

Building Projects in the 21st Century



“N” of Knowledge is Good!!



Introduction

- Over the past year we had numerous questions and issues involved with the basics of building projects –
 - project planning,
 - design professional contracts
 - financing,
 - payment and performance bonds, and
 - bids and bidding,
 - construction contracts

Introduction

- This session will explore the construction delivery methods available to school districts (design-bid-build, construction management at risk, and design-build) to construct school buildings in conjunction with the options available to Nebraska school districts to finance building projects, including lease purchase and/or tax anticipation note financing, and a discussion of “public-private” financing arrangements in use in other states.

Examples of Improvement Projects

- New additions to existing buildings
 - Classrooms / libraries / media centers / multi-purpose rooms
 - Kitchens / cafeterias
 - Gymnasiums / locker rooms
- Demolition of old buildings
- Brand-new (i.e. “greenfield”) buildings
- New furnishings

5

Examples of Improvement Projects

- Roof replacement
- Technology improvements
- Security improvements
- Remodeling
- Equipment/furnishing updates

6

Examples of Improvement Projects

- Track resurfacing
- Playing field improvements
- Lighting installation
- Bleacher addition
- Playground equipment

7

Examples of Improvement Projects

- Technology improvements
- Security improvements
- Remodeling
- Equipment/furnishing updates

8

The “Basics”

- Nebraska **school boards** and **administrators** considering or initiating capital construction projects with a projected budget of \$100,000 or more are required to:
 - Bid the Work - §73-101 & 73-106 (except of CM@R, D-B and Energy Financing Contracts – see below).
 - Retain the services (in some form) of architects and engineers (“design professional” or “design firms”) - §81-3445.

The “Basics”

- Nebraska **school boards** and **administrators** contracting for capital construction projects with an estimated cost of \$10,000 or more are required to:
 - Secure a PAYMENT BOND!!!!
 - And, we advise a PERFORAMCNE BOND.
- [Such bonds secure payment for subcontractors and suppliers – as public property is not subject to the filing of construction liens to secure such payment.]

Construction Delivery Methods

- Design-Bid-Build
- Construction Manager at Risk
- Design-Build
- (Energy Finance Contracts)

11

Design-Bid-Build

- Neb. Rev. Stat. § 73-106
- Public bid statute (traditional method)
- Applies to projects > \$100,000 for construction, remodeling, or repair of school building or for sight improvements
- Must award construction contract(s) to “lowest responsible bidder”

12

Design-Bid-Build

- **Still use Design Professional(s)**
 - Design Professionals required for projects > \$100,000
- **Standard DBB model has all work let and awarded to one (1) General Contractor**
 - GC free to subcontract any work it sees fit
 - GC responsible for subcontractor work

13

Design-Bid-Build

- **Alternate DBB model uses Construction Manager as Agent and either one (1) General Contractor or multiple Prime Contractors**
 - Nebraska State Auditor's office has opined that CMA work must be publicly bid

14

Design-Bid-Build

- **Advantages**
 - Less School District involvement
 - Fewer contractors to deal with
- **Disadvantages**
 - Less School District involvement
 - Little / No control over actual construction costs until bid opening day
 - May require Value Engineering / Change Orders / Bid Alternates to fit project within budget

15

Construction Manager at Risk

- **Nebraska Political Subdivisions Construction Alternatives Act, Neb. Rev. Stat. §§ 13-2901 et seq.**
- **CM@R**
 - Assumes legal responsibility to deliver project to School within Guaranteed Maximum Price
 - Acts as construction consultant to School during design phase
 - Is the builder during the construction phase

16

Construction Manager at Risk

- School must have adopted policies to allow CM@R construction delivery method
- CM@R selected based on qualification criteria

17

Construction Manager at Risk

- Advantages
 - More School District involvement
 - Greater accuracy/flexibility on cost estimation
 - Potential for accelerated construction scheduling
- Disadvantages
 - More School District involvement
 - Multiple prime contractors
 - Potential for higher overhead costs

18

Design-Build

- Nebraska Political Subdivisions Construction Alternatives Act, Neb. Rev. Stat. §§ 13-2901 *et seq.*
- D-B
 - Furnishes Design Professional services
 - Is the builder during the construction phase

19

Financing Projects - General Fund

- Neb. Dept. of Educ. Rule 2
- Used to pay for “all facets of services rendered by the school district, inclusive of operation and maintenance.”
- Cannot use General Fund for Special Building Fund purposes but . . .
 - Can pay for a lease of a building for school purposes from General Fund.
 - Can be used to pay for equipment.

20

Funding Projects - Special Building Fund

- Neb. Rev. Stat. § 79-10,120; NDE Rule 2
- Used ONLY for:
 - Acquiring sites for school buildings
 - Purchasing existing buildings for use as school buildings
 - Erection, alteration, equipping, and furnishing of school buildings
 - Additions to school buildings

21

Funding Projects Special Building Fund

- Sources of Revenue for SBF?
 - Tax levy.
 - Other property sale.
- Levy not to exceed \$0.14/\$100 taxable valuation.
- SBF levy included within \$1.05 levy lid.
- Cannot transfer funds from the General Fund into the Special Building Fund
 - But can borrow from one fund to the other – 2 years.

22

Bond Issuance

- **Neb. Rev. Stat. §§ 10-701 *et seq.***
- **Used ONLY for:**
 - **Purchasing a site for and erecting thereon a school building.**
 - **Purchasing an existing building for use as a school building.**
 - **Furnishing the school building.**
 - **Paying for additions to or repairs for a school building.**

23

Bond Issuance

- **Requires bond issue to be submitted to voters**
 - **Special election.**
 - **General / Primary election.**
- **Notice of election must be published in local newspaper at least 20 days prior to election.**
- **If bond election fails, school cannot resubmit bond issue for 6 months after election.**

24

Bond Issuance

- Election Act, Neb. Rev. Stat. §§ 32-101 *et seq.*
- File certification of election issue with county clerk / election commissioner
 - Primary Election → by March 1.
 - General Election → by September 1.
 - Special Election → not less than 50. days prior to election.

25

Bond Issuance

- Special election must be held on 1st Tuesday following 2nd Monday of selected month.
- No special elections held in April, May, June, October, November or December of even-numbered year.

26

Lease-Purchase Agreement

- Neb. Rev. Stat § 79-10,105
- Used ONLY for:
 - Buildings.
 - Equipment.
- Lease-Purchase Term → Not to exceed 7 years.
- Source of payments on lease-purchase:
 - General Funds.
 - Special Building Funds.

27

Lease-Purchase Agreement

- Neb. Rev. Stat § 79-10,105
- “No school district shall directly or indirectly issue bonds to fund any such lease-purchase plan for a capital construction project exceeding [\$25,000] in costs unless it first obtains a favorable vote of the legal voters”
- *Nebuda v. Dodge County School District 0062*, April 23, 2015.

28

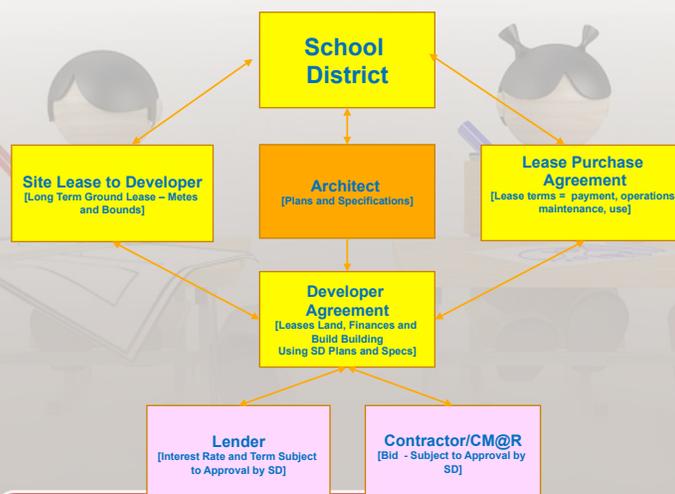
Lease-Purchase Agreement

- “We conclude that the taxpayers' claims for injunctive and declaratory relief are moot because they no longer have a cognizable interest in our resolution of the case. But because of the public nature of their dispute, we have resolved the issue presented under the public interest exception to the mootness doctrine.
- We conclude that § 79-10,105 does not prohibit a school district from entering into a lease-purchase agreement to finance a capital construction project, if it has not created a nonprofit corporation to issue bonds for the school district. Because that maneuver did not occur here, the district did not violate § 79-10,105 by entering into a lease-purchase agreement with the bank.
- *Nebuda v. Dodge Cty. Sch. Dist. 0062 (Scribner-Snyder Cmty. Sch.)*, 290 Neb. 740, 756, 861 N.W.2d 742, 754-55 (2015)

29

P3 – Flow Chart Matrix

Source of Funds = Building Fund for Building & General Fund for Equipment



30

Qualified Capital Purposes Undertaking Fund (“QCPUF”)

- Neb. Rev. Stat. § 79-10,110.02 – Projects initiated after April 19, 2016.
- Used ONLY for:
 - Actual/potential environmental hazard.
 - Actual/potential accessibility barrier.
 - Life safety code violation.
 - Indoor air quality modifications.
 - Mold abatement and prevention.

31

Qualified Capital Purposes Undertaking Fund (“QCPUF”)

- Tax levy
 - Not to exceed 10 years.
 - Not to exceed \$0.03/\$100 taxable valuation –3¢!
- If issuing bonds, tax levy is exempt from levy lid.
- If not issuing bonds, tax levy is within levy lid.

32

Tax Anticipation Note

- **Neb. Rev. Stat. § 79-1070**
- **Allows School District to borrow money**
- **No restrictions on use**
- **Loan amount and terms:**
 - **Principal:**
 - **70% of unexpended balance of total anticipated receipts of (i) the General Fund, (ii) the Special Building Fund, (iii) any Bond Fund, or (iv) any QCPUF**
 - **For current school fiscal year and following school fiscal year.**

33

Tax Anticipation Note

- **Loan amount and terms:**
 - **Interest Rate = Whatever School District can negotiate or obtain**
 - **Terms:**
 - **Two-year term note ONLY.**
 - **Must be able to budget to pay-off loan in 2 fiscal years.**
 - **Can “roll it over.”**

34

Energy Finance Contracts

- Neb. Rev. Stat. §§ 66-1060 to 66-1066
- “Energy Finance Contracts”
 - Agreement between an “energy service company” and a governmental unit— i.e. school district.
 - Used for the implementation of one or more “energy conservation measures” in an existing facility.
 - Payment based on portion of the energy cost savings produced.

35

Energy Finance Contracts

- “Energy Conservation Measures”
 - Repair or renovation of HVAC systems;
 - Installation or repair of automated/computerized energy control systems;
 - Replacement or modification of lighting fixtures
 - Insulation of a building structure or systems within that structure;
 - Installation of energy recovery systems;
 - Installation of cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;

36

Energy Finance Contracts

- **“Energy Conservation Measures”**
 - Replacement, weather-stripping, caulking, or other insulation of windows or doors;
 - Meter replacement, installation, or modification or installation of automated meter reading systems;
 - Replacement or installation of energy or water conservation equipment or improvements thereto, or substitution of non-water-using fixtures, appliances, or equipment; or,
 - Any other measure designed to reduce energy consumption.

37

Energy Finance Contracts

- The Bid Statutes do not apply to Energy Finance Contracts.
- Need written opinion from a Nebraska professional whose interests are independent from the financial savings outcome of the contract.
- Require Separate Agreements for:
 - HVAC Project Development Agreement.
 - HVAC Equipment Design and Installation Contract.

38

Energy Finance Contracts

- HVAC Equipment Design and Installation Contract - Key Contract Terms:
 - Negotiated contract!!! **Do not just take what the ESCO presents.**
 - Have it Reviewed by a design professional!!
 - Should state:
 - Scope of work in each building.
 - Specified equipment – cost and mark-up (\$\$\$).
 - Design/Engineer cost.
 - Project Management Cost.
 - Contingency in price.

39

Energy Finance Contracts

- HVAC Equipment Design and Installation Contract - Key Contract Terms:
 - Must state the calculated energy cost savings during the contract period attributable to the energy conservation measures.
 - Payments made over time and contract term not to exceed 30 years.
 - Must state the effective interest rate being charged by the energy service company.

40

Energy Finance Contracts

- Key Contract Terms:
 - Provide that the calculated savings for each year of the contract period will meet or exceed all payments to be made during each year of the contract.
 - Provide that the energy service company shall have total responsibility for the savings guarantee for each guaranteed savings contract.

41

Energy Finance Contracts

- Key Contract Terms:
 - Energy service company shall provide performance bond for 100% of the total cost of the contract.
 - Energy service company shall provide guarantee bond for 100% of the guaranteed energy savings for the entire term of the contract.
 - We would also require a payment bond.

42

Public Facilities Construction and Financing Act

- §§72-2301, - 72-2308:
- Allows 2 or more “qualified public agencies” to cooperate to issue bonds to finance joint projects.
- Qualified public agencies include school districts, ESUs, cities, villages, community colleges, counties, etc.

43

Public Facilities Construction and Financing Act

- Bonds may be issued to either a “Joint Entity” or a “Joint Public Agency” in connection with the joint project.
 - “Joint Entity” is entity created under the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 13-801 *et seq.*
 - “Joint Public Agency” is entity created under the Joint Public Agency Act, Neb. Rev. Stat. §§ 13-2501 *et seq.*

44

Public Facilities Construction and Financing Act

- **Used ONLY for acquisition, construction, financing, operation and ownership of:**
 - **Public buildings and related improvements to real estate.**
 - **Information technology for libraries operated by school districts, among others.**
- **May issue bonds without an election of voters.**
- **Taxes levied for bonds not subject to levy lid.**

45

Public Facilities Construction and Financing Act

- **Bond limitations on building projects:**
 - **Total principal amount of bonds issued by a qualified public agency for all existing joint projects shall be less than \$5 million.**
 - **Total principal amount of bonds issued by all qualified public agencies for a single joint project shall be less than \$5 million.**

46

Public Facilities Construction and Financing Act

- **Bond limitations on IT projects:**
 - **Total principal amount of bonds issued by a school district for all existing joint projects shall be less than \$100,000**
 - **Total principal amount of bonds issued by a school district for a single joint project shall be less than \$100,000**

47

Know the content of what you sign!

- **It is well-settled law in Nebraska that one who signs an instrument without reading it, when he or she can read and has the opportunity to do so, cannot avoid the effect of his or her signature merely because he or she was not informed of the contents of the instrument.**
- **Five Points Bank v. White, 231 Neb. 568, 437 N.W.2d 460 (1989); Meek v. Gratzfeld, 223 Neb. 306, 389 N.W.2d 300 (1986). Walker v. Walker Enters., 248 Neb. 120, 127 (Neb. 1995).**

Building Projects in the 21st Century

