



39th Annual School Client Conference

Friday, January 12, 2024

School Capital Projects/Financings: Your Issues for 2024

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- A. Capital Project Vote Outcomes (2016-2023)
- B. Authorization of Capital Projects
 - Annual & Special Votes
 - New Constitutional Debt Limit for Small City School Districts
 - Personal Voter Registration for Small City School Districts
 - SEQRA/Environmental Compliance
 - Capital Project Contract Coordination
 - Capital Project Contract Provisions
 - Public Bidding on Capital Projects
- C. Sources of Financing of Capital Projects: Looking Beyond BANs
 - Capital Reserve Funds
 - Installment Purchase and Energy Performance Contracts
 - Capital Outlay Projects
 - Emergency Projects
 - Zero-Emission Bus Mandate
- D. Issuers' Obligations under Securities and Exchange Commission Rule 15c2-12
 - Official Statements
 - Electronic Municipal Market Access System
 - Continuing Disclosure Requirements of SEC Rule 15c2-12
 - Application of New Events/Procedures
- E. Tax Law Updates
 - Recent Federal Tax Issues
 - Private Business Use/Sale or Lease of a School Building
 - Post-Issuance Tax Compliance Procedures
- F. Long-Term Financing
 - Permanent (Bond) Financing through DASNY
 - Refundings



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Recent Capital Project Vote Outcomes (2016-2023)

- **December 2023**
 - Falconer CSD - \$18,650,000 – APPROVED (88% YES)
 - Oakfield-Alabama CSD - \$23,065,000 – APPROVED (53% YES)
 - Lackawanna City Schools - \$81,200,000 – APPROVED (77% YES)
 - Brocton CSD - \$16,285,000 – APPROVED (80% YES)
 - West Seneca CSD – Prop 1 \$23,500,000 “*Essential Scope Project*” – APPROVED (53% YES); Prop 2 \$4,000,000 *Theatre Upgrades Project*” – Defeated (43% YES); Prop 3 \$12,500,000 “*Turf Complex and Playgrounds Project*” – Defeated (39% YES)
 - Jamestown City Schools - \$123,000,000 – APPROVED (89% YES)
 - Frewsburg CSD - \$14,350,000 – APPROVED (58% YES)
 - Alden CSD - \$17,950,000 – Defeated (42% YES)
 - Genesee Valley CSD - \$9,800,000 – APPROVED (73% YES)
 - Pine Valley CSD - \$9,100,000 – APPROVED (73% YES)
 - Lyndonville CSD - \$19,505,384 – APPROVED (73% YES)
 - Batavia City Schools - \$45,060,486 – APPROVED (76% YES)
- **November 2023**
 - Panama CSD - \$7,200,000 – APPROVED (60% YES)
 - Franklinville CSD - \$36,252,000 – Defeated (40% YES)
- **May 2023**
 - Falconer CSD - \$18,650,000 – APPROVED (89% YES)
 - Akron CSD - \$29,829,634 – APPROVED (63% YES)
 - Bemus Point CSD - \$2,430,000 – APPROVED (76% YES)
 - Warsaw CSD - \$22,960,000 – APPROVED (79% YES)
 - Cheektowaga-Maryvale UFSD \$36,250,000 “*Modification of Capital Improvements Project, 2021*” – APPROVED (70% YES)
 - Cassadaga Valley CSD - \$13,200,000 “*Modification of Capital Improvements Project, 2022*” – APPROVED (79% YES)
- **January 2023**
 - Olean City Schools - \$30,300,000 “*Modification of Capital Improvements Project, 2020*” – APPROVED (67% YES)
- **December 2022**
 - Holley CSD - \$18,100,000 – APPROVED (81% YES)
 - Amherst CSD - \$68,704,432 – APPROVED (61%% YES)
 - East Aurora UFSD \$22,300,000 – APPROVED (50.49% YES)
 - Randolph CSD - \$35,640,000 – APPROVED (73% YES)
- **November 2022**
 - Belfast CSD - \$5,500,000 – APPROVED (57% YES)
- **May 2022**
 - Cassadaga Valley CSD - \$10,300,000 – APPROVED (76% YES)

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- North Collins CSD - \$7,950,000 – APPROVED (79% YES)
- Orchard Park CSD - \$114,000,000 – APPROVED (79% YES)
- Cleveland-Hill UFSD - \$12,570,000 – APPROVED (76% YES)
- Yorkshire-Pioneer CSD - \$28,645,000 – APPROVED (63% YES)
- Salamanca City CSD - \$21,489,881 – APPROVED (86% YES)
- **March 2022**
 - Silver Creek CSD - \$950,000 – APPROVED (89% YES)
- **December 2021**
 - Cheektowaga-Maryvale UFSD - \$29,550,000 – APPROVED (69% YES)
 - Bolivar-Richburg CSD - \$15,375,600 – APPROVED (67% YES)
 - Depew UFSD – Prop 1 \$20,200,000 “*District Facilities Upgrades Project*” – APPROVED (72.5% YES); Prop 2 \$4,700,000 “*Cayuga Heights Auditorium Addition Project*” – APPROVED (68% YES); Prop 3 \$9,800,000 “*District-Wide Air Conditioning Project*” – APPROVED (69% YES)
 - Albion CSD - \$26,690,000 – APPROVED (84% YES)
 - Wilson CSD - \$9,893,684 – APPROVED (84% YES)
 - Southwestern CSD - \$18,237,000 – APPROVED (70% YES)
- **October 2021**
 - Hamburg CSD - \$68,500,000 – APPROVED (68% YES)
- **September 2021**
 - Springville GI CSD - \$19,620,000 – APPROVED (61% YES)
 - Ripley CSD - \$3,916,000 – APPROVED (74% YES)
- **July 2021**
 - Frontier CSD - \$70,116,550 – APPROVED (61% YES)
- **May 2021**
 - Frewsburg CSD - \$7,000,000 – APPROVED (68% YES)
 - Jamestown City SD - \$86,500,000 – APPROVED (87% YES)
 - Lockport City SD - \$22,941,000 – APPROVED (72% YES)
 - Cattaraugus-Little Valley - \$18,500,000 – APPROVED (75% YES)
 - Holland CSD - \$7,500,000 – APPROVED (53% YES)
 - Batavia City SD - \$5,000,000 Energy Performance Contract – APPROVED (81% YES)

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- **March 2021**
 - West Valley CSD - \$3,875,000 – APPROVED (70% YES)
- **December 2020**
 - Clymer CSD - \$4,500,000 – APPROVED (87% YES)
 - Eden CSD - \$12,596,132 “2022 *Capital Improvement Project*” – APPROVED (61% YES); PROP 2 \$3,283,990 *Additional Health, Safety, Technology And Recreational Upgrades* – APPROVED (56% YES)
 - Newfane CSD - \$30,569,000 – APPROVED (65% YES)
- **October 2020**
 - Iroquois CSD - \$19,509,249 – APPROVED (74% YES)
- **May (Deferred June) 2020**
 - Clymer CSD - \$3,750,000 – DEFEATED (46% YES)—BUT LATER APPROVED (DECEMBER, 2020)
 - Dunkirk City SD - \$10,766,730 – APPROVED (78% YES)
 - Lewiston-Porter CSD - \$17,250,000 – APPROVED (64% YES)
 - Oakfield-Alabama CSD - \$15,300,000 – APPROVED (59% YES)
 - Yorkshire-Pioneer CSD - \$21,248,000 – APPROVED (63% YES)
- **March 2020**
 - Friendship CSD - \$2,300,000 – APPROVED (79% YES)
- **February 2020**
 - Kenmore-Town of Tonawanda UFSD - \$75,000,000 – APPROVED (77% YES)
 - Allegany-Limestone CSD - \$10,000,000 – APPROVED (88% YES)
- **January 2020**
 - Panama CSD - \$5,000,000 – APPROVED (81% YES)
- **December 2019**
 - Clarence CSD - \$27,200,000 – APPROVED (84% YES)
 - Hornell City SD - \$4,464,709 – DEFEATED (47% YES)
 - Cheektowaga CSD - \$16,400,000 – APPROVED (87% YES)
 - Ellicottville CSD - \$8,400,000 – APPROVED (75% YES)
 - Westfield CSD - \$5,276,698 – APPROVED (91% YES)
- **November 2019**
 - Pine Valley CSD - \$9,887,212 - APPROVED (76% YES)
 - Bolivar-Richburg CSD - \$11,254,464 – DEFEATED (26% YES)—NOT YET RE-PROPOSED
- **October 2019**
 - Alden CSD - \$11,375,777 *Modification of Vision 20/20 High School Pool Renovations Project* - APPROVED (52% YES)
 - Sweet Home CSD - \$39,927,382 - APPROVED (72% YES)
 - Tonawanda City SD - \$53,469,266 - APPROVED (65% YES)—NEEDED 60% AND GOT IT

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- **May 2019**
 - Bemus Point CSD - \$2,385,000 - APPROVED (83% YES)
 - Frewsburg CSD - PROP 3 \$5,600,000 *Capital Improvements Project, 2019* - APPROVED (75% YES); PROP 4 \$1,426,283 *Energy Performance Improvements Project, 2019* - APPROVED (83% YES)
 - Holland CSD - \$2,265,000 - APPROVED (66% YES)
 - Royalton-Hartland CSD - \$12,100,000 - APPROVED (80% YES)
 - Salamanca City CSD - \$34,788,000 - APPROVED (88% YES)
- **March 2019**
 - Akron CSD - \$11,973,108 - APPROVED (76% YES)
- **January 2019**
 - Grand Island CSD - \$24,149,626 - APPROVED (68% YES)
- **December 2018**
 - Salamanca City CSD - PROP 1 *Intermunicipal Agreement Veterans Park* - APPROVED (92% YES); PROP 2 *Acquisition of Two Parcels of Real Property* - APPROVED (90% YES)
 - Pine Valley CSD - \$6,500,000 - DEFEATED (45% YES) --BUT LATER APPROVED (NOVEMBER, 2020)
 - Gowanda CSD - PROP 1 \$29,174,459 *Capital Improvements Project, 2018* - APPROVED (67% YES); PROP 2 \$1,334,058 *Synthetic Turf Athletic Fields Project, 2018* - APPROVED (56% YES)
 - North Collins CSD - \$10,380,000 - APPROVED (80% YES)
 - West Seneca CSD - \$75,500,000 - APPROVED (75% YES)
- **November 2018**
 - Orchard Park CSD - \$12,200,000 - APPROVED (77 % YES)
 - Holland CSD - \$5,000,000 - APPROVED (68%)
- **October 2018**
 - Brocton CSD - PROP 1 \$6,191,300 *Capital Project* - APPROVED (53% YES); PROP 2 \$1,089,200 *Auditorium and Lighting Project* - DEFEATED (44 % YES)
 - Belfast CSD - \$5,188,035 - APPROVED (59% YES)
 - Attica CSD - \$17,276,000 - APPROVED (63% YES)
- **September 2018**
 - Frontier CSD - \$1,804,000 - APPROVED (79% YES)
- **July 2018**
 - Yorkshire-Pioneer CSD - PROP 1 \$10,553,000 *Capital Project* - APPROVED (85% YES); PROP 2 \$10,460,000 *Modification of 2016 Capital Project* - APPROVED (86% YES)



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- **May 2018**
 - Springville-Griffith Institute CSD - \$14,729,621 - APPROVED (56% YES)
 - Ripley CSD - \$445,000 *Fire Alarm Project* - APPROVED
 - Franklinville CSD - PROP 1 - \$6,100,000 *Capital Project* - APPROVED (55% YES); PROP 2 - \$5,100,000 *Multi-Sport Athletic Fields Project* - DEFEATED (31% YES)
 - Gowanda CSD - \$31,188,924 - DEFEATED (40% YES) --BUT LATER APPROVED (DECEMBER, 2018)
- **March 2018**
 - Silver Creek CSD - \$17,600,000 - APPROVED (77% YES)
- **January 2018**
 - Iroquois CSD - PROP 1 - \$6,600,000 *Turf/Track Project* - DEFEATED (48% YES); PROP 2 - \$4,435,620 *Turf/Baseball/Softball Project* - DEFEATED (38% YES) --BUT SIMILAR PROJECT WAS LATER APPROVED (OCTOBER, 2020)
- **December 2017**
 - Fredonia CSD - \$8,500,000 - APPROVED (67% YES)
 - Alden CSD - PROP 1 - \$13,825,000 *Capital Project* - APPROVED (72 %YES); PROP 2 - \$5,630,000 *Pool Renovations* - APPROVED (71% YES); PROP 3 - \$1,731,645 *Energy Performance/Savings Project* - APPROVED (80% YES)
 - Cheektowaga-Maryvale UFSD - PROP 1 - \$24,300,000 *Capital Project* - APPROVED (80% YES); PROP 2 - \$7,500,000 *New Capital Reserve Fund* - APPROVED (80% YES)
 - Southwestern CSD - PROP 1 - \$13,900,000 *Capital Project* - APPROVED (79% YES); PROP 2 - \$1,300,000 *Energy Performance Contact* - APPROVED (84% YES)
 - Wilson CSD - PROP 1- \$9,850,000 *Capital Project* - APPROVED (78% YES); PROP 2 - \$5,000,000 *New Capital Improvements Reserve Fund* - APPROVED (78% YES)
- **October 2017**
 - Hinsdale CSD - \$4,920,000 - APPROVED (52% YES)*
- **June 2017**
 - Salamanca City CSD - \$27,565,000 - APPROVED (64% YES)**
- **May 2017**
 - Allegany-Limestone CSD - \$15,000,000 - APPROVED (85% YES)
 - Falconer CSD - \$23,000,000 - APPROVED (76% YES)
 - Frontier CSD - \$27,000,000 - APPROVED (73% YES)
 - Lewiston-Porter CSD - \$9,250,000 - APPROVED (78% YES)
 - Warsaw CSD - PROP 1 - \$17,000,000 *Capital Project* - APPROVED (68% YES); PROP 2 - \$15,000 *Land Purchase* - APPROVED (72% YES)
- **March 2017**
 - Batavia City SD - \$26,768,813 - APPROVED (73% YES)

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- **December 2016**
 - Cuba-Rushford CSD - \$14,000,000 - APPROVED (80% YES)
 - Depew UFSD - PROP 1 - \$15,624,184 *Capital Project* - APPROVED (74% YES); PROP 2 - \$6,397,842 *Athletic Facilities Upgrades* - APPROVED (71% YES); PROP 3 - \$10,000,000 *New Bus Acquisition Capital Reserve Fund* - APPROVED (79% YES)
 - Amherst CSD - \$29,567,299 - APPROVED (89% YES)
 - Lockport City SD - \$28,660,000 - APPROVED (81% YES)
 - Cleveland Hill UFSD - \$10,900,000 - APPROVED (88% YES)
- **October 2016**
 - Genesee Valley CSD - \$13,800,000 - APPROVED (59% YES)***
 - Cheektowaga CSD - \$24,830,850 - APPROVED (68% YES)
- **September 2016**
 - Springville-Griffith Institute CSD - \$27,795,000 - APPROVED (61% YES)****
- **August 2016**
 - Belfast CSD - \$1,700,000 - APPROVED (66% YES)
- **July 2016**
 - Yorkshire-Pioneer CSD - \$10,352,000 - APPROVED (92% YES)
- **May 2016**
 - East Aurora UFSD - PROP 1 \$23,550,000 *Capital Project* - APPROVED (60% YES); PROP 2 - \$1,725,000 *Athletic Complex Renovations* - APPROVED (50.3% YES)
 - Hamburg CSD - \$9,875,000 - APPROVED (81% YES)
- **March 2016**
 - Genesee Valley CSD - \$15,600,000 - DEFEATED (46% YES)
- **January 2016**
 - Iroquois CSD - PROP 1 \$17,000,000 *Capital Project* - APPROVED (85% YES); PROP 2 - \$6,000,000 *Athletic Facilities Project* - APPROVED (71% YES)

* Hinsdale CSD - initially defeated in April of 2017 - \$6,800,000 (39% YES)

** Salamanca City SD - initially defeated in December of 2015 - \$58,700,000 (34% YES)

*** Genesee Valley CSD- initially defeated in March of 2016 - \$15,600,000 (46% YES)

**** Springville-Griffith Institute CSD - initially defeated in December of 2015 - \$38,722,000 (19% YES)

Some Key Takeaways on **Annual & Special Votes**

- **Vote dates:** Other than the Big 5, districts must generally hold their **annual** votes on the **third Tuesday in May**. Generally, special votes may be conducted on any date. For special votes, we have found it very useful to insert into the legal notice that in the event that the school is closed for any reason on a day a vote is scheduled, such vote would take place on the first date that the district reopens. We had to utilize this language in “Snowvember” of 2014, and for Covid-19 issues.
- **Legal notices** must be published **four times in the seven weeks** preceding the date of the annual/special vote, in two newspapers having general circulation in the district, or one newspaper of general circulation, if there is only one, with the **first publication occurring at least 45 days before** the date of the annual/special vote. **Be conservative here**—publication costs are aided as part of the project.
- **Contingent propositions** are an approved method of breaking a project into two or more components. **Alternative propositions are not allowed.**
- Determining the **sources of funds** is important at the proposition stage. Sources, such as private money/donations, reserve fund appropriations or other available district funds that serve to reduce the amount of obligations issued **must be specified in the proposition.**
- All propositions should provide that all types of obligations are authorized. This is especially important for the **acquisition of vehicles**. Many districts have incorporated **lease/installment purchase** language into their vehicle propositions; however, some districts still have not.
- Proposition language should be reasonably descriptive but should **provide for future flexibility.**
- **Constitutional debt limit** should be evaluated when a project is presented to the public. In situations where the issuance of obligations authorized in the proposition would place the district above (or further above) its constitutional debt limit **supermajority vote language must be inserted into the proposition.**
- Constitutional debt limit issues are most common in **small city school districts**; however, we have had occasions where **small rural districts** have found it necessary to exceed their debt limit, and we needed to insert the special language into the proposition. This issue applies to both construction/reconstruction projects as well as vehicle acquisition propositions.

Some Key Takeaways on the **New Constitutional Debt Limit for Small City School Districts.**

- One of the outcomes of this year’s November election was a big win for every small city school district in New York State.
- Proposal 1, amending the Constitution of the State of New York by revising the debt limit currently imposed on small city school districts, was approved by the voters. Consequently, small city school districts have been given the same debt limit calculation as central School districts and union free school districts.
- As of January 1, 2024, **the new debt limit for small city school districts is 10% of the full valuation of the real property subject to taxation by the district.**
- However, **small city school districts cannot exclude building aid debt** like central and union free school districts can.
- Lastly, no changes have been made to the capital outlay regulations which allow small city school districts to reimbursement for base year capital outlay expenses for projects that are wholly funded through capital outlay and if bonded, would cause a small city school district to exceed 95% of its constitutional debt limit.

BOTTOM LINE: Legislation has **permitted small city school districts to calculate their debt limit the same way central/union free school district calculate such debt limit.** Such a change in the calculation permits small city school districts to take on larger projects without the requirement of a supermajority voter approval requirement. However, the advantage of being able to exclude building aid debt has yet to be given to small city school districts.

Some Key Takeaways on **Personal Voter Registration for Small City School Districts.**

- Small city school districts are required to provide for the personal registration of voters pursuant to the Education Law.
- The time and location of voter registration is determined by a resolution. Generally, we place this information in the special meeting and vote documents. The goal of this meeting is to update the voter register to include those who are newly registered to vote.
- Personal voter registration is performed by the Board of Registration (“BOR”). The BOR is composed of those appointed by the Board of Education. **The BOR must be formed by February 15 in each year.**
- The BOR can be comprised of as many members as the Board of Education deems necessary; however, **no more than half** of the BOR can be comprised of people of the same political party.
- There are two requirements for the time and location of voter registration. The **registration date** must be **at least 20 days after the resolution** containing such information is passed and must be **at least two weeks prior to the election.**
- Finally, a Notice of Registration and Notice of Availability of Register must be published in a newspaper that has general circulation within the district.
- Notice of Registration – notifies the public when and where they can register to vote. Must be published once a week for two weeks prior to the BOR meeting.
- Notice of Availability of Register - notifies the public that the voter register has been completed and is available for inspection. Must be published once a week for two weeks prior to the election.

BOTTOM LINE: Small city school districts must plan to create the BOR, hold the BOR meeting, and make the voter register available for inspection when creating the timeline for capital improvements projects. Adherence to such requirements will minimize the risk of litigation and project delays.

Some Key Takeaways on **SEQRA/Environmental Compliance**:

- **SEQRA is an important initial task that needs to be completed early in the planning process:** Prior to deciding to approve, fund, or undertake a project/action, a school district's governing board needs to evaluate actual or potential impacts on the environment.
- **Environment is broadly defined:** Besides the typical land, air and water analysis, traffic, historic and archeological sites, community/neighborhood character, lighting, sound, and recreational resources, etc. may be considered as well depending on the proposed project scope.
- **Studies may include** State Historic Preservation Office (SHPO) review, archeological study, wetlands delineations / stream assessments, Phase I/II Environmental Site Assessments, traffic study, Federal NEPA review. Also, related assessments of possible permits.
- **SEQRA applies to many types of projects:**
 - Capital projects: replacement/repair; site work (pavement, athletic fields); construction of a new building. Both large projects and small ones (such as \$100,000 “capital outlay” projects).
 - Real estate transactions: sales, purchases, donations, leases, easements. Need to assess future use; therefore, for sales, cooperation of purchaser for facts and municipality for analysis is needed. Also, need to do environmental due diligence (Phase I/II ESAs) to assess risks for purchases, and purchasers need to do this as well. These steps take time.
- **Type of SEQRA Action (Type I, Unlisted, Type II) depends on facts of specific project:** Many criteria, but common ones are acreage of land disturbance (converted to buildings & pavement and temporarily disturbed such as athletic fields, areas near construction); historic designation of building or neighborhood; nearby parkland.
- **Procedural path depends on which type of SEQRA Action it is:**
 - Type II: resolution stating why no further review is required; could have SHPO issue(s).
 - Unlisted: does not meet Type I thresholds but requires review; Short Environmental Assessment Form (EAF) and optional coordination with other agencies, if any; typically SEQRA resolution and Negative Declaration prior to resolution to approve project/transaction.
 - Type I: Full EAF and required coordination with other agencies, if any; typically SEQRA resolution and Negative Declaration prior to resolution to approve project/transaction.

BOTTOM LINE: We need **plenty of lead time** to evaluate facts, determine **type of SEQRA Action**, retain an **environmental consultant**, complete an EAF, and possibly **coordinate** with other agencies regarding a proposed project and/or future use of a site. **Please contact bond counsel/SEQRA counsel** about potential projects and property transactions (sales, purchases, donations, leases, easements) as early as possible, even if not all of the specifics have been determined, so that we can help you determine an appropriate schedule, and the proper approach. If SEQRA is not addressed properly and thoroughly, **a project can be completely derailed or at least delayed significantly** with litigation and/or NYSED review/approval process.

Some Key Takeaways on Capital Project Contract Coordination

- **Owner-Architect and/or Owner-Construction Manager Agreements drive the form and content of remaining project contracts**
 - Proposals as contracts or exhibits to contracts
 - **Pre-referendum services** are often addressed in proposals with provisions for **subsequent contracts following a successful vote**, or full contracts for a project, with post-referendum services **obviated following a negative vote**.
 - Accepted proposals can constitute complete contracts, but are **difficult to coordinate with subsequent typical standard-form agreements**.
 - Proposals can be exhibits to contracts to define the scope of work and fee calculation, but **watch out for conflicts** between provisions in a proposal and those in a subsequent formal contract.
 - Subsequent contracts superseding proposals
 - Clarify **what portions** of a formal contract **supersede a prior accepted proposal**, and what provisions of the accepted proposal survive.
 - Standard and custom-made forms
 - AIA or other standard industry forms facilitate coordination, but **any revisions** to standard form provisions **in one contract must be coordinated** with parallel provisions in the others.
 - Avoid custom-made forms – they are usually **overly favorable to the party that prepares them**, and much more difficult to coordinate.
- **Common Coordination Issues**
 - Scope of Architect’s services
 - Provisions in **other contracts**, such as for a Construction Manager or independent Clerk of the Works, **will reference services of the Architect**, which **may not be consistent** with services in the Owner-Architect Agreement.
 - Construction Manager/Clerk of the Works Agreements
 - When retaining a Construction Manager or Clerk of the Works after already retaining the Architect, it is **problematic when the contract with the latter did not provide for one or both** on the project.
 - Dispute resolution
 - Critical that **all contracts contain the same dispute resolution provisions**, such as mediation, arbitration, or litigation, and that **all parties to a dispute are bound to the same forum in single proceedings**.

Some Key Takeaways on Capital Project Contract Provisions

• **Common Misunderstood Provisions**

- Indemnity – New York’s “anti-indemnity” statute
 - Under the General Obligations Law, in any contract for construction, renovation, or demolition of a structure, **a party cannot be indemnified for its own portion of liability** for personal injury or property damage claims.
- Architect’s inspection and approval obligations
 - **Unless compensated** for it as an Additional Service, **the Architect does not provide detailed inspection** of all aspects of the work of Contractors, and only “approves” construction work in a very general way.
- Overall project coordination by Owner – Non-delegable duty in New York
 - While the General Contractor is often designated to “coordinate” the work of all prime contractors (e.g., its own work with that of the Electrical, Plumbing, and Mechanical contractors), **such coordination is by law the obligation of the Owner** and cannot be “delegated” to any prime contractor.

• **Common Under-Vetted Provisions**

- Scope of Architect’s services
 - The breakdown of Basic Services **may not cover all items the Owner anticipated** for the project, leaving **anything left out to be an Additional Service**.
- Clerk of the Works and Owner’s Representative
 - The **Owner’s Representative** generally does not take on detailed inspection responsibilities, and **is not a Clerk of the Works**.
- Dispute resolution
 - There are **significant differences** among mediation, arbitration, and litigation **to consider** before the Owner decides which it prefers.
- Insurance
 - Commercial, Auto, Professional, Excess/Umbrella, Workers Compensation, and Employer Liability
 - While Professional Liability coverage is solely for the Architect, **all of the others should be required of all parties retained by the Owner for the project**. The Owner’s insurance broker and/or internal insurance personnel should be **intimately involved in advising on coverages**.
 - Additional Insured Status – Primary and Non-Contributory
 - The status comes into play only as to work performed by the insured party for the Additional Insured that **nonetheless gives rise to a third-party claim** against the Owner.

Some Key Takeaways on Public Bidding on Capital Projects

- **Categories for rejecting a bid**

- Non-Responsive

- Responsiveness is a **question of compliance with the requirements of the bid instructions**, such as filling in all blanks, providing a non-collusion certificate, and providing proper bid security.

- Non-Responsible

- Non-responsibility raises the question of **whether a bidder is actually qualified to do the work**, whether as to required qualifications or experience in the bidding documents, or defaulting on other public work contracts.

- Debarment of bidder or a principal of the bidder, or subcontracting of work to a debarred company or individual

- When a company and principals in it are debarred, **neither the company nor its principals** can bid on public work, and **the debarment extends to other companies** in which the debarred principals have interests, whether bidding for a prime contract or designated to be a subcontractor to a successful bidder.

- **Bid Withdrawals**

- Bid errors

- To justify withdrawal of its bid without penalty, the **low bidder must show that the error was of such consequence that it could not perform the contract successfully at the bid price**. If there is a legitimate error justifying withdrawal, the Owner has no recourse other than to go to the next lowest bidder. If it is **not a justifiable withdrawal** and the bidder still refuses to enter into a contract, the Owner can **go to the next lowest bidder and then make a claim** against the original low bidder's Bid Bond for the difference between the two bids.

- **Rejection of All Bids**

- Ambiguities in bid documents

- **Only justified if** it is apparent that **all or most bidders were misled** by material ambiguities in plans, specifications, or bidding requirements.

- Budget

- Usually comes into play **only when all bids are well over budget**. The bidding instructions should contain language about this as a **right to reject all bids**.

- **Alternates**

- Effect on low bid determination

- Bidding requirements should be **clear as to how the “low” bidder is determined** (e.g., base bid alone or base bid adjusted for accepted alternates).

Some Key Takeaways on **Capital Reserve Funds**

- Reserve funds are a useful method for school districts to allocate money for **future uses** without running into fund balance caps.
- Many school districts considering capital improvements projects use a capital reserve fund as a sort of **savings account** to set aside money for such purpose.
- Capital reserve funds for school districts are a function of **Section 3651 of the Education Law**, which allows such a reserve to be created (with voter approval) to cover, in whole or in part, the cost of any object or purpose for which a school district may issue bonds.
- The **creation** of a capital reserve fund requires voter approval. In the proposition, the school district must identify the **purpose** of the fund, the **maximum amount of funds** that can be deposited into the reserve, the **length of time** the fund can exist, and the **source(s)** from which funds would be obtained. In our experience, **voters usually approve** the creation of capital reserve funds.
- A capital reserve fund's maximum amount **does not represent the highest balance** that the fund can have at any one time. Instead, that amount represents the absolute maximum of funds that can be deposited **over the life of the fund**. For example, if a capital reserve fund is created with a \$10 million cap and then fully funded with \$10 million, the school district cannot spend \$1 million and then deposit more money into the fund. Once \$10 million in deposits has been reached, the district cannot deposit any more money in the fund (unless the voters approve a change in the maximum amount of the fund).
- An **expenditure** from a capital reserve fund also requires voter approval. Importantly, such **funds must be expended or allocated in the same fiscal year in which voter approval is obtained**. Further, funds deposited into a capital reserve cannot be spent in the same fiscal year in which they were deposited. If you appear to be hindered by one of these rules, please call us (we have some work-arounds).
- If the original terms of a capital reserve fund (purpose, maximum, length of time, sources) no longer are workable for a school district, the **terms can be modified with voter approval** so long as the end date for the fund has not passed.
- There has been **new legislation** adopted in New York in the wake of Covid-19:
 - School districts can use capital reserve funds for **capital costs** attributable to the Covid-19 pandemic **without a referendum**.
 - School districts can also **“borrow”** money from a capital reserve fund for **operating costs** attributable to the Covid-19 pandemic, so long as such moneys are **repaid within five fiscal years, with interest**.
 - Inter-fund advances for costs attributable to the Covid-19 pandemic do **not need to be repaid until the close of the following fiscal year**.
 - We haven't seen our clients resorting to these techniques, thanks to all the **Covid relief funding**.

BOTTOM LINE: Capital reserve funds can be useful when structuring a capital improvements project and “covering the local share,” but the need for voter approval can make them tricky. If your school district is planning to expend money out of a capital reserve fund or thinking of creating or modifying a capital reserve fund, let us know so that we can help you stay within the legal boundaries.

Some Key Takeaways on **Financing with Installment Purchase Contracts and Energy Performance Contracts as Compared to Issuing General Obligations**

IPCs and EPCs are not general obligations. They are financing tools used as alternatives to issuing traditional bonds or bond anticipation notes (“BANS”). There are, however, several subtle issues that districts should be aware of prior to entering into these types of arrangements.

Installment Purchase Contracts (“IPCs”)

- IPCs must be authorized by **the same procedure** as a general obligation issue is authorized. What this means for schools is that if a proposition is required for a BAN or bond issue, then a proposition for an IPC is required. A financing resolution must also be adopted. **This does not apply to energy performance contracts** (see below).
- Additionally, the State Comptroller has set forth **very specific** things that a district must do prior to issuing an IPC. (See 2 N.Y.C.R.R. §§ 39.0-39.10). For example, a district must demonstrate (and the board must confirm) that entering into an IPC is **more advantageous** than issuing a general obligation. Again, **this does not apply to energy performance contracts**.

Energy Performance Contracts (“EPCs”)

- EPCs may be used to finance the costs of capital improvements projects **involving energy efficiency improvements**. EPCs can be used to accomplish energy saving projects without necessarily needing to incur initial capital costs (the cost of the upgrades is covered by the savings).
- The financing for an EPC can take the form of a shared savings agreement financed by the energy service company, cash from a district’s capital project budget, a power purchase agreement where the energy service company fully funds the project, or an IPC.
- **Competitive bidding and IPC requirements do not apply to an EPC procured using a written request for proposals (“RFP”)** developed in accordance with procurement or internal control policies, procedures or guidelines the district has adopted pursuant to Section 104-b of the GML. Nor do you need to have a public vote (although doing so can trigger an **extra 10% in building aid**).
- Another important difference between EPCs and traditional general obligations is the **length of time for which the project can be financed**. Whereas bonds cannot be issued for a longer period of time than the period of probable usefulness (“PPU”) of the project being financed (determined by the Local Finance Law), EPCs cannot have a duration longer than the **reasonably expected useful life** of the energy facilities or equipment, with an absolute maximum duration of 35 years.
- Reasonably expected useful life is not necessarily the same as the PPU. Instead, **the reasonably expected useful life should be determined on a case-by-case basis** using generally accepted industry standards and should be based on evidence that will provide reasonable accuracy.

Considerations Applicable to IPCs and EPCs

- Be careful: unlike the standard terms found in most bond deals, many IPCs/EPCs do not clearly state **all the relevant provisions, including financing details**. While the contract may state the general details, the specifics of the agreement may be scattered in the **term sheet and the associated financing documents**. Additionally, prepayment penalties (or “make whole” provisions) may apply; tax reform may trigger some of those.
- Like BANS and bonds, IPCs and EPCs require the filing of **IRS forms**, either 8038-GC (contracts under \$100,000) or 8038-G (over \$100,000). Care must be taken to ensure that these forms are prepared and filed properly. A mistake on Form 8038 can trigger a full IRS audit—**they should be prepared and filed by your bond counsel**.

With the assistance of your municipal advisor and bond counsel, a school district can fully evaluate the different types of obligations to be utilized for a particular IPC/EPC project, and can choose the best one.

Some Key Takeaways on **Capital Outlay Projects**

- When you are planning your budget, a useful method for getting some capital project-type work done on favorable terms is a **capital outlay project** up to (in most cases) \$100,000 (can be higher in small city school districts that are over their debt limit).
- Capital outlay projects are useful because SED will provide **building aid in the current or following year**, rather than paying the aid over a 15-year period. Districts may receive reimbursement for base year capital outlay expenses for projects that are wholly funded through capital outlay and which have a **total cost of no more than \$100,000**.
- In several recent years (including 2022), bills have been introduced in Albany to amend the Education Law to **increase the total cost** for eligible capital outlay projects to no more than **\$250,000**. They have not yet become law. The costs being imposed by the **new electric buses mandate** may make passage more likely in the future.
- **Small city school districts** (less than 125,000 inhabitants), however, **can apply for a waiver** to allow for a capital outlay project in **excess of \$100,000** as long as, if bonded, the project would cause the district to exceed 95% of its debt limit. Small city waiver requests must be applied for through SED and are **granted on a case-by-case basis**.
- When considering granting a waiver, SED generally **requires** a number of **OSC or District forms** including (among others) OSC Debt Limit Report, Form AC-991 Statement of Total Debt, Copy of Consent Order, Constitutional Debt Limit Calculation, and a District Debt Service Schedule. Small city school districts seeking a waiver should **contact the SED Building Aid Unit** in the Office of State Aid at 518-474-2977.
- Only **one capital outlay project** may receive aid in a given budget year. While a district may spend and report the capital expense for such a project over multiple years, and receive aid on the same project over multiple years, only one project per year can receive aid. The appropriate **building aid ratio** will be applied to reported expenses to determine the amount of aid.
- Such projects can be used for **general upkeep and upgrades** to facilities. You may wish to use these funds for projects that cannot be funded through other means. For example, you may not wish to upgrade technology as a capital outlay project, as funds will be available for such purpose under the Smart Schools Bond Act.
- Plans for a capital outlay project must be **submitted to the Office of Facilities Planning** in writing so that Facilities Planning can determine whether the project is eligible for aid.
- Like larger capital projects, to be eligible for aid, capital outlay plans **must include at least \$10,000 of “building work.”** Without this \$10,000 component SED does not consider the work to be a "project" that is eligible for building aid.
- More recently, we have seen some pushback from Facilities Planning regarding the manner and extent to which a capital outlay has been publicized. Because the annual vote on the budget is considered to be the authorization for a capital outlay project, Facilities Planning has indicated that **a description of the capital outlay project should be included as part of the District’s published budget materials**. It is



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important that this description be **drafted broadly enough** to allow for changes in the anticipated work (we can help you with that).

- When planning for a capital outlay project, be careful that the project expenses will **not exceed \$100,000**, as any overrun will cause Building Aid to be amortized over a PPU of 15 years for reconstruction projects. Careful budgeting is important (think about soft costs).
- **More information** on capital outlay projects can be found at the Facilities Planning website, at https://stateaid.nysed.gov/BUILD/html_docs/capexc_aid.htm.
- It is a good idea to **plan for regular capital outlay projects**. If you include a capital outlay project in each budget, the residents will become comfortable with such projects after a period of time. You can “chip away” at your building condition survey items and make your larger capital project dollars stretch further.
- Regular use of capital outlay projects can result in a reduced size and scope of larger capital projects down the road.
- We can help you (typically in the first quarter of each year) with the necessary **authorizing resolution and SEQRA analysis** (these projects are typically “Type II” actions under SEQRA). **Please call us in February!**

Some Key Takeaways on **Emergency Projects**

- Planning for “normal” capital projects can take years, but **not all projects can be planned in advance**.
- The State recognizes that the need for certain projects may arise out of the blue; therefore, there is provision for **building aid** for emergency projects.
- Typically, districts may receive building aid reimbursement for emergency projects **in the current or following year**, not spread over a 15-year period as is normally required for reconstruction projects.
- Generally, an emergency project must come as the result of an **accident or other unforeseen occurrence or condition** affecting public buildings, public property, or life, health, safety or property.
- Under the Local Finance Law, an emergency can be created by an epidemic, conflagration, riot, storm, flood, earthquake or other unusual peril to the lives and property of citizens.
- These definitions indicate that emergency projects are generally thought of as the result of an “act of God,” **not normal wear and tear**. An opinion of the State Comptroller stated that the condition cannot arise as the result of deterioration or bad facilities oversight.
- Emergency projects are generally those that **require immediate corrective action** which cannot await normal bidding procedures. The mitigation activities should be needed immediately and be temporary in nature. Such activities are considered not to involve capital construction in the usual sense, and do not require approval of the Commissioner.
- Recently, we have seen SED deem a project that required immediate action (but may not have quite fit the “act of God” criteria) as a “**local emergency**.” Under the “local emergency” scenario, the district is still allowed an exemption from certain public vote and bidding requirements, but instead of receiving aid in the current or following year, such aid is amortized over 15 years.
- Be careful: SED has indicated it **will more closely scrutinize** emergencies that could have been avoided (was the item included in a recent Building Condition Survey?).
- **Districts typically must have the Board of Education declare the situation to be an emergency (and address SEQRA—these projects are usually “Type II” actions)**. We can help you with that.
- Emergency projects may be carried out prior to receiving approval from the Commissioner, but they must eventually **receive approval** from the Office of Facilities Planning in order for expenditures to be eligible for State Aid. **Consult with SED and us in advance!**
- More information on emergency projects can be found at the Facilities Planning website, at http://www.p12.nysed.gov/facplan/policy/capital_construction-emergencies.html and https://stateaid.nysed.gov/build/html_docs/capexc_aid.htm.

BOTTOM LINE: We hope that none of you are faced with such a situation, but if something unexpected occurs, contact us so that we can help you **frame your project** within the parameters needed to receive accelerated State Aid.

Some Key Takeaways on the **Zero-Emission Bus Mandate**

The 2022 – 2023 New York State Budget imposed a mandate that all school buses be replaced, over time, with zero-emission buses. This mandate came as part of Governor Kathy Hochul’s push for implementing environmentally-friendly policies to combat climate change.

Observations and Challenges:

- **Cost of buses** – electric buses typically **cost** around \$400,000 versus \$150,000 for standard buses.
 - In addition, **renovations and upgrades** to equipment and facilities will be required to store, maintain, and charge the electric buses. These renovations will increase costs even further.
 - Moreover, the **period of probable usefulness (“PPU”)** for buses is only five years. Therefore, districts must pay-off any debt used to finance the buses within five years of the purchase. Will zero-emission buses have a longer useful life than that? Should the PPU for them be lengthened?
 - The capital outlay project maximum amount is still only \$100,000. Can districts use this new mandate as a **talking point** in seeking to increase that limit?
- **Availability of buses** – supply chain issues have persisted in the wake of the Covid-19 pandemic. As a result, manufacturers may be unable to produce enough new buses to satisfy the needs created by the mandate.
- **Infrastructure** – districts will have to strategically plan the location and capacities of their charging stations to ensure that all of their buses are fully charged.
 - Facilities
 - Costs
- **Grid capacity**
 - Power grids can only provide so much energy. It will be necessary for school districts to get in touch with their energy supplier to discuss capacity and supply issues.
- **Work Force** – bus drivers and staff will have to be re-trained on how to operate and maintain the new buses.

Options:

- **Grant money** – New York State passed the Clean Water, Clean Air, and Green Jobs Environmental Bond Act “the Act” in November 2022. This Act allocated \$500 million to cover the costs associated with purchasing zero emission school buses. Pursuant to the Act, New York State will issue bonds to fund grants to local school districts and municipalities, enabling them to carry out environmentally conscious projects, including electric buses.
 - In addition to the Act, Governor Hochul announced an additional \$8 million in funding to install fast chargers, including, in underserved communities.
- **Bond Counsel** – as your bond counsel we can assist you in obtaining financing from bond issuances as well as other sources.

BOTTOM LINE: All buses purchased after 2027 must be zero-emission and all buses on the road must be zero-admission by 2035. There are many questions and issues still to be addressed in this area.

Some Key Takeaways on Official Statements

- Under SEC Rule 15c2-12 (the “Rule”), a substantially final “**preliminary official statement**,” providing disclosure of the material information concerning an issuance of bonds or notes, must be reviewed and provided to potential investors, and a **final official statement** must be prepared and made available following the sale of the bonds or notes
- The Rule states that official statements must be **complete**, in that a potential investor should not be expected to conduct an investigation outside of reading the document and any publicly available materials incorporated by reference.
- Three Basic Functions: (1) provide a **description of the bonds or notes** offered and the transaction, (2) assist with **marketing** the bonds or notes, and (3) **disclose risks and other material information** associated with investment in the bonds or notes.
- If a material development occurs or material information comes to light following the distribution of the preliminary official statement, the preliminary official statement **must be supplemented (or “stickered”) prior to the sale date**. Correcting or updating the information in the “final official statement” post-sale is not sufficient. The SEC is focused on the state of disclosure **at the time the investment decision is made**.
- Under the Rule, the **issuer is responsible** for the completeness and accuracy of the official statement used to offer its securities. Material misstatements or omissions can subject an issuer’s officials to **liability for fraud** under federal securities laws.
- Bond Counsel: Review official statements with a focus on the provisions related to the (1)(a) tax-exempt status, (b) terms, and (c) authorization of the bonds and/or notes, (2) purpose of the financing, and (3) disclosure undertaking.
- Issuer Hot Spots: While the issuer is responsible for the entire official statement, the following sections require additional attention from the issuer:
 - The Issuer Detail Sections:
 - Description,
 - Demographics & Statistical Information,
 - Indebtedness,
 - Finances,
 - Financial Status, and
 - Real Property Tax Information.
 - Litigation
 - Investment Risks (*confirming statements related to state funding, certiorari proceedings, etc.*)
 - Disclosure Undertaking (**confirming accuracy regarding compliance with the Rule**)
 - Other Matters (*confirming statements regarding estoppel publication, late payments, etc.*)
 - Additional Information (*confirming contact information is correct*)
 - Appendices (*confirming accuracy of annual financial information, audited financials, etc.*)

BOTTOM LINE: The issuer is responsible for the completeness and accuracy of the official statement used to offer its bonds and notes. It is critical that issuers prepare the official statements (working closely with their municipal advisor) and maintain ownership of its content and of the process of its preparation to protect the issuer’s interests.



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Some Key Takeaways on the **Electronic Municipal Market Access** system (“EMMA”)

- Under SEC Rule 15c2-12 (the “Rule”), underwriters may not purchase or sell municipal securities in connection with a bond or note offering unless the underwriter has determined that an issuer has undertaken to **provide certain information** to the Municipal Securities Rulemaking Board.
- Prior to June 1, 2009, municipal issuers had to send their financial disclosures through the Nationally Recognized Municipal Securities Information Repository (**NRMSIR**) system. There were several NRMSIRs, but disclosure could also be made electronically through a dissemination agent such as DisclosureUSA.
- **Disclosure to the NRMSIRs was problematic.** Without a centralized repository, continuing disclosure information on municipalities and school districts was often incomplete or inaccurate.
- As a result, the SEC amended the Rule to require filings to be made to a **centralized depository, EMMA**. According to an SEC release, the amended rule was intended to “improve availability of information about the municipal securities to investors, market professionals, and the public generally.”
- **EMMA can be accessed** at the following web address: <http://emma.msrb.org/>. You can find your district in several different ways, including (1) the Quick Search bar in the upper right; (2) the Advanced Search option in the green bar that runs across the page; or (3) the Browse Issuers option also located in the green bar.
- Once you’ve located your district, you can click on any of the bond or note issues listed to get **more information** on that deal, such as the official statement, continuing disclosure documents, or trade activity.
- Issuers also have the option of creating an organization account on EMMA that allows an organization to see all the information about that organization that is posted on EMMA, as well as submit disclosure filings. This is something your municipal advisor may have already created for your organization. We recommend that you **contact your municipal advisor** about this.

BOTTOM LINE: EMMA is a system that is much **more user-friendly** than its predecessors, and it’s a good idea to familiarize yourself with EMMA so that you can see firsthand what investors (and regulators) can access regarding your district’s continuing disclosure.

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Some Key Takeaways on **Continuing Disclosure Requirements of SEC Rule 15c2-12**

- Under SEC Rule 15c2-12 (the “Rule”), underwriters may not purchase or sell municipal securities in connection with a bond or note offering unless the underwriter has determined that an issuer has undertaken to **provide certain information** to the Municipal Securities Rulemaking Board (via EMMA). Issuers agree to provide such disclosure in a Continuing Disclosure Undertaking (a “CDU”).
- **The SEC has been cracking down on issuers’ statements regarding continuing disclosure** compliance through enforcement of the anti-fraud provisions of the federal securities laws. Being aware of required deadlines, as well as which events require disclosure, is a good first step.
- Generally, there are two types of information that must be disclosed under the Rule: **(1) annual financial information** and **(2) certain designated events (or “Material Events”)**.
 - **Annual Financial Information:** Annual financial information or operating data for the issuer as presented in the final official statement. If not submitted as part of the annual financial information, then when and if available, audited financial statements.
 - **Certain Designated Events:** Notice of such events (as further described below) must be submitted to EMMA **within 10 business days of their occurrence**.
- A **failure to file notice** must also be submitted when Annual Financial Information is not filed by the date specified in the CDU (or within 10 business days of the occurrence of one of the Material Events as required by the Rule).
- To help you determine when a designated event may have occurred, so that you (working with your bond counsel and municipal advisor) can provide the appropriate (and timely) event notice, we’ve listed the required events below, along with a brief description/example of how each situation might arise. *Note: the two events marked with an asterisk were required to be included in CDU’s entered into on or after February 27, 2019*

Most Likely To Occur:

- **Principal and interest payment delinquencies**
 - *Was there a late payment? For example, a district missed a payment because school was closed due to a “snow day” on a day on which a payment was due. This can also occur during periods of staff transition/absence.*
- **Bond and note calls, and tender offers, if material**
 - *Example: the issuer calls in old bonds as part of a refunding transaction*
- **Defeasances**
 - *This usually occurs in a refunding transaction -- an escrow is established to satisfy debt service on the refunded bonds. In a legal defeasance, the escrow is composed of securities backed by the U.S. government, which generate the cash flow needed to pay the interest and principal on the refunded bonds, and the issuer is legally discharged of the debt. In the case of an economic defeasance, the escrow is funded with other types of securities, and the issuer is not legally discharged of the debt.*
- **Ratings changes**
 - *Example: there is a change in the issuer’s underlying rating change (up or down), or a bond insurer’s rating change affects the rating of the issuer’s insured bonds.*
- **Incurrence of a financial obligation** of the issuer or obligated person, **if material**, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, **any of which affect security holders, if material***
 - *Example: the issuer enters into a lease/purchase agreement or issues a BAN or bonds without an official statement.*

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Some Key Takeaways (Continued) on **Continuing Disclosure Requirements of SEC Rule 15c2-12**

Less Likely, But Possible

- **Adverse tax opinions, the issuance by the IRS of proposed or final determinations of taxability, Notices of Proposed Issue or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security**
 - *Example: the IRS examined a bond or note issue and determined that the issuer is not in compliance with federal tax laws, and makes the determination that the interest on such bond or note issue is now taxable.*
- **Modifications to the rights of security holders, if material**
 - *Example: the New York State Legislature eliminates the State Aid Intercept Program, thus eliminating the right of bond or noteholders to receive payment from the State Comptroller in the event of default.*
- **The consummation of a merger, consolidation, or acquisition involving the obligated person**
 - *Example: two school districts merge.*
- **Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, any of which reflect financial difficulties***
 - *Example: the issuer fails to pay principal or interest, not because of a clerical error, but because of an inability to pay.*

Unlikely (these are aimed more at revenue bond financings, as opposed to general obligation financings)

- **Non-payment related defaults**
 - *Example: an issuer agrees (but fails) to provide financial statements to the bondholders every 30 days.*
- **Unscheduled draws on debt service reserves reflecting financial difficulties**
 - *Example: an airport finds that the revenue from parking receipts is lower than expected, and has to make an unscheduled draw on a debt service reserve fund to make required principal and interest payments.*
- **Unscheduled draws on credit enhancements reflecting financial difficulties**
 - *Similar to the above, except that the issuer goes to, for example, a letter of credit bank for the money needed to make principal and interest payments (whereas in the case of a debt service reserve, the money is already there).*
- **Substitution of credit or liquidity providers, or their failure to perform**
 - *Example: the issuer changes credit providers in the above scenario.*
- **Bankruptcy, insolvency, receivership or similar event of the obligated person**
 - *Insolvency is the inability of an entity to pay its debts as they become due. Bankruptcy is the “legal declaration” of such circumstances.*
- **Appointment of a successor or additional trustee or the change of name of a trustee, if material**
 - *A trustee acts as the representative of bondholders in a revenue bond transaction; this is not applicable in general obligation financings.*



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Some Key Takeaways on the New Designated Events added to SEC Rule 15c2-12 in 2019 and recent SEC's Enforcement Priorities

- **Application of New Designated Events**

- Under Securities and Exchange Commission (“SEC”) Rule 15c2-12 (the “Rule”), continuing disclosure undertakings entered into on or after February 27, 2019 need to provide for **notice** of the following events:
 - **Event 15: Incurrence of a financial obligation** of the issuer or obligated person, **if material**, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, **any of which affect security holders, if material**; and
 - **Event 16: Default**, event of acceleration, termination event, modification of terms, or other similar **events under the terms of the financial obligation** of the issuer or obligated person, **any of which reflect financial difficulties**.
- Since the requirement for two additional events went into effect in 2019, we are seeing far more disclosures for Event 15 (incurrence of a financial obligation) than we are for Event 16 (default, etc.).
- Because many of our clients issue financings without an official statement, there are many incurrences of a financial obligation that must be posted to EMMA. **Municipal advisors are at the front lines of this—**they can **help you identify what needs to be posted** and do so in a timely manner.
- While the new event states that the incurrence of a financial obligation must be posted to EMMA, it does not prescribe a form.
- There are **some differences** in municipal advisors regarding what they wish to post. We have been working with our colleagues in Albany and the municipal advisors to determine how to disclose the material terms in an **efficient and cost-effective manner**.
- One note that has come up in other parts of the state is **obligations created by purchasing agreements through BOCES**. Lease/purchase agreements are a financial obligation, so if something appears to be a “lease” but contains a provision that **the equipment can be purchased at the end of the term** for a nominal sum, then it may be a lease/purchase agreement that needs to be posted to EMMA.
- Again, municipal advisors are key. Even if you (for example) finance buses without using your municipal advisor, you need to **let them know** so that they can determine whether the terms need to be **posted to EMMA**.

- **SEC Enforcement Priorities**

- The SEC’s acting director for the Office of Municipal Securities has indicated that Rule 15c2-12 disclosures will be closely watched by his office.
- This focus largely stems from the new designated events that were introduced in 2019 and a concern that, due to ambiguities, municipal issuers may be underreporting instances of these events.
- Accordingly, school districts need to be even more careful with regard to disclosure. **Err on the side of caution!** If you are not paying cash for a bus, copier, or any other piece of equipment, **send the arrangement to your municipal advisor** so that they can consult with us if needed.

BOTTOM LINE: The SEC continues moving toward requiring additional disclosure. Issuers should work closely with their municipal advisor and bond counsel in evaluating what financial obligations, or terms thereof, are considered **material** to ensure compliance with the Rule going forward.

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Some Key Takeaways on Recent Federal Tax Issues

• **IRS Priorities for Tax-Exempt Bond Programs in 2024**

- Tax-Exempt and Government Entities – In 2022, in connection with the long-term funding the IRS received as part of the Inflation Reduction Act, the IRS published a Strategic Operating Plan outlining initiatives and objectives across its many sectors and providing a future vision for the federal tax administration as a whole. The 2024 Program Letter announced the IRS Tax-Exempt and Government Entities division’s alignment with the objectives set forth in the Strategic Operating Plan and provided general guidance for priorities for FY 2024. Similar to last year, the IRS continues to provide an update on specific priorities in its quarterly IRS Priority Guidance Plan.
 - In its most recent update released in September 2023, the IRS indicated it would continue to focus on issuing the following:
 - Guidance under §142, as amended by the Infrastructure Investment and Jobs Act.
 - Guidance under §§144(b) and 150 on qualified student loan bonds.
 - Regulations under §§148 and 150 on refunding bonds.
 - Revenue procedure on the recovery of rebate under §148.
 - Final regulations on bond reissuance under §150. Proposed regulations were published on December 31, 2018.
- The IRS is yet to publish its return examinations (audits) and hiring data for FY 2023.
- In FY 2022, the IRS started 348 and closed 334 tax-exempt bond return examinations, which were comprised of compliance strategies and referrals, claims and other casework. The most prominent issues found in the cases examined were arbitrage related, including claims for refund, rebate requirements, and yield restriction issues.

• **Private Business Use**

- A tax-exempt bond may be treated as a private activity bond and thus may lose its tax-exempt status if **BOTH** the private business use test and the private security or payment test are met.
- For a school district financing to qualify for tax-exempt bond or note financing: (i) **no more than 10% of the proceeds** of a bond issue may be used for a private business use (the private business use test); or (ii) **no more than 10% of the debt service** on the bonds may be secured by or payable from property used for a private business use (the private security or payment test).
- Also, no more than the lesser of 5% or \$5,000,000 of the bond proceeds can be used to finance private loans (the private loan financing test).
- Note that the private use threshold is reduced to 5% **if the use is “not related or disproportionate” to the district use.**
- Leases, sale of a building, etc. – Conduct periodic review of leases with private users. Is there a potential sale of a building (that was improved with the proceeds of tax-exempt bonds) to a private user?



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- **Tax Reform Under President Biden**

- In March of 2023, the Treasury Department released its latest ‘Green Book’ which explained the revenue proposals included in President Biden’s FY 2024 Budget. Consistent with those originally provided in early 2022, the proposed changes included:
 - Corporate tax rate increases from 21% to 28%.
 - Individual tax rate increases from 37% to 39.6% for taxpayers with taxable income over \$450,000 for married individuals filing a joint return (compared to \$693,750 in 2023) and \$400,000 for unmarried individuals (compared to \$578,125 in 2023).
 - Subjecting long-term capital gains (“LTCG”) to tax at ordinary income rates for taxpayers with taxable income greater than \$1 million.
 - A potential increase or outright repeal of the \$10,000 cap on state and local tax deductions (the “SALT cap”).
 - Return of advance refundings?
- Although these Federal tax law changes are consistent with President Biden’s FY 2022 Budget, the Inflation Reduction Act (which passed in August 2022 and took effect on January 1, 2023) did not contain any of the proposed changes listed above.

Some Key Takeaways on **Private Business Use/Sale or Lease of a School Building**

- For bond and note issues to be federally tax-exempt, there are **strict limits on private business users benefitting from the project**.
- Private business use can result from the **sale** of property, the **lease** of property, output contracts, research agreements, **management contracts**, other agreements giving special legal entitlement, or any special economic benefit in facilities not used by the general public.
- These rules are especially important in light of the **decreased state funding and lower enrollment** many districts have faced until recently. As districts attempt to lower costs and overhead, some districts have chosen to sell buildings, lease portions of buildings, or hire private management companies to handle tasks such as the provision of food services.
- The two most typical scenarios triggering private business use issues involve the **sale** of the entire building or the **lease** of a portion of the building.
- Special attention should be paid to the **use of school buildings** throughout the life of bonds that were issued for such building construction/reconstruction. When a partial or complete change in use occurs, **such as in the case of a sale or lease of a building or a portion of a building**, the change may jeopardize the tax-exempt status of the obligations. There are a number of possible approaches to avoid this, but careful and timely planning is required.
- **Remember:** (i) **no more than 10% of the proceeds** of a bond issue may be used for a private business use (the private business use test); or (ii) **no more than 10% of the debt service** on the bonds may be secured by or payable from property used for a private business use (the private security or payment test). Also, no more than the lesser of 5% or \$5,000,000 of the bond proceeds can be used to finance private loans (the private loan financing test).
- There are a number of different ways the 10% threshold can be measured (e.g., square footage analysis). If a school district is considering a project that includes private use, **we can work with the district** to determine whether the use would go over the 10% threshold and consider possible structuring alternatives.
- It is important to note that just because a project involves private business use does not mean that it cannot be financed. For example, **the financing could be done on a federally taxable, not tax-exempt, basis**. The obligations would still be state tax-exempt.
- **EXAMPLE:** If a district hires a food services company to manage its cafeteria in a building financed by tax-exempt bonds, that company is considered to “use” bond proceeds, and the payments for the services will be viewed as “securing” the bonds. This may be a private use issue, unless certain safe harbors are met.

BOTTOM LINE: For a school district’s financings to be federally tax-exempt, a district must pay attention to how the improved facilities are used **over the life of the bonds**. Any time a district considers selling or leasing a building, entering into a management contract, leasing rooftop space for a cell tower, allowing outside groups to use a school facility, or making any other **agreement with a private user**, please get in touch with us so that we can help you plan to avoid jeopardizing the tax-exempt status of the district’s bonds and notes.



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Some Key Takeaways on **Post-Issuance Tax Compliance Procedures**

As a result of increased scrutiny of school districts (and all governmental issuers) by the Internal Revenue Service (“IRS”), these are the procedures that you should have in place. We can help you with these (although by now just about all of our clients have adopted these procedures).

Designate a Post-Issuance Compliance Officer who will, among other things:

- **Coordinate** procedures for record retention and review of such records so as to comply with applicable IRS requirements.
- **Obtain and store** a closing binder and/or CD of any relevant and customary transaction documents (a “transcript”).
- **Monitor the expenditure** of bond/note proceeds arbitrage to ensure compliance with specific arbitrage rules and regulations.
- **Monitor and track** private use and private payments with respect to facilities financed with tax-exempt obligations.
- **Advise** bond counsel promptly upon receipt of communications from the IRS.

Be aware: focus has shifted to the “**effectiveness**” of procedures.

Some Key Takeaways on **Permanent (Bond) Financing through DASNY**

- The Dormitory Authority of the State of New York (“DASNY”) offers a **School Districts Revenue Bond Financing Program**, which has grown out of pressures resulting from the assumed amortization schedule that was adopted as part of the State Building Aid overhaul in 2001.
- Typically, school districts that issue their own bonds receive Building Aid based on an Assumed Interest Rate set by the Commissioner of Education. Districts that finance through DASNY, however, receive Building Aid based on the **actual blended net interest cost of the District’s BANs and DASNY bonds**. This is particularly important for districts that cannot issue their own bonds at interest rates lower than the state-wide Assumed Interest Rate (due to being an infrequent issuer or having a lower credit rating).
- **Interest rates remain relatively low, but lately have been rising as the Federal Reserve tries to rein in inflation, and the assumed amortization rate has not kept pace.** Because of this, we are anticipating that more and more clients will need to go to permanent bond financing for their projects through DASNY.
- DASNY financings are issued on a pooled basis. DASNY issues bonds to investors, and then uses the funds to make loans to participating school districts. **Instead of issuing bonds directly to a purchaser or through DTC, school districts issue bonds to DASNY.**
- DASNY financings involve **more parties, planning and paperwork than typical bond issues**, so the fees associated with these financings are higher.
- School districts still work with their own municipal advisor and bond counsel. **If you have any issues going to bonds in a given year, January/February of that same year is a good time to talk to your municipal advisor** regarding the pros and cons of issuing such bonds through DASNY. The DASNY pooled financing typically closes in **early June**.
- If you do issue bonds through DASNY, we have our clients **adopt a resolution specifically authorizing such DASNY financing**, instead of relying on the language of the original bond resolution.
- DASNY is very strict about certain paperwork. Copies of the **bond resolution, SEQRA resolution and estoppel notice must be presented up front**. This means that proper record-keeping is **essential** for such deals. They look at everything, from inception.
- As part of a DASNY deal, there is **increased scrutiny of tax issues and disclosure issues**, including post-issuance tax compliance and SEC-driven continuing disclosure compliance.
- School districts must complete a **tax questionnaire and due diligence questionnaire**. As part of this process, **documentation related to any private use of the building(s) financed by the relevant project is usually requested as well**. DASNY’s bond counsel firm(s) and underwriter’s counsel review these forms very thoroughly, and any questions need to be addressed promptly.

BOTTOM LINE: Financing through DASNY gives school districts assurance that their building aid will reflect the actual costs associated with borrowing. Because it is an expensive and time-consuming process, a district should discuss the pros and cons with its municipal advisor. We have a great deal of experience with these financings, and can help guide you through the process.



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Some Key Takeaways on **Refundings**

- Generally, refundings involve the issuance of obligations to refinance higher debt obligations at a lower rate. **Refundings** are relatively more complex transactions that require additional expertise and specialized authorizing procedures. Multiple factors are used to evaluate whether the original obligations can be refinanced, but it is something that should frequently be looked at by you and your municipal advisor (if you do not yet work with a municipal advisor, this might be a good opportunity to start doing so). We can provide you with contact information for the municipal advisors that are active in this area.
- Because of the high amount of refundings in recent years, it is likely there will be somewhat fewer going forward – **interest rates remain relatively low**, but federal tax reform legislation has reduced the number of refunding opportunities available, and interest rates are now rising rather substantially. We expect to see **fewer refundings** going forward.
- Generally, refundings can be grouped into two categories: **current** or **advance**.
- A **current** refunding occurs when the original obligations are retired within 90 days after the new issue is sold. This approach can be used to refinance bonds that have already been refunded previously.
- **Advance** refundings, which are more complicated, occur when the original obligations are retired more than 90 days after the new issue is sold. However, tax reform legislation **eliminated the federal tax exemption for advance refundings** as of January 1, 2018, making this type of refunding a less viable savings option for districts.
- Now, advance refundings may still be issued, albeit on a **taxable basis**, resulting in increased costs to the issuer and thus, less savings.
- Further, advance refundings also generally require **approval from the Office of the State Comptroller** (“OSC”). In certain situations, there are very specific applications and filings that need to be made, and the closing of the deal will likely be contingent on written approval having been received from the Comptroller’s office.
- When considering a taxable refunding, an analysis will still be needed to determine if a district can achieve sufficient savings. In light of the increased costs/loss of savings from doing a taxable refunding, it may be more difficult to reach the 3-4% savings level that OSC likes to see.
- On October 26, 2018, the IRS released a memorandum confirming that **tax-exempt bonds may be issued to advance refund outstanding taxable, non-tax-advantaged bonds**. The IRS seems to view this as consistent with the law because under such circumstances there are not two sets of tax-advantaged bonds outstanding for the same project or activity.
- We saw far fewer advance refundings in 2018 and 2019, but then more in 2020 and in 2021 in the wake of the pandemic and the resulting low interest rates, but in 2022 refundings dropped off a cliff, due to the Federal Reserves interest rate hikes.

BOTTOM LINE: The loss of advance refundings is unfortunate, but other techniques can be used to regain some lost savings opportunities, beginning with current refundings. With the assistance of your municipal advisor and bond counsel, an issuer can fully evaluate its refinancing opportunities, in order to create debt service savings within the framework of the rules. **Look at all of your debt issues: can any be refinanced to save you money?**

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