Office of Internal Audit
and Compliance

Public Private Venture (PPV) Program

University System of Georgia
Facilities Officer Conference
Columbus State University
October 27, 2011

Office of Internal Audit and Compliance

Operating PPV Projects After CO

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Agenda

- On-Going Responsibilities of Bond Issue;
- Qualified Management Agreements;
- PPV Program Audits;

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“PPV Management” … “We Built This PPV Project & Now What?”

Definition of a Public Private Venture

A Public Private Venture is a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes substantial financial, technical and operational risk in the project.

For the University System of Georgia, a public private venture is a financing agreement utilizing an issuing authority which loans money to a foundation’s LLC to construct physical plants (student housing, parking decks, food courts, and student support facilities) to be leased to the University System of Georgia for the use of students, faculty and staff of a College/University.

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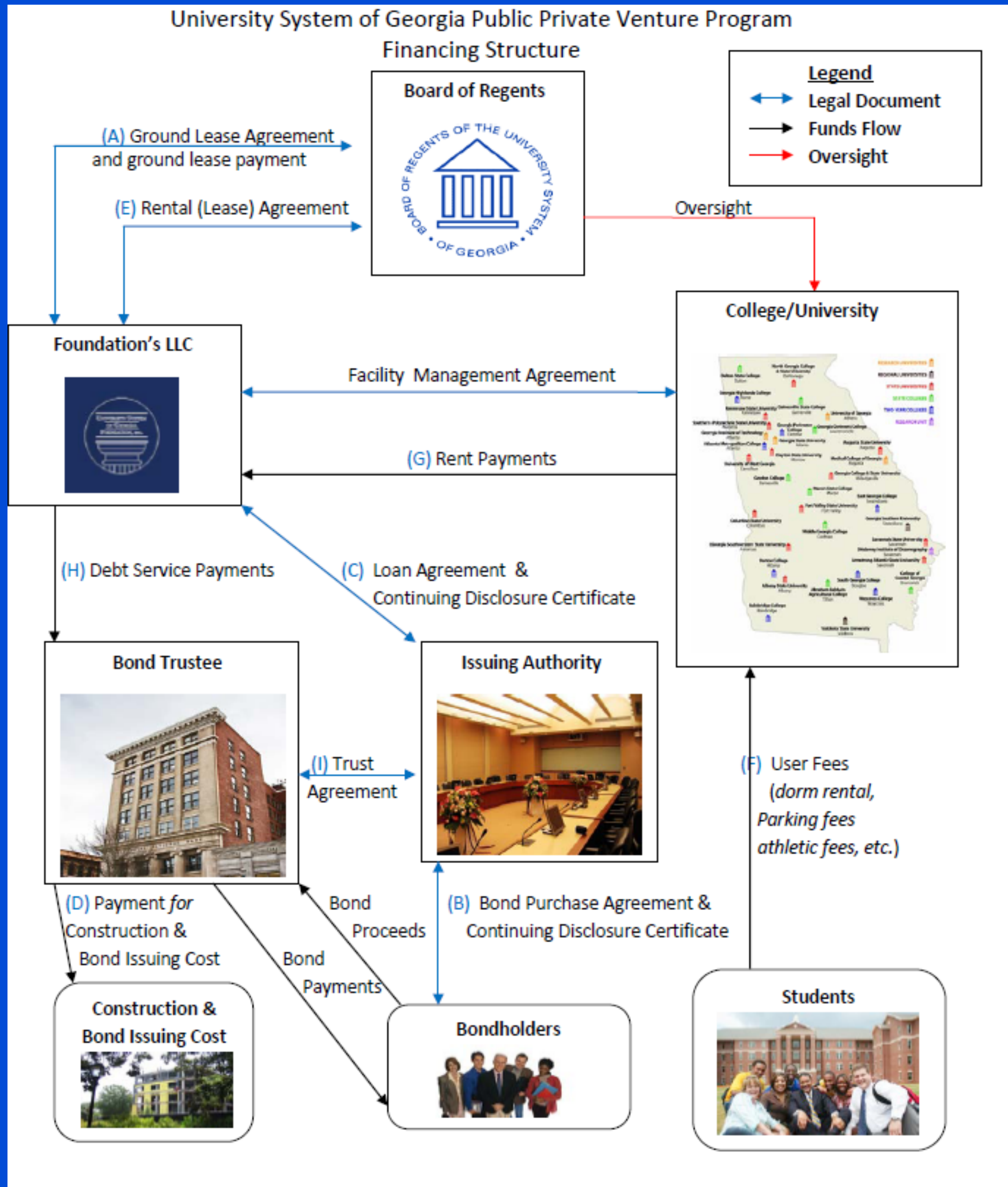

ONGOING RESPONSIBILITIES OF BOND ISSUE

Murray Barnes Finister LLP
October 27, 2011

Record Retention

- Basic records relating to the transaction
- Documents evidencing expenditure of the Bond proceeds
- Documentation evidencing the use of Bond-financed property
- Documentation pertaining to any investment of Bond proceeds
- Such records must be maintained as long as the Bonds are outstanding, plus three years after the final payment or redemption date

Track Bond Proceeds Expenditures

- Choose an accounting method
- Track bond proceeds expenditures
- Monitor the timing of the spending of bond proceeds,
- All project moneys and earnings should be spent within three years of issuance

Track Use of Facilities

- Monitor the remaining economic life of Bond-financed assets
- Monitor use of facilities by outside parties
- Educate staff who manage and use the facilities about private business use
- Consult your bond lawyer before negotiating or entering into any use agreements

Continuing Disclosure

- Must file annual financial statement of LLC and certain material information
- Must be filed no later than 180 days after fiscal year end
- Send notice of certain enumerated events
- Register and post to www.emma.msrb.org

On-Going Payments

- Make debt service payments
- Pay fees related to the PPV
  - BOR
  - Foundation
  - Trustee
  - Issuer
  - Rating Agency
- Proforma should have estimated amounts
- Parties should provide invoices

Bond Document Requirements

- Bond document requirements
  - Annual budget submission
  - Periodic Insurance reviews
  - Periodic engineering review
  - Continuing disclosure
  - Ratio calculations

- BOR document requirements
  - Renew Rental Agreement annually
  - Submit As Build Survey

Corporate Affairs

- Renew LLC with Secretary of State
- Meetings of the managers or directors
- Appoint/elect officers and managers as needed
- Recordkeeping
- Renew D&O insurance

QUALIFIED MANAGEMENT CONTRACTS IN TAX-EXEMPT FINANCINGS

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Qualified Management Contracts

- When applicable
  - Tax-exempt financing (G.O. and PPV/501(c)(3) projects)
  - Private business use of tax exempt bond-financed facility

Qualified Management Contracts

- What is “private business use”?
  - Use (directly or indirectly)
  - Of the “facilities”
    - Facilities financed by, or the proceeds of, a tax-exempt financing)
  - In a “trade of business”
    - Any activity carried on by a person other than a natural person
  - Carried on by a nonqualified user
    - Any user other than a “qualified user”
      - “Qualified user”
        - » State or local government
        - » In certain circumstances, a 501(c)(3) organization using facilities in furtherance of its exempt purpose
        - » Federal government and its agencies are NOT qualified users

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Qualified Management Contracts

- Private business use of tax-exempt financed facility
  - Can be created by a management contract based, in whole or in part, on sharing of net profits from operation of the facility
  - "Excessive" private business use generally not permissible
  - Limited use in trade or business of a private person
    - Rationale: Excessive private business use provides private party with a benefit intended for the public
  - Examples of limitations
    - No more than 5% of proceeds (or net proceeds) or facilities
      - 501(c)(3) bonds (e.g., PPV projects)
        - » Includes 2% costs of issuance
      - State & local government bonds (use unrelated to qualifying use)
    - No more than 10% of proceeds or facilities
      - State & local bonds (use related to qualifying use)

Qualified Management Contracts

- Private business use of tax-exempt financed facility
  - Examples of limitations (cont'd)
    - "Special Legal Entitlements" (e.g., naming rights, lease, ownership)
    - Research agreements (Revenue Procedure 2007-47)
    - Management and service contracts

Qualified Management Contracts

- Exceptions to private business use
  - General public use
  - Temporary use
  - Incidental use
    - No control and possession of separate space (except vending machines, advertising displays, etc.)
    - Does not exceed 2.5% of proceeds of the bond issue
  - "Qualified improvements" to existing property
  - Safe harbors

Qualified Management Contracts

- Management contracts
  - Management, service or incentive payment contract for private company to provide services involving all or a portion of, or any function of, a facility
  - Evaluated based on "facts and circumstances test"
  - Revenue Procedure 97-13
  - Examples include contracts for
    - » Bookstores
    - » Dining facilities
    - » Parking facilities

Qualified Management Contracts

- Compliance
  - Bond Counsel should approve management contracts
  - Include language in RFP indicating contract must comply with Rev. Proc. 97-13
  - IRS monitors post-issuance compliance
    - Audit
    - Form 990
      - Report percentage of private business use of tax-exempt bond-financed property AND
      - Whether contracts comply with safe harbors

Qualified Management Contracts

- Revenue Procedure 97-13
  - Safe harbors
  - General requirements
    - Compensation must be reasonable
    - Compensation CANNOT be based, in whole or in part, on net profits from operation of facility
    - Vendor must NOT be a non-exempt related party

Qualified Management Contracts

- Generally, NOT management contracts resulting in private business use
  - Contracts for incidental services
    - Janitorial services
    - Office equipment repair
  - Contracts where only compensation is reimbursement of service provider for actual and direct expenses paid to unrelated party
  - Incidental use

Qualified Management Contracts

- Compensation
  - All payments received by vendor under the contract
    - Example: Parking fees paid by students/public to park in parking deck

Qualified Management Contracts

- NOT net profit sharing
  - Reimbursement of actual and direct expenses
  - Percentage of gross revenues or percentage of expenses but NOT both
  - Capitation fee
    - Fixed amount for each person service provider has assumed responsibility to provide services for
    - May include variable component of up to 20% of total capitation fee to protect service provider against catastrophic loss
  - Per unit fee
  - Productivity award equal to
    - Stated dollar amount based on

      (i) increases or decreases in gross revenues OR

      (ii) reductions in total expenses but NOT both

Qualified Management Contracts

- Permitted Arrangements (Revenue Procedure 97-13)
  - 95% Periodic Fixed Fee – 15 and 20 Year Contracts
    - One-time incentive award
      - (i) Automatic increase in compensation
      - (ii) Meet gross revenue or expense target (but not both)
      - (iii) Award = single, stated dollar amount
  - 80% Periodic Fixed Fee – 10 and 20 Year Contracts
    - One-time incentive award
      - (i) Automatic increase in compensation
      - (ii) Meet gross revenue or expense target (but not both)
      - (iii) Award = single, stated dollar amount
  - 50% Periodic Fixed Fee – 5 Year Contracts
  - Capitation Fee – 5 Year Contracts
  - Combination Capitation Fee & Periodic Fixed Fee – 5 Year Contracts
  - Per-Unit Fee – Certain 3 Year Contracts
  - Percentage of Revenue or Expense – 2 Year Contracts

Qualified Management Contracts

- Renewal Options
  - Provisions giving service provider legally enforceable right to renew the contract
  - Automatic renewal if neither party cancels is NOT a renewal option

Qualified Management Contracts

- Periodic Fixed Fee
  - Stated dollar amount for services rendered for specified period of time
  - Fixed at time contract is entered into (fee for each year must be known subject to external index adjustments)
  - No renegotiation or adjustment based on experience in prior years
  - Dollar amount may automatically increase based on specified, objective, external standard not linked to output or efficiency of facility (e.g., Consumer Price Index)
- Per-Unit Fee
  - Fee based on unit of service (e.g., fee per car parked)

Qualified Management Contracts

- Non-compliant contract
  - Can result in penalties by the IRS or interest on bonds being taxable
  - Generally up to 5% of qualified 501(c)(3) bonds can be used to finance property for non-qualified purposes
    - Note: 5% allowance includes 2% allowed for costs of issuance
  - Amend contract
    - Can be done to add new tax exempt bond financed facilities to an existing contract that does not comply with Rev. Proc. 97-13
  - Taxable debt or equity
  - Private letter ruling
  - Remedial action
    - Redeem bonds allocable to property to be used in connection with non-compliant contract PRIOR to entering into contract (or within 90 days after)
    - Closing agreement with IRS through its Voluntary Closing Agreement Program (VCAP) to remediate private business use caused by non-compliant contracts

Qualified Management Contracts

- Summary
  - Generally no excessive private business use of facilities
  - Generally sharing net profits equals private business use
  - Rev. Proc. 97-13 provides safe harbors
  - Rev. Proc. 97-13 in RFP
  - Bond counsel should review all contracts related to services involving any portion or function of facility
  - All amounts received under the contract (even if from third parties) are generally considered compensation
  - If contracts are non-compliant risk penalties and interest on bonds being taxable

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Audit Issues that we are seeing.

- Conflict of Interest (representing the Institution and the Foundation).
- Fully executed lease agreements (annual renewals).
- Timeliness of the MSRB annual filing.
- Foundation Policies for:
  - Conflict of Interest;
  - Whistleblower; and ,
  - Document Retention.
- Improved financial performance monitoring.
  - Proforma analysis (actual to projection);
  - Plans to correct variances; and
  - Supporting documentations for line items in analysis.

Questions and Discussion

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The University of Georgia Public Private Venture Program

These slides are available

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Conflict of Interest

A situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties. This includes when an individual's personal interests or concerns are inconsistent with the best interest of a customer, or when a public official's personal interests are contrary to his/her loyalty to public business.

An attorney, an accountant, a business adviser or realtor cannot represent two parties in a dispute and must avoid even the appearance of conflict. He/she may not join with a client in business without making full disclosure of his/her potential conflicts, he/she must avoid commingling funds with the client, and never take a position adverse to the customer.

http://legal-dictionary.thefreedictionary.com/conflict+of+interest

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The University of Georgia
Public Private Venture Program

- **Foundation Documents:**

  - Loan Agreement: Issuing Authority and Foundation
  - Continuing Disclosure Certification - MSRB EMMA - annual reporting
  - Trust Indenture (Trust Agreement)
  - Ground Lease – College/University & Foundation
  - Rental (Lease) Agreement - Foundation & College/University
  - Articles of Incorporation
  - Georgia State Registration
  - Memorandum of Agreement

- **Control Processes:**

  - Arbitrage Provisions – Foundation
  - Unrelated Trade or Business Activity – Foundation
  - Unrelated Trade or Business Income – Foundation
  - Engineering Report - Foundation
  - Accounting for Ground Lease and Rental Agreement
  - Contracts with Outside Vendors
  - Annual Insurance Review
  - Annual Audit by a Certified Public Accountant
  - Filing of the IRS Form 990
  - Notification of any Third-party audit including an IRS audit.