Ch. 36.

⁵⁷*Id.* § 16.71.

⁵⁸*Id.*; *id.* § 36.59; Univ. Wisc. Syst. Admin. Pol’y 1010 (rev’d 11-21-2017). *See* Univ. of Wisc. Syst. and Bd of Regents Policies [under revision 2018]. Related policy documents include Regent Pol’y Doc 13-2 (Real Property Contracts: Signature Authority and Approval), Regent Pol’y Document 13-5 (Capital Projects Solely Managed by the UW Syst.: Approval and Signature Authority).

\$1,000,000, and require the system and each institution and college campus that enters into a contract for materials, supplies, equipment, or contractual services relating to information technology to include in each contract with a vendor of information technology that involves a large, high-risk information technology project under sub. (2) or that has a projected cost greater than \$1,000,000 a stipulation include in each contract with a vendor of information technology that involves a large, high-risk information technology project under sub. (2) [of section 36.59] or that has a requiring the vendor to submit to the board for approval any order or amendment that would change the scope of the contract and have the effect of increasing the contract price. The stipulation shall authorize the board to review the original contract and the order or amendment to determine all of the following and, if necessary, to negotiate with the vendor regarding any change to the original contract price:

1. Whether the work proposed in the order or amendment is within the scope of the original contract.
2. Whether the work proposed in the order or amendment is necessary.

(b) The Board of Regents may exclude from a contract described in par. (a) the stipulation required under par. (a) if all of the following conditions are satisfied:

1. Including such a stipulation would negatively impact contract negotiations or significantly reduce the number of bidders on the contract.
2. If the exclusion is sought by the system or an institution or college campus, the system or that institution or college campus submits to the board a plain-language explanation of the reasons the stipulation was excluded and the alternative provisions the system, institution, or college campus will include in the contract to ensure that the contract will be completed on time and within the contract budget.
3. The board submits for approval by the joint committee on information policy and technology any explanation and alternative contract provisions required under subd. 2. If, within 14 working days after the date that the board submits any explanation and alternative contract provisions required under this subdivision, the joint committee on information policy and technology does not contact the board, the explanation and alternative contract provisions shall be deemed approved.⁵⁹

The university system may generally delegate procurement authority to individual institutions which may further delegate authority internally.⁶⁰

The Board of Regents of the University of Wisconsin System has the power of eminent domain⁶¹ and may purchase and lease lands, buildings and “all other property of any nature which may be necessary.”⁶²

Any lease is subject to the powers of the University of Wisconsin Hospitals and Clinics Authority under s. 233.03 (13) and the rights of the authority under any lease agreement, as defined in s. 233.01 (6). The board shall not permit a facility that would be privately owned or operated to be constructed on state-owned land without obtaining prior approval of the building commission under s. 13.48 (12). Subject to prior action under s. 13.48(14)(am) or 16.848(1), the board may sell or dispose of such property as provided by law, or any part thereof when in its judgment it is for the best interests of the system and the state. All purchases and sales of real property shall be subject to the approval of the building commission. The provision of all leases of real property to be occupied by the board for use other than for student housing shall be the responsibility of the board. The provision of all leases of real property to be occupied by the board for use as student housing shall be the responsibility of the department of administration under [s. 16.84\(5\)](#).

⁵⁹Wis. Stat. Ann. § 36.59(5).

⁶⁰*Id.* Purchasing Responsibility and Authority (G8) (Eff. June 5, 1998).

⁶¹Wis. Stat. Ann. § 36.11(9).

⁶²*Id.* § 36.11(1)(b).

except for leases in effect on July 14, 2015, regardless of any subsequent extension, modification, or renewal, which shall be the responsibility of the board.⁶³

Energy Performance Contracting

State agencies, including universities, may enter into contracts for energy savings financed by the contractor, subject to numerous restrictions.⁶⁴ Such contracts must include a provision “stating in substance that payments under the contract are contingent upon available appropriations.”⁶⁵

Debt Limitations

The State is constitutionally and statutorily limited in the amount of debt it may incur.⁶⁶ Counties, towns, villages, municipalities and school districts are statutorily limited in the amount of “municipal obligations” they may incur.⁶⁷ “‘Municipal obligation’ includes every lawful promise or engagement in writing by a municipality to pay at a specified future time a specified sum of money.”⁶⁸ All are also constitutionally limited in the amount of debt they may incur.⁶⁹

In *State ex rel. Thomson v. Giessel*,⁷⁰ the court found that three true leases between the state and public building corporations did not create debt in contravention of the state constitution.⁷¹ The state was not obligated by the terms of the lease, and could terminate the lease by nonappropriation of funds.⁷² While the court construed the agreements as true leases, it noted that “[a]n installment purchase agreement does not necessarily create state debt. It has been determined . . . that no state debt is created where payments are to be made solely at the state’s option.”⁷³

In *Dieck v. Unified School District of Antigo*,⁷⁴ the Supreme Court of Wisconsin affirmed the decision of the court of appeals⁷⁵ and upheld the validity of a school district’s lease-purchase financing agreement for the construction of a new school building. The agreement included a nonappropriation clause which saved the agreement from violating indebtedness limitations in the Wisconsin constitution and statutes.

“The test established . . . for indebtedness [under the Wisconsin constitution] is not whether the municipal body unit will probably pay or whether the municipal body would be foolish not to pay. The

⁶³*Id.*

⁶⁴*Id.* § 16.858.

⁶⁵*Id.*

⁶⁶Wis. Const. art. VIII, § 4; Wis. Stat. Ann. § 18.02 (state may not incur debt in excess of \$100,000).

⁶⁷*Id.* § 67.03(1).

⁶⁸*Id.* § 67.01(6).

⁶⁹Wis. Const. art. 11, § 3(2). In *Burnham v. City of Milwaukee*, 73 N.W. 1018 (Wis. 1897), the city contracted for the purchase of lands for public parks. The city acquired no title until all installments were paid and it could stop payment at any time. *Id.* at 1020. The contract was not included in the computation of the debt of the city. In *Stedman v. City of Berlin*, 73 N.W. 57 (Wis. 1897), the city voted to pay rental for the use of water hydrants at \$4,500 per annum for thirty years. *Id.* at 58. The court held that where a municipality contracts for annual services for a series of years, to be paid for by annual payments, such payments cannot be computed for the whole term and only that amount that will become due within a certain year can be considered in determining whether such a contract is in violation of the debt limit.

⁷⁰72 N.W.2d 577 (Wis. 1955).

⁷¹*Id.* at 591.

⁷²*Id.* at 588.

⁷³*Id.* at 590.

⁷⁴447 N.W.2d 613 (Wis. 1991).

⁷⁵458 N.W.2d 565 (Wis. Ct. App. 1990).

test is whether the municipal body is under an obligation to pay and the creditor has a right to enforce payment against the municipal body or its assets.”⁷⁶

This case is also important for (1) citing section 120.10(5), relating to the “erection of suitable buildings or for the lease of suitable buildings for a period not exceeding twenty years,” as authority for school district to enter into a lease-purchase financing;⁷⁷ (2) noting that any lack of authority of the school district to issue certificates of participation is no obstacle since the district will not be a signatory on the certificates⁷⁸ and (3) holding that it was not illegal for the school district to disburse money to lease buildings from its general fund.⁷⁹

The attorney general has advised that school districts may lease-purchase transportation equipment without violating debt limitations if such agreements include nonappropriations clauses.⁸⁰ The opinion further advises that the use of a nonsubstitution clause may cause the lease-purchase agreement to be in violation of the debt limit.⁸¹ Such a clause would effectively prohibit the school district from terminating the agreement by nonappropriation because the district would be prohibited from substituting equipment other than that leased to provide statutorily required transportation.⁸²

Interest Rate Limitations

Except as authorized by other statutes, no person shall . . . contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:

- (a) At the rate of \$12 upon \$100 for one year computed upon the declining principal balance of the loan or forbearance;
- (b) With respect to loans or forbearances repayable in substantially equal weekly or monthly installments and the face amounts of which include predetermined interest charges, at the rate of \$6 upon \$100 for one year computed upon that portion of the original principal amount of any such loan or forbearance . . . ; and
- (c) With respect to loans or forbearances repayable in installments other than of the type described in . . . (b), the amount of interest may be predetermined at the rate set forth in . . . (a) at the time the loan is made on the basis of the agreed rate of interest and the principal balances agreed to be outstanding and stated in the note or loan contract as an addition to the principal⁸³

“This section does not apply to any loan . . . in the amount of \$150,000 or more”⁸⁴ It also doesn’t apply to loans to a corporation or limited liability companies.⁸⁵

No other provisions were found relating to interest rate limitations.

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent**

⁷⁶447 N.W.2d at 618.

⁷⁷*Id.* at 623.

⁷⁸*Id.*

⁷⁹*Id.* at 623-24.

⁸⁰10-83 Op. Att’y Gen., slip op. unpublished (Wis. Mar. 3, 1983) (on Lexis, states library, Wis. file).

⁸¹*Id.*

⁸²*Id.*

⁸³Wis. Stat. Ann. § 138.05(1).

⁸⁴*Id.* § 138.05(7).

⁸⁵*Id.* § 138.05(5).

research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.

WYOMING 2017 REVISION

Updated through the 2016 Budget Session, Westlaw¹

Counties

Counties qualify as tax-exempt issuers for purposes of federal income tax law due to their tax,¹ eminent domain² and police powers.³ Each county may “[p]urchase property for the use of the county,”⁴ “[s]ell or convey property owned by the county, when it is in the best interests of the county”⁵ and may “[m]ake contracts and perform other acts relating to the property and concerns of the county.”⁶

Counties may “acquire by lease, purchase, or otherwise, lands and other property for airport purposes . . . [and] lease or let any portion of the area, buildings or facilities to any private person or corporation, upon terms deemed satisfactory.”⁷

“The board of county commissioners may lease approved voting machines or purchase them in annual installments not to exceed ten (10) years.”⁸

Counties have the authority to lease and purchase jails, prisons or other incarceration facilities over a term of years, subject to statutory restrictions.⁹

Energy Performance Contracting

Counties may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.¹⁰

Municipalities

Municipalities¹¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax, eminent domain and police powers.¹² Municipalities may “[p]urchase and hold real and personal property for their use”¹³ and “[s]ell, convey and lease any estate owned.”¹⁴ Municipalities may also “[p]urchase, lease or rent land . . . for the deposit of refuse matter”¹⁵ and “[t]ake any action necessary to acquire any needed or useful property.”¹⁶

¹Wyo. Stat. Ann. § 39-13-102(g).

²*Id.* § 1-26-801(a).

³*See generally id.* tit. 18, ch. 5.

⁴*Id.* § 18-2-101(a)(ii).

⁵*Id.* § 18-2-101(a)(iii).

⁶*Id.* § 18-2-101(a)(iv).

⁷*Id.* § 10-5-101(a)(i) and (iv).

⁸*Id.* § 22-10-103.

⁹*Id.* § 7-22-104.

¹⁰*Id.* §§ 9-12-1201 to 9-12-1203.

¹¹Municipalities for purposes of this discussion are cities and towns. Such may adopt a charter form of government. Wyo. Const. art. XIII, § 1(b).

¹²*See generally* Wyo. Stat. Ann. tit. 15.

¹³*Id.* § 15-1-103(a)(iii).

¹⁴*Id.* § 15-1-103(a)(iv). Sale of property generally requires public bidding. *Id.* § 15-1-112.

¹⁵*Id.* § 15-1-103(a)(xxi).

¹⁶*Id.* § 15-1-103(a)(xlii).

Municipalities may “acquire, by lease, purchase, or otherwise, lands and other property for airport purposes . . . [and] lease or let any portion of the area, buildings or facilities to any private person or corporation, upon terms deemed satisfactory.”¹⁷

Municipalities have the authority to lease and purchase jails, prisons or other incarceration facilities over a term of years, subject to statutory restrictions.¹⁸

Energy Performance Contracting

Municipalities may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.¹⁹

School Districts

School districts qualify as tax-exempt issuers for purposes of federal income tax law due to their tax²⁰ and eminent domain powers.²¹ School districts may “[a]cquire, hold, convey, lease, rent, and manage property, real and personal, for the benefit of the school district. This includes capital leasing under [section] 21-15-112.”²² Under this restrictive statute concerning the leasing of capital assets, school districts have authority to “lease any land, building, equipment or other asset,” but it appears that such a lease must be initiated by the School Facilities Commission and would be authorized solely through a non-profit corporation approved by the Wyoming State Building Commission.²³

Energy Performance Contracting

School districts may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.²⁴

Fire Districts

Fire districts²⁵ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.²⁶ It appears that fire districts have the power of eminent domain.²⁷ Fire district boards of directors are authorized to enact such ordinances as may be necessary to establish and operate a fire protection district.²⁸ Districts may enter into contracts or agreements to jointly purchase or lease facilities and equipment used in jointly established fire protection agency facilities.²⁹

Energy Performance Contracting

¹⁷*Id.* § 10-5-101(a)(i) and (iv).

¹⁸*Id.* § 7-22-104.

¹⁹*Id.* §§9-12-1201 to 9-12-1203.

²⁰*Id.* § 21-3-110(a)(vi).

²¹*Id.* § 21-3-111(a)(xiii).

²²*Id.* § 21-3-111(a)(ii).

²³*Id.* § 21-15-112. This position was taken in an unpublished opinion of the attorney general to Ian Catellier, Dir. Wyo. Sch. Facilities Dept., dated Nov. 30, 2012 concerning a school district's intent to finance construction services through a lease-purchase financing.

²⁴Wyo. Stat. Ann. § 9-12-1201 to 9-12-1203.

²⁵Fire protection districts are “special districts.” *Id.* § 22-29-103(a).

²⁶*Id.* § 35-9-204.

²⁷*Id.* § 1-26-502 and §§ 1-26-801 to 809.

²⁸*Id.* § 35-9-203. A special district must file any ordinances or bylaws it adopts with the county clerk for each county in which the district is located. *Id.* § 22-29-103.

²⁹*Id.* § 18-2-108.

Fire districts may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.³⁰

Hospital Districts

Hospital districts³¹ qualify as tax-exempt issuers for purposes of federal income tax law due to their tax power.³² It appears that hospital districts have the power of eminent domain.³³ A hospital district “may acquire real and personal property and equipment for hospital³⁴ purposes by . . . purchase, and enter into contracts for the acquisition by purchase or lease of real and personal property and equipment and convey, lease and otherwise dispose of its property for the hospital.”³⁵

Energy Performance Contracting

Hospital districts may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.³⁶

State Entities

The Department of Administration and Information, General Services Division, procurement section generally manages procurement³⁷ for the executive branch of the State.³⁸ Competitive bidding is generally required for supplies or services in excess of \$7,500.³⁹ An elected state official may contract for supplies or services, if the contract is for \$20,000 or less, by competitive or noncompetitive negotiation.⁴⁰ Contracts may be made by noncompetitive negotiation where determined by the

³⁰*Id.* §§9-12-1201 to 9-12-1203.

³¹Hospital districts are “special districts.” *Id.* § 35-2-401; § 22-29-103(a). There are also entities known as county or county memorial hospitals that do not appear to be tax-exempt issuers under federal tax laws. *Id.* §§ 18-8-101 through 18-8-109.

³²*Id.* § 35-2-414.

³³*Id.* § 1-26-502 and §§ 1-26-801 to 809.

³⁴“Hospital” and “hospital purposes” means any institution, place, building or agency in which any accommodation is maintained, furnished or offered for the hospitalization of the sick or injured or care of any person requiring or receiving chronic or convalescent care, and includes public health centers, community mental health centers and other types of hospitals and centers, including but not limited to general, tuberculosis, mental and chronic disease hospitals, and also medical facilities, and related facilities; (ii) “Medical facilities” includes but is not limited to diagnostic or treatment centers, rehabilitation facilities and nursing homes, as those terms are defined in the Federal Act Public Law 482, 83 congress, July 12, 1954 (C. 471, Sec. 4 (c)-(f), 68 Stat. 465-466), as amended; (iii) “Related facilities” means but is not limited to laboratories, outpatient departments, nurses’ homes and nurses’ training facilities and central service facilities operated in connection with hospitals. *Id.* § 35-2-403(b).

³⁵*Id.* § 35-2-403.

³⁶*Id.* § 9-12-1203.

³⁷Procurement “means buying, purchasing, renting, leasing or otherwise acquiring any supplies or services. It also includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.” *Id.* § 9-2-1016(a)(i). Supplies means: “(a)ll property, including but not limited to, furniture, fixtures, stationery, printing, paper, fuel and equipment of every kind required for use in the offices, service and functions performed by agencies, and for repairing, heating and lighting the state building.” *Id.* § 9-2-1016(a)(iii).

³⁸*Id.* § 9-2-1016. “For the purpose of this subsection the term ‘agencies’ does not include the University of Wyoming, community college districts, or school districts. It does not include the department of transportation except as to [insurance and liability bonds].” *Id.* The department of transportation is authorized to acquire real property in the name of the transportation commission to construct, maintain and supervise the public highways of the state. *Id.* § 24-2-102. “Purchases of supplies and services for the legislature shall be approved by the management council or its designee. Purchases of supplies and services for the judiciary shall be approved by the judges for their respective courts. Purchases of supplies and services by the offices of state elected officials shall be approved by the respective elected official or his designee and made in accordance with the requirements and guidelines of W.S. 9-2-1016. Purchases by the legislature or the judiciary shall be made in accordance with the requirements and guidelines for competitive or negotiated purchases or contracts set forth in W.S. 9-2-1016(b)(iv)(A) and (B).” *Id.* § 9-2-1026.

³⁹*Id.* § 9-2-1016(b)(iv).

⁴⁰*Id.*

administrator and approved by the governor.⁴¹ Small purchase procedures authorize agencies to procure supplies or services not exceeding \$1,500, or such higher amount established by the department, but not to exceed seven thousand five hundred dollars \$7,500, without prior approval of the department.⁴²

“Whenever an agency has a need to contract for goods or services and more than one payment will be required to fulfill the agreement, a contract shall be issued by Procurement.”⁴³

The general services division is authorized to “lease all property for the state in accordance with rules of the state building commission. Leasing of property by the state shall be conducted on a bid and proposal basis with advertising of space needs and square footage in community or local newspapers. Leasing contracts may be entered into by noncompetitive negotiation only if: (A) The administrator determines in writing that competitive bidding is not feasible; or (B) The lessor is a governmental agency.”⁴⁴ Formal approval by the state building commission is required prior to the purchase or lease of any property.⁴⁵

The general services division, with the approval of the state building commission, “may buy, take options to buy and lease property to be used for building sites for future state office buildings.”⁴⁶ The division, in accordance with rules of the state building commission, “may maintain, operate, lease, manage and equip state office buildings in Wyoming.”⁴⁷ The state building commission may acquire property for special construction projects by purchase, lease, or eminent domain when approved by the legislature or when done pursuant to a state plan.⁴⁸

The “repairing and furnishing the halls and rooms used for the meeting of the legislature and its committees shall be performed under contract” . . . “subject to the approval of the governor and state treasurer.”⁴⁹

The general services division is authorized to purchase and lease “all state motor vehicles and equipment.”⁵⁰

Information Technology

The state's chief information officer oversees and reviews information technology and telecommunications acquired by the state.⁵¹ Pursuant to the code, expenditures for data processing hardware, software, or consultants exceeding the amount set by the department of enterprise technology, services must be approved as follows: by the president of the University of Wyoming for the University of Wyoming; by the state chief information officer for agency requests; by the chief justice of the supreme court for the judicial branch; by the director of the legislative service office for the legislative branch; or by the president of each community college for his respective community college.⁵²

⁴¹*Id.*

⁴²*Id.*

⁴³Dept. of Admin. & Info. Proc. Sect. Purch. & Proc. Man. §2717.00 (Jan. 1, 2011).

⁴⁴Wyo. Stat. Ann § 9-2-1016(b)(xix).

⁴⁵St. Building Comm'n Rules, Ch. IX (Oct. 27, 1997); <http://rules.wyo.gov>. Ref. No. 006.0012.10271997.

⁴⁶Wyo. Stat. Ann. § 9-5-102.

⁴⁷*Id.* § 9-5-104.

⁴⁸*Id.* § 9-5-108(a).

⁴⁹Wyo. Const. art. III, § 31.

⁵⁰*Id.* § 9-2-1016(h).

⁵¹*Id.* § 9-2-2906.

⁵²*Id.* § 9-2-1005(a)(xii); *id.* § 9-2-2906. No threshold amount was found.

Higher Education

The University of Wyoming Board of Trustees⁵³ may “(h)old, manage, lease or dispose of . . . any real or personal estate as is conducive to the welfare of the institution.”⁵⁴ General terms and conditions applicable to university contracts are available through the university website.⁵⁵ All business matters are done in the name of “The University of Wyoming.”⁵⁶ The president of the Board of Trustees is authorized by board bylaws to sign contracts.⁵⁷ The Secretary shall “sign with the President.”⁵⁸ By board rule, the Vice President for Administration shall execute leases and other instruments relating to the transfer of real property⁵⁹ And, in addition to the President, is authorized to sign agreements for the purchase or lease of equipment.⁶⁰ With approval of the president, officers may delegate their signing authority, in writing, to employees within their units; and contracts are submitted to the university legal office for review.⁶¹

Energy Performance Contracting

The State and its departments, boards and agencies, and the University of Wyoming, may enter into lease-purchase agreements for the financing of energy or water conservation measures for a term not to exceed twenty years, subject to numerous restrictions.⁶²

Debt Limitations

The State, counties, municipalities and school districts are constitutionally limited in the amount of debt they may incur.⁶³ “The governing body of a municipality⁶⁴ shall not make any appropriation in the final budget of any fund in excess of the estimated expendable revenue of the fund for the budget year.”⁶⁵ In *Laramie Citizens for Good Government v. City of Laramie*,⁶⁶ a lease agreement between a not-for-profit corporation and the city for realty was held to be a sales transaction in violation of the debt limit. The not-for-profit corporation issued bonds for the project. Under the lease agreement, no additional consideration would be paid at the end of the term by the city to acquire title, the city could *not* terminate the transaction at yearly intervals, the rental amount was gauged by the debt service amount, and the city would pay all taxes and assessments. The court stated that “[t]he intent of the parties is determinative as to whether or not the transaction is a lease or sale.”⁶⁷ Factors in determining whether or not a contract is a lease are whether it includes provisions for (a) yearly cancellation or renewal, (b)

⁵³Wyo. Const. art. VII, § 17.

⁵⁴Wyo. Stat. Ann § 21-17-204.

⁵⁵http://www.uwyo.edu/procurement/_files/docs/general-terms-conditions-Rev. 12-22-2014.

⁵⁶Univ. Wyo. Bd. of Trustees Bylaws, Rev. 5-13-2014, art. XI.

⁵⁷*Id.* art. V, § 5.2.

⁵⁸*Id.* § 5.4.

⁵⁹Univ. Wyo. Reg. 1.1-II.C.

⁶⁰Univ. Wyo. Pres. Dir. 3-2014-1 (7-28-2014).

⁶¹*Id.*

⁶²*Id.* §§ 9-12-1201 to 9-12-1203.

⁶³Wyo. Const. art. XVI, § 1; *id.* art. XVI, § 3 (county); *id.* art. XVI, § 5 (municipality, county and school district). “No debt in excess of the taxes for the current year shall, in any manner, be created by any county or subdivision thereof, or any city [or] town . . . unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved.” *Id.* art. XVI, § 4. For purposes of art. XVI, § 4, school districts are subdivisions of counties. *West v. School Dist. No. 9*, 258 P. 583 (Wyo. 1927).

⁶⁴Municipality means “incorporated first class cities and towns having populations in excess of 4,000 inhabitants and all towns operating under the city manager form of government; . . . [c]ounties; . . . [and] [s]chool districts.” Wyo. Stat § 16-4-102(a)(xiv).

⁶⁵*Id.* § 16-4-110. “No officer or employee of a municipality shall make any expenditure or encumbrance in excess of the total appropriation for any department.” *Id.* § 16-4-108(a).

⁶⁶17 P.2d 474 (Wyo. 1980).

⁶⁷*Id.* at 479.

payment of a substantial amount at the end of the term or for no transfer of title to take place, or (c) maintenance of the property by the lessor.⁶⁸ Had the transaction in *Laramie* been a lease, the only debt or liability that would have been incurred would have been for the payment of rent for the current year. The court also viewed the not-for-profit corporation as the alter ego of the city, since the bonds were issued “on behalf of” the city, a majority of the board of directors were the members of the city council and mayor, and the lessor not-for-profit corporation had no separate economic base.⁶⁹ The Attorney General has opined that in a lease revenue financing where the state is not obligated to continue annual rental payments or to repay bonds, constitutional debt limitations are not violated.⁷⁰ The attorney general took particular notice of a nonappropriation clause in the lease and a lease for a period shorter than the debt service period of the lease revenue bonds. In essence, the structure needed to be a true lease, which would not qualify for tax-exempt financing.

Interest Rate Limitations

No applicable provisions limiting interest rates were found.

ⁱ **The authors of this Survey have used their best efforts to compile and provide only the most accurate information available in the subject matter areas which are covered. However, none of the authors or the Association for Governmental Leasing & Finance make any warranty or representation as to accuracy or completeness. The reader is encouraged to engage its legal counsel and conduct his or her own independent research on any topic dealt with herein before advising clients or otherwise relying upon such information in connection with particular transactions.**

⁶⁸*Id.*

⁶⁹*Id.* at 482. *See also* Witzemberger v. State ex rel. Wyoming Community Development Authority, 575 P.2d 1100 (Wyo. 1978), striking down a financing structure using an authority.

⁷⁰1998 Wyo. Op. Atty Gen. 005 (Wyo. A. G.).