“Other Financing Agreements” Policies/Procedures

Legal Framework

ORS 283.085 (4) defines “Financing agreements” and ORS 283.087 (5) prohibits state agencies from entering into financing agreements over $100,000 under any provision of law except ORS 283.085 to 283.092. Among other provisions, ORS chapter 283 requires approval by the DAS Director and the State Treasurer or his/her designee for any financing agreement over $100,000.

Oregon Administrative Rules 122-070-0100 to 122-070-0160 provides additional legal guidelines for administration of the financing agreement program consistent with ORS chapter 283.

In the current version of the Oregon Revised Statutes (2013), after ORS 283.085 there is a note that reads: “283.085 to 283.092 were enacted into law by the Legislative Assembly but were not added to or made part of ORS chapter 283 or any series therein by legislative action.” This fact has become important in recent years as certain agencies whose enabling statutes exempt them from the provisions of ORS chapter 283 have discovered that such an exemption by itself does not exempt them from the provisions of the financing agreement statutes.

General Background

The term “Other Financing Agreements” is derived from language in the biennial “Bond Bill” (SB 5506 in 2013) in which a specified dollar amount of authority is granted to DAS to approve “Certificates of Participation and Other Financing Agreements”. Certificates of Participation are a unique type of financing agreement administered similar to state bond programs. “Other Financing Agreements” (FAs) are often in the form of capital leases although the definition in ORS 283.087 (5) is broad enough to encompass many forms of contracts with long term payment commitments.

FAs typically involve agreeing to make payments over time for the acquisition of an asset (or use of such an asset for much of the period of its useful life). Because FAs involve committing state resources over a period of over one year, it is a form of borrowing. Most borrowing by state government is prohibited under the State Constitution, however because FAs must be structured in such a way that biennial payments can be made only “subject to appropriation” they are technically not borrowings for Constitutional purposes as confirmed in *Kane v Goldschmidt*.

Evaluation of Potential Financing Agreements

State agencies evaluating transactions that could potentially be optimally accomplished through FAs should contact the Capital Finance and Planning Manager in advance (or be referred by their DOJ counsel or contracting department).

Budgetary Authorization Requirements

ORS 283.087 (3) subjects FAs to authorization requirements of ORS 286A.085. Therefore, no FA agreements can be entered into unless sufficient authority has been granted by the Legislative
Assembly (typically through the Bond Bill). Furthermore, ORS 283.091 requires that amounts necessary to repay FAs be included in the Governor’s Budget.

The Budget Instructions include information directing agencies to identify FA needs so that such amounts are included in the Bond Bill prepared in support of the Governor’s Budget. However, if possible, it is prudent to include some amount beyond identified needs to allow agencies to use FAs to address needs that may not have been contemplated during budget preparation.

**Documentation Required for Proposed Financing Agreements**

Agencies requesting approval of FAs (“Benefitting Agencies”) should submit Form CIS 101 to the Capital Finance and Planning Manager in the Office of the Chief Financial Officer (Forms are available for download from the CFIS web page). Benefitting agencies should submit documentation supporting the entries on Form CIS 101. Generally, this supporting documentation will include a detail list of assets being acquired supporting the principal amount of the FA, a payment schedule from which interest rates can be verified, copy of the agreement between the state and other parties to the FA (this should include provisions regarding tax-exempt status of agreement if applicable, and a clause confirming that payments by the state under the agreement are subject to appropriation).

The Benefitting Agency should also submit an Agreement including, but not limited to, the following elements:

- Identification of the source of funds used to repay the financing agreement;
- Commitment to use best efforts to seek funds and budgetary authority each biennium to repay the financing agreement so long as it is outstanding;
- Commitment that the financed property will be used only by state government and only for authorized government purposes unless the Benefitting Agency obtains written consent from the Capital Finance and Planning Manager allowing other purposes;
- Certify that asset(s) being acquired is (are) essential t providing governmental services and are free and clear of all liens and encumbrances
- For tax-exempt FAs, a commitment to assist DAS and the State Treasurer with filing all forms, responding promptly to inquiries and taking any actions necessary to ensure ongoing compliance with tax laws together with an acknowledgment that the Benefitting Agency is responsible for costs related to tax matters including but not limited to bond/tax counsel fees; and,
- Commitment to retain all records relative to FAs for three years subsequent to final maturity.

*Note: Special requirements exist for agencies subject to ORS 276.429 using FAs to acquire office quarters. See OAR 122-070-0120.*

**Processing and Approval of Financing Agreements**

The Capital Finance and Planning Manager must first ensure that requested FA is consistent with amounts approved for Other Financing Agreements in Oregon Law (typically within the “Bond Bill”). The Manager must document reasons for allowing FAs beyond those approved in law. Such
documentation must show clearly how future requests in the biennium will be approved within total amounts authorized in law.

The Capital Finance and Planning Manager should review the Financing Agreement particularly as it applies to tax provisions and State law. Many boilerplate agreements include references to tax-exempt transactions that may not be appropriate. Subject to appropriations clauses are required to ensure the agreement is constitutional. Furthermore, review should verify principal amounts are computed correctly and that only items permitted under ORS 283 (including intangible assets such as software) are being financed. Consult with the Department of Justice, bond/tax counsel and State purchasing as necessary to ensure an appropriate review of all transactions.

The Capital Finance and Planning Manager must review documentation supporting submitted Form CIS 101 and work with agency personnel to ensure consistency between Form 101 and supporting documentation. The Capital Finance and Planning Manager should obtain a general understanding of the reason for asset acquisition as well as exploring business case for use of FA as opposed to other methods of meeting agency needs.

Once assured that the Form CIS 101 is accurate, the document will be routed to the DAS Director (or Deputy Director) and the State Treasurer for approval. Note: The CIS 101 also includes areas for Contract Services and the Capital Finance and Planning Manager to sign. These signature blocks are meant to provide additional assurance to the DAS Director that contracting and budgeting aspects of the agreement have been reviewed and approved.

If the FA is a tax-exempt transaction, the Capital Finance and Planning Manager will contact bond counsel (tax counsel) and ask that an IRS Form 8038-G be prepared. Under no circumstances should agency personnel sign any tax form prepared by the vendor or leasing agent on behalf of the State. The Capital Finance and Planning Manager (or his/her supervisor) will sign the Form 8038-G on behalf of the State.

When all approvals have been obtained, notify Benefitting Agency. Assign a Control Number to the Form CIS 101 and record the transaction in the biennial Other Financing Agreement log and in the COP/Other Financing Agreement Issuance Register. Periodically, Capital Finance and Planning Section staff then records relevant information in the Debt Issuance Register.

File all documentation by transaction in the Other Financing Agreement records, including IRS acknowledgment of receipt of Form 8038-G. Back-up tax forms and IRS correspondence in Other Financing Agreements area (Capital Finance and Planning)of the DAS servers.

**Subsequent to Financing Agreement Approval**

Periodically make inquiries of Benefitting Agency regarding potential change in use. If such inquiries, or contacts from Benefitting Agency, reveal a change in use (for a tax-exempt transaction), document circumstances. Work with tax counsel and Benefitting Agency to develop strategies to respond to situation and document accordingly.