

Department of Administrative Services
Other Financing Agreements Policies and Procedures

Updated: July 2019

Legal Framework

ORS 283.085 to 283.095 provide the legal framework for “Financing Agreements”. ORS 283.085 (3) defines a financing agreement to include Certificates of Participation, a form of borrowing that has essentially been replaced by lower-cost Article XI-Q general obligation bonds. Other forms of Financing Agreements, other than Certificates of Participation, are considered “Other Financing Agreements”. These policies and procedures apply to Other Financing Agreements. Oregon Administrative Rules 122-070-0100 to 122-070-0160 provides additional legal guidelines for administration of financing agreements consistent with ORS chapter 283.

As defined in ORS 283.085 (3), an Other Financing Agreement is a lease purchase agreement, an installment sale agreement, a loan agreement or any other agreement to finance real or personal property that is or will be owned and operated by the state or any of its agencies. Per ORS 283.085 (5), personal property means tangible personal property, software and fixtures. In practice, the most common form of Other Financing Agreement is capital leases, although the definition in ORS 283.087 (3) is broad enough to encompass many forms of contracts with long-term payment commitments. Special requirements exist for agencies subject to ORS 276.429 using Financing Agreements to acquire office quarters. See OAR 122-070-0120.

Authority to Enter Into Financing Agreements

ORS 283.087 authorizes the Director of the Department of Administrative Services (DAS) to enter into financing agreements in accordance with ORS 283.085 to 283.092. *If authorized* by a provision of law other than ORS 283.085 to 283.092, a state agency may enter into a financing agreement with a principal amount of \$100,000 or less. However, a financing agreement with a principal amount in excess of \$100,000 is subject to the requirements of ORS Chapter 286A and must be approved by the Office of the Oregon State Treasurer (OST) and the DAS Director or his/her delegate. If a state agency is not authorized by a provision of law other than ORS 283.085 to 283.092, then financing agreements with a principal amount of \$100,000 or less must also be approved by OST and the DAS Director, or his/her delegate.

In the current version of the Oregon Revised Statutes (2017), 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 is important because, for an agency whose enabling statutes exempt the agency from the provisions of ORS chapter 283, such an exemption by itself does not exempt the agency from the provisions of the statutes related to Financing Agreements.

Legislative and Budget Authorization Requirements

Since Other Financing Agreements involve committing state resources for a period of more than one year, such agreements must include a provision that biennial payments can be made only “subject to appropriation” so agreements are technically not borrowings for purposes of the Oregon Constitution. Regardless of not being considered borrowings for Constitutional purposes, ORS 283.087 (2) (c) subjects Financing Agreements with a principal amount in excess of \$100,000 to the requirements of ORS Chapter 286A (State Borrowing). For this reason, such Financing Agreements cannot be entered into unless sufficient authority has been granted by the Legislative Assembly. The authority for Other Financing Agreements is provided to DAS as a specified not-to-exceed amount for each biennium in the Bond Bill. ORS 286A.001 (2), by the definition of “bond”, excludes financing agreements if the principal amount of the agreement is \$100,000 or less; therefore, such agreements do not count against the amount of legislatively provided authority for Other Financing Agreements.

The Budget Instructions direct agencies to identify needs for Financing Agreements in the upcoming biennium so that sufficient authority can be included in the Bond Bill prepared in support of the Governor’s Budget. Generally, the Capital Finance and Planning (CFP) Manager adds an estimated amount to requested amounts to cover needs that may not have been contemplated during the agency request budget process. Furthermore, ORS 283.091 requires the Governor’s Budget to include amounts that will become due on unpaid Financing Agreements during the biennium.

Documentation Required for Proposed Financing Agreements

An agency requesting approval of Financing Agreements (“Benefitting Agency”) should submit Form CFP 101 to the CFP Manager in the Chief Financial Office (form is available on the CFP web page). Prior to submitting the completed form, Benefitting Agencies must have DAS Procurement Services sign the form to indicate the Financing Agreement is *recommended by* Procurement Services. In addition to the completed form, the Benefitting Agency should submit documentation that supports the information on the form, which generally includes:

- Detailed list of assets being acquired supporting the principal amount of the agreement;
- Payment schedule with principal and interest amounts separately identified; and
- The unsigned agreement between the State and the other party to the agreement, which should include a clause indicating payments under the agreement are subject to appropriation and provisions regarding tax-exempt status of the agreement, if applicable.

Processing and Approval of Financing Agreements

After receiving the CFP 101 form, the CFP Manager reviews the supporting documentation to ensure consistency between information provided and the completed form. The CFP Manager assigns a “control number” and enters it in the Financing Agreements tracker for each biennium (e.g., 19-01). Tracking is done centrally in CFP to ensure there is sufficient authority remaining in the biennium for an additional Financing Agreement to be approved. If sufficient authority is not available, the process stops until additional authority can be provided by the Legislature in a Bond Bill amendment.

The CFP Manager reviews the unsigned lease or other agreement to ensure it contains a subject to appropriations clause, which is required for the agreement to be constitutional; if the agreement was reviewed by the Department of Justice (DOJ) first, this should have already been addressed. In addition, the review includes verifying that only items permitted under ORS Chapter 283, including intangible assets such as software, are being financed. As needed, the CFP Manager will consult with DOJ, bond or tax counsel, and/or state purchasing.

After review, the CFP Manager signs the CFP 101 Form to indicate the Financing Agreement is *recommended* by the CFP Manager. The form and draft lease/agreement are then sent to the DAS Director (or Delegate) and OST (Director of Debt Management Division) for approval. When both approvals have been obtained, the CFP Manager sends a signed copy of the form to the Benefitting Agency and indicates the agency can move forward to execute the lease or other agreement.

Subsequent to Financing Agreement Approval

After the Benefitting Agency executes the lease or other agreement and signs the “Certificate of Acceptance” to indicate the financed items have been received, the Benefitting Agency sends both signed documents to the CFP Manager. It is *essential* that these signed documents be provided timely to the CFP Manager for tax-exempt leases so that IRS Form 8038-G can be filed timely.

For **tax-exempt** leases, DAS will require the Benefitting Agency to sign an Interagency Agreement and Tax Certificate which includes, but is not limited to, the following elements:

- Benefitting Agency commitment to use its best efforts to seek funds and budgetary authority each biennium to repay the financing agreement so long as it is outstanding;
- Acknowledgement that financed property will be used only by state government and only for authorized government purposes unless the Benefitting Agency obtains written consent from the CFP Manager allowing other purposes;
- Benefitting Agency’s certification that assets being acquired are *capital assets* essential to providing governmental services;
- Commitment by Benefitting Agency to provide DAS with information for filing IRS tax form 8038-G and to take any actions necessary to ensure compliance with tax laws; and
- Benefitting Agency’s agreement to retain all records relative to the agreement for three years subsequent to the final payment date on the payment schedule.

If an agreement is not tax-exempt, the Benefitting Agency will not need to sign an Interagency Agreement or Tax Certificate.

For **tax-exempt** agreements, the CFP Manager will request DAS’ tax counsel to prepare Form 8038-G by the required due date. **Under no circumstances should agency personnel sign any tax form prepared by the vendor or leasing agent on behalf of the State.** The CFP Manager reviews and signs the Form 8038-G on behalf of the State. Tax counsel sends proof of filing the Form 8038-G to the CFP Manager who forwards proof of filing to the Benefitting Agency.