

EXECUTIVE DEPARTMENT
DELAWARE ECONOMIC DEVELOPMENT AUTHORITY
Statutory Authority: 29 Delaware Code, Section 5053(k), (29 Del.C. §5053(k))
1 DE Admin. Code 401

FINAL

ORDER

401 Procedures Regarding Non-State Guaranteed Bonds

Pursuant to 29 Del.C. §5053(k), The Delaware Economic Development Authority (the "Authority") is authorized to prescribe such regulations as may be necessary to carry out the purposes of the act creating the Authority, 29 Del.C. Ch. 50 (the "Act"). The purpose of this Regulation is to regulate the administration of the Act, including, but not limited to, regulation of the process for applying to the Authority for the issuance of Bonds and the Authority's approval of such applications. Having provided due public notice, the Authority adopts the attached Regulation published in the November 1, 2016 edition of the Delaware *Register of Regulations* for the reasons that follow.

SUMMARY OF THE EVIDENCE

1. The Authority has considered increasing requests for Non-Guaranteed State Bond financing such as revenue bonds for charter school financing. The Authority, in consultation with the Delaware Council on Development Finance (the "Council"), identified a need to improve the preparation of Non-Guaranteed State Bond applications for submission to the Council for review and recommendation.

2. As a result of these issues, the Authority issued guidelines for the review of Non-State Guaranteed Bond offerings to protect the financial integrity of the State's authority to issue non-guaranteed and general obligation financing.

3. This amendment focuses on non-rated or below investment grade Non-State Guaranteed Bond offerings. The regulation amends 17 DE Reg. 90 (07/01/13) to require the Authority to consult a qualified independent investment advisor to assess the financial viability of applications for bonds. However, the Chairperson of the Authority retains discretion to waive this requirement if the proposed bond offering is projected or rated above BBB- by a nationally recognized rating agency, or a bank is underwriting the offering.

4. The Authority issued and duly noticed the amended Regulation in accordance with the Delaware Administrative Procedures Act, 29 Del.C. Ch. 101.

5. The proposed Regulation was published in the *Register of Regulations* on November 1, 2016. For a period of thirty (30) days following publication, the public had the opportunity to offer written comment.

6. No written comments were received by the Authority during the public comment period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The public was given notice and an opportunity to provide the Authority with comments in writing on the proposed Regulation.

2. There were no public comments provided to the Authority during the public comment period.

3. A regulation requiring the authority to consult a qualified independent investment advisor to assess the financial viability of applications for Non-Guaranteed State Bonds in the event that the proposed bond offering is non-rated or is rated below investment grade protects the financial integrity of the State's authority to issue non-guaranteed and general obligation financing.

4. The Regulation provides discretion to waive this requirement in circumstances where the bond offering is projected or rated above BBB- by a nationally recognized rating agency or a bank is underwriting the offering in order that the State ability to issue necessary Non-Guaranteed Bond financially will not be impeded.

5. This Regulation is promulgated under the authority granted to the Authority by 29 Del.C. §5053(k) and the Delaware Administrative Procedures Act, 29 Del.C. Ch. 101.

DECISION AND ORDER CONCERNING THE REGULATIONS

Having found that the proposed changes to the regulations are necessary as outlined herein, the Authority finds that the Regulation shall be adopted as final in the form as proposed. The exact text of the regulations as appeared in the Delaware *Register of Regulations* is attached to this order. These changes will become effective ten days following publication of this order in the Delaware *Register of Regulations* in February 2017.

IT IS SO ORDERED this 5th day of January 2017 by the Delaware Economic Development Authority.

Bernice Whaley,
CHAIRPERSON,
DELAWARE ECONOMIC DEVELOPMENT AUTHORITY

401 Procedures Regarding Non-State Guaranteed Bonds

1.0 Enabling Legislation

Pursuant to 29 **Del.C.** §5053(k), The Delaware Economic Development Authority (the "Authority") is directed to prescribe such regulations as may be necessary to carry out the purposes of the act creating the Authority, 29 **Del.C.** Subch. IV (the "Act"). The following regulations have been adopted by the Authority pursuant to the foregoing provision of the Act.

2.0 Purpose

The purpose of this Regulation is to regulate the administration of the Act, including, but not limited to, regulation of the process for applying to the Authority for the issuance of Bonds and the Authority's approval of such applications.

17 DE Reg. 90 (07/01/13)

3.0 Definitions

Unless otherwise indicated, all capitalized terms used herein shall have the meaning ascribed to such terms in the Act.

4.0 Application Procedures

4.1 An application to the Authority for the approval of the issuance of a Bond shall be made on the application form provided by the Authority and must be completed according to the requirements stated therein. One (1) original and nine (9) copies of the completed application should be submitted to the Authority on or before the first (1st) day of the month preceding the month during which the council on Development Finance ("Council") will be asked to review an application. For example, for an application to be eligible for review by the Council at a May meeting, it should be submitted to the Authority on or before April 1.

4.2 The Authority shall consult a qualified independent financial advisor to assess the financial viability of Non-State Guaranteed Bond applications prior to the application being forwarded to the Council. In the event that the proposed Non-State Guaranteed Bond offering is projected or rated above BBB- by a nationally recognized rating agency, or a bank is underwriting the offering, the Chairperson may waive this requirement.

5.0 Project Approval and Standards

5.1 Findings. In connection with the approval of the issuance of a Bond for a Project, the Act requires the Authority to make certain findings and determinations with respect to the Project. The Authority shall apply the following standards where applicable in making such findings and determinations:

5.1.1 Employment Standard. For a proposed Project, the Authority will review the information submitted by an Assisted Person to determine whether the Project will tend to maintain or provide gainful employment within the State. The standards to be considered will include, but not be limited to, the wage scale applicable to persons to be employed as a result of the Project, the economic situation in the State, the effect of the Project on the tax base of the State and of the county or municipality in which the Project is to be located, and the expected effect that the Project will have on the development of new economic activity within the State.

5.1.2 Abandonment Standard. When applying the "employment standard," the Authority will take into consideration whether the proposed Project will cause or result in abandonment of an existing facility elsewhere in the State by an Assisted Person or by the proposed operator or principal user of the Project. If a facility in the state is to be abandoned, a statement by the Assisted Person, operator or principal user that the existing facility in the State is to be abandoned because of obsolescence, lack of available labor or site limitations shall be prima facie proof that the Assisted Person has not violated the abandonment standard.

5.1.3 Capability Standard. In determining whether a proposed Project "will serve a public purpose by contributing to the prosperity, health or general welfare of the citizens of the State," the Assisted Person

shall demonstrate to the Authority that the Assisted Person, operator, or principal user has the capability to, operate and maintain the Project efficiently and effectively. Financial strength and prior related experience by the Assisted Person, operator or principal user may be considered as well as the qualifications of management.

- 5.1.4 Operator and User Standard. An Assisted Person shall, if requested by the Authority or required in the application for financing, submit such information as is requested or required for each proposed operator or principal user of the Project. The Authority shall apply the same standards with respect to the operators and principal users of the Project as if they were the Assisted Person, unless there is good reason, established by the Assisted Person, to make the findings and determinations with respect to the Assisted Person alone. The financial strength of the Assisted Person and his capacity to manage or operate the Project, among other considerations, may be the basis for omitting such findings and determinations with respect to the operators or principal users.
- 5.1.5 Commercial and Agricultural Business Standards. In making findings and determinations with respect to the capital investment in a Project for an Agricultural Business or for a Commercial Business, the Authority will consider capital investment made and to be made in the proposed Project during a period of time commencing one (1) year prior to the date on which an application for financing is submitted to the Authority and terminating one year following the issuance of a Bond with respect thereto. The term "capital investment" shall be applied in accordance with generally accepted accounting principles.
- 5.2 Adherence to Law. In making a finding and determination that the Assisted Person has not been cited for a major labor law violation or illegal conduct involving moral turpitude, the Authority may, in its discretion, rely on a sworn affidavit of the Assisted Person or an officer of the Assisted Person in lieu of an opinion of counsel to the Assisted Person. If requested by the Authority, similar proof shall be obtained from any operator or principal user of a Project.
- 5.3 Speculative Buildings. The Authority may, after applying the foregoing standards, approve Projects to be financed with Bonds prior to a determination of the feasibility of the Project, provided that at the time the Bonds are issued, satisfactory evidence demonstrates to the Authority, in its sole discretion, the feasibility of the Project.

6.0 Initial Approval

- 6.1 Binding Obligation. The initial approval of a Project for financing by the Authority will constitute official action on the part of the Authority demonstrating its intention to adopt a resolution authorizing the issuance of a Bond, provided that circumstances have not substantially changed, in the Authority's sole discretion, between the time of initial approval and the adoption of the resolution authorizing the issuance of a Bond.
- 6.2 Approval Period and Extensions. The initial approval will be effective for a period of one (1) year. If the applicant demonstrates that the Project has not been changed significantly and that the method of financing continues as originally intended, the Authority may grant no more than two (2) six (6)-month extensions, making the maximum approval period two (2) years, beginning on the date of the initial approval. If it is necessary that the approval continue beyond two (2) years, then a revised application reflecting any subsequent changes, along with updated financial information, must be submitted for review by the Authority and the Council.

7.0 Closing Documents

- 7.1 Deadlines re: Closing Documents. To the maximum extent feasible, closing documents should be processed according to the following schedule:
 - 7.1.1 Draft closing documents should be forwarded to the Authority's Deputy Attorney General for review by bond counsel no fewer than thirty (30) days prior to the anticipated closing date.
 - 7.1.2 Documents should be returned to bond counsel with suggested changes by all parties to the financing no fewer than twenty (20) days prior to the anticipated closing date.
 - 7.1.3 Final closing documents should be forwarded by bond counsel to the Authority's special counsel not less than ten (10) days prior to the scheduled closing.
- 7.2 Mandatory Provisions in Closing Documents. All closing documents with respect to the issuance of a Bond by the Authority shall contain, at a minimum, provisions acceptable to the Authority with respect to its own responsibilities and protection, including, without limitation, provisions with respect to limited liability of the Authority, continued operation of the Project at all times in accordance with the requirements of the Act (including the employment requirements of the Act), insurance, payment of fees and expenses, indemnity, inspection of the Project premises and records with respect to the Project, transfer or assignment of the Project

property, and substitution of Assisted Persons (including, if applicable, transfer or assignment of interests in the Assisted Person).

- 7.3 Authority Not to Hold Title. All transactions should be structured so as to eliminate title to the Project property being at any time in the name of the Authority.
- 7.4 Financial Statements., Unless waived by the Authority in its sole discretion, the Assisted Person shall, during the time any Bond is outstanding, submit to the Authority, on an annual basis, financial statements prepared by an independent certified public accountant. Except in the case of Assisted Persons who are individuals, the Authority expects such statements to be audited, but may in its sole discretion accept a review. Such statements should include, at a minimum:
 - 7.4.1 A balance sheet, income statement, statement of retained earnings, statement of changes in financial position, all accompanying notes to the financial statements, and the accountant's report.
 - 7.4.2 If the Assisted Person is a publicly-held company, SEC Form IOK must accompany the financial statements.
 - 7.4.3 If the Assisted Person is not a publicly-held company, annual financial statements of each principal of the Assisted Person may be required, in the sole discretion of the Authority.
- 7.5 Liability Insurance and Indemnity. Prior to the issuance of a Bond by the Authority, the Assisted Person shall establish to the satisfaction of the Authority that adequate indemnity of the Authority has been provided against claims or losses resulting from the authorization and issuance of the Bond, or the refinancing of a Bond with respect to the Project.
- 7.6 Post Issuance Compliance and Record Retention. The Assisted Person shall certify, in a form acceptable to the Authority, that it shall comply with the DEDA Post Issuance Compliance and Record Retention Policy.

17 DE Reg. 90 (07/01/13)

8.0 Fees

- 8.1 Application Fee. Each applicant shall deliver to the Authority with its application a check made payable to the Authority in the amount of Two Hundred Fifty Dollars (\$250) before an application will be considered by the Authority. Such application fee shall not be refundable.
- 8.2 Approval Fee. An amount equal to one-half percent (.50%) of the face amount of Bonds to be issued up to the first One Hundred Fifty Million Dollars (\$150,000,000) shall be payable to the Authority on the day the Bond is issued. An amount equal to one-quarter percent (.25%) of the face, amount of Bonds to be issued in excess of One Hundred Fifty Million Dollars (\$150,000,000) shall be payable on the day the Bond is issued.
- 8.3 Administration Fees. Fees shall be at least Four Hundred Dollars (\$400) per year, and may increase, at the Authority's sole discretion, to reflect the Authority's annual administration expenses in connection with a Project.
- 8.4 Fees Payable Unless Waived. The foregoing fees shall, unless otherwise waived by the Authority in its sole discretion, be paid with respect to all Bonds issued by the Authority, including, without limitation, refunding Bonds previously issued by the Authority.

17 DE Reg. 90 (07/01/13)

20 DE Reg. 655 (02/01/17) (Final)