

Title 23
BOARD OF PUBLIC WORKS

Subtitle 03 PUBLIC SCHOOL CONSTRUCTION

Chapter 05 Alternative Financing

Authority: Education Article, §§4-126, 5-112, and 5-301,
Annotated Code of Maryland

.01 Scope.

A. This chapter applies to a public school construction project for building, improvement, supplies, or equipment if it:

(1) Exceeds \$25,000 and has Board of Public Works planning or funding approval; or

(2) Requires review by the State Superintendent of Schools under Education Article, §2-303, Annotated Code of Maryland.

B. This chapter does not apply to a project in a building that is not used primarily for the instruction of students, including an office building, warehouse, or vehicle maintenance or repair building.

C. In this chapter, "IAC or its designee" includes "State Superintendent or designee" if State Superintendent approval is required by Education Article, §2-303(f), Annotated Code of Maryland.

.02 Alternative Project Delivery Proposal Review Assistance.

The State Superintendent or designee may request assistance from the IAC or its designee when reviewing alternative project financing proposals.

.03 Educational and Design Standards Apply.

All projects financed through alternative methods shall comply with State procedures for project design review.

.04 Use of Alternative Financing Methods.

A. A county or an LEA may use alternative financing methods for public school construction.

B. An LEA shall obtain the approval of the county governing body to use an alternative financing method.

.05 Types of Alternative Financing Methods.

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 sub-leased 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.

.06 State Notifications and Approvals.

A. Alternative Financing Notification. An LEA shall notify the IAC or its designee of the proposed use of an alternative financing method for the construction of a public school by submitting a written determination.

B. The determination shall include:

(1) Justification for the use of alternative financing, including the advantages the method will provide to the public;

(2) A description of the method to be used;

(3) A description of the method proposed to procure the alternatively financed project;

(4) The estimated project cost; and

(5) The scope of work eligible for State reimbursement.

C. The submission shall also:

(1) Acknowledge that the State is not responsible for any costs associated with financing, interest payments, design services, or project cost overruns; and

(2) Include a letter from the county approving the use of the alternative financing method.

D. IAC or Designee Approval to Construct. Regardless of project financing method, the LEA may not begin construction until the IAC or its designee has authorized the LEA to proceed.

.07 State Funding.

The State may award funds for an alternatively-financed project only up to the maximum amount that the State would fund if the project were financed conventionally.

.08 Procurement.

A. An LEA or county may procure an alternative financing arrangement for construction of public school facilities in accordance with COMAR 23.03.03.

B. In addition to complying with requirements set forth in COMAR 23.03.03, an LEA shall evaluate the following when procuring an alternative-financing arrangement for construction of public school facilities:

(1) The cost benefit to the LEA and county;

(2) The impact on local financing and on the debt or debt burden of the LEA and county;

(3) A detailed analysis of whether the proposed project financing will preclude use of tax-exempt bond proceeds for the proposed project or any future projects;

(4) The estimated project income and its allocation;

(5) The financial plan, including:

(a) Overall feasibility and reliability of the plan;

(b) The offeror's past performance with similar plans and similar projects;

(c) The degree to which the offeror has conducted due diligence investigation and analysis of proposed financial plan; and

(d) The results of the analyses.

.09 Comprehensive Agreement.

A. General. The LEA or county and the successful offeror shall enter into a comprehensive agreement regarding the parties' rights and obligations. The LEA or county may not enter into a comprehensive agreement with a private entity until the IAC or the State Superintendent, as applicable, has approved the agreement.

B. The comprehensive agreement shall include:

(1) Performance, educational standards, or both, as applicable, of the project;

(2) Time line for completion;

(3) Security such as performance and payment bonds or letters of credit to assure timely completion;

(4) The requirements for approval of sites, plans, and specifications by the State or other authorities with jurisdiction;

(5) The right of the State and other authorities with jurisdiction to periodically examine the project to ensure compliance;

(6) Risk allocations, including liability insurance that covers the LEA;

(7) If applicable, monitoring by the State and local authorities with jurisdiction of the private entity's maintenance to ensure proper maintenance before the responsibility is transferred to the LEA or county;

(8) Procedures in the event that the comprehensive agreement is terminated with or without cause, or there is a material default by the private entity, which shall include:

(a) Conditions governing assumption of the responsibilities of the private entity by the LEA, county, or other designated party, and the transfer or purchase of the private entity's property or other interests by the LEA or county; and

(b) Requirements for LEA or county to give notice of default, procedural and response requirements of the private entity, and the LEA or county, and related procedures;

(9) Periodic reporting of required financial information from the private entity;

(10) The mechanism by which user fees, lease payments, or service payments, if any, shall be established upon agreement of the parties, including the following:

(a) Payments or fees shall be commensurate with those of similar facilities; and

(b) The private entity shall make available a schedule of the user fees and payments to the public upon request;

(11) The terms, if any, under which the LEA or county may be obligated to contribute financial resources;

(12) Periodic reports by which the private entity describes the project's impact on the LEA or county, the local community, and the State;

(13) The private entity's certification, including an individual certification from each team member, that:

(a) All material representations and material information provided in the proposal remain true and correct; and

(b) If material changes occur with respect to any material representation or material information, the private entity shall promptly notify the LEA or county and the IAC or designee; and

(14) Any other information the LEA requires.

.10 Maintenance and Operations.

The private entity shall turn over to the LEA or county the maintenance and operation of the educational portions of the alternatively financed facility on or before the date the facility is open for its intended use.

.11 Minority Business Enterprise Participation.

All alternatively financed projects shall comply with the Minority Business Enterprise requirements that would apply to similar State-supported projects.

.12 Prevailing Wage.

A. All alternatively financed projects shall comply with the prevailing wage rate requirements that would apply to a similar State-supported project.

B. This obligation does not apply to any part of the project that will not be used for public use or benefit as provided in State Finance and Procurement Article, Title 17, Subtitle 2, Annotated Code of Maryland.

C. Nonconstruction costs, such as movable equipment and move-in costs, are not included in calculating State participation.

Administrative History

Effective date: May 21, 2007 (34:10 Md. R. 891)