

**"CHAPTER 37D
MANAGEMENT OF FINANCING AGREEMENTS**

Section

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Chapter heading amended by L 2001, c 200, pt of §3.

Case Notes

Financing agreements entered into in accordance with this chapter are not bonds as that term is used in article VII, §12 of Hawaii constitution and thus do not count toward the debt ceiling of article VII, §13. 85 H. 1, 936 P.2d 637.

" **§37D-1 Definitions.** Unless the context requires otherwise, as used in this chapter:

"Agency" means the judiciary, any executive department, independent commission, board, authority, bureau, office, other establishment of the State (except the legislature and its agencies), or public corporation that is supported in whole or in part by state funds, or any agent thereof, authorized by law to expend available moneys; provided that the Hawaii health systems corporation and its regional system boards shall not be governed by this chapter for any financing agreement unless it elects to be.

"Attorney general" means the attorney general of the State or any duly designated deputy attorney general.

"Available moneys" means moneys appropriated or otherwise made available, from time to time, by the legislature to pay amounts due under a financing agreement for the fiscal period in which the payments are due, together with any unexpended proceeds of the financing agreement, and any reserves or other amounts that have been deposited in trust to pay amounts due under the financing agreement. The legislature shall not be obligated to appropriate or otherwise make moneys available.

"Certificate of participation" means any certificate evidencing a participation right or a proportionate interest in any financing agreement or the right to receive proportionate payments from an agency due under any financing agreement.

"Credit enhancement agreement" means any agreement or contractual relationship between the State, the department, or, with the approval of the director, any agency, and any bank, trust company, insurance company, surety bonding company, pension fund, or other financial institution providing additional credit on or security for a financing agreement or certificates of participation authorized by this chapter.

"Department" means the department of budget and finance of the State.

"Director" means the director of finance of the State or any duly designated deputy director of finance.

"Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including without limitation banks, savings banks, savings and loan companies or associations, financial services loan companies, and credit unions.

"Financing agreement" means any lease purchase agreement, installment sale agreement, loan agreement, line of credit, or other agreement of the department or, with the approval of the director, and any agency, to finance the improvement, use, or acquisition of real or personal property that is or will be owned or operated by one or more agencies of the State, the department, or any agency, or to refinance previously executed financing agreements including certificates of participation relating thereto.


"Line of credit" means an account at a financial institution under which the financial institution agrees to lend money to the department or to an agency, with the approval of the director and the agency, from time to time to finance one or more projects that are authorized by this chapter.

"Personal property" means tangible personal property, software, and fixtures.

"Project" means the real and personal property to be acquired or improved by the department or an agency with the proceeds of a financing agreement of the department or the agency, respectively, or provided to the agency by the department.

"Property rights" means, with respect to personal property, the rights of a secured party under chapter 490, and, with respect to real property, the rights of a trustee or lender under a lease authorized by section 37D-3(4).

"Software" includes software, training, and maintenance contracts related to the operation of computer equipment. [L 1996, c 119, pt of §2; am L 1998, c 263, §1; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1 and c 290, §11]



" **§37D-2 Financing agreements.** (a) [Subsection effective until June 30, 2023. For subsection effective July 1, 2023, see below.] There is hereby established and authorized the financing agreement program of the State. Any agency desiring to acquire or improve projects through the financing agreement program established and authorized by this chapter shall submit a written request to the department providing any information that the department shall require. Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, only with the approval by the attorney general as to form and legality and

upon the written request of one or more agencies may the department enter into a financing agreement in accordance with this chapter, and only with the approval by the attorney general as to form and legality, and by the director as to fiscal responsibility, and upon the written request of an agency, the agency may enter into a financing agreement in accordance with this chapter, except that the department of education may enter into a financing agreement in accordance with section 36-32 with the concurrence of the director and with the approval of the attorney general as to form and legality; and that the board of regents of the University of Hawaii may enter into a financing agreement in accordance with this chapter without the approval of the director and of the attorney general as to form and legality if the principal amount of the financing agreement does not exceed \$3,000,000. A financing agreement may be entered into by the department on behalf of one or more agencies, or by an agency, at any time (before or after commencement or completion of any improvements or acquisitions to be financed) and shall be upon terms and conditions the department finds to be advantageous. In each case of a written request by the judiciary to participate in the financing agreement program, the department shall implement the request; provided that the related financing agreement shall be upon terms and conditions the department finds to be advantageous. Any financing agreement entered into by the department without the approval, or by an agency without the approvals required by this section shall be void and of no effect. A single financing agreement entered into by the department may finance a single item or multiple items of property to be used by multiple agencies or may finance a single item or multiple items of property to be used by a single agency. If the financing agreement is by the department, the department shall bill any agency that benefits from property acquired with the proceeds of a financing agreement for the agency's pro rata share of:

- (1) The department's costs of administration of the financing agreement program; and
- (2) The financing costs, including the principal and interest components of the financing agreement and insurance premiums,

on a monthly or other periodic basis, and may deposit payments received in connection with the billings with a trustee as security for the financing agreement. Any agency receiving such a bill shall be authorized and shall pay the amounts billed from available moneys.

If a financing agreement is by an agency, the agency shall deposit on a monthly or other periodic basis with the department, payments from available moneys with respect to the

agency's financing costs, including the principal and interest components of the financing agreement and insurance premiums, which payments the department may deposit with a trustee as security for the financing agreement. The department may bill an agency for the department's costs of administering the agency's payments and the agency receiving such a bill shall be authorized to and shall pay the amounts billed from available moneys.

(b) Financing agreements shall be subject to the following limitations:

- (1) Amounts payable by an agency to or upon the direction of the department in respect to a project and by the department or an agency under a financing agreement shall be limited to available moneys. In no circumstance shall the department or an agency be obligated to pay amounts due under a financing agreement from any source other than available moneys. If, by reason of insufficient available moneys or other reason, amounts due under a financing agreement are not paid when due, the lender may exercise any property right that the department or the agency has granted to it in the financing agreement, against the property that was purchased with the proceeds of the financing agreement, and apply the amounts so received toward payments scheduled to be made by the department or the agency under the financing agreement;
- (2) No property rights may be granted in property unless the property is being acquired, is to be substantially improved, is to be refinanced with the proceeds of a financing agreement, or is land on which the property is located;
- (3) Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, and as otherwise provided in this section with respect to the department of education and the University of Hawaii, and except as provided in chapter 323F as to the Hawaii health systems corporation and its regional system boards, an agency shall not have the power to enter into a financing agreement, except as authorized by this chapter, and nothing in this chapter shall be construed to authorize the sale, lease, or other disposition of property owned by an agency;
- (4) Except as otherwise provided in this section with respect to the department of education and the University of Hawaii, the sale, assignment, or other disposition of any financing agreements, including

certificates of participation relating thereto, shall require the approval of the director; and

- (5) The department or the agency proposing to enter into a financing agreement shall not be subject to chapter 103D and any and all other requirements of law for competitive bidding for financing agreements. [L 1996, c 119, pt of §2; am L 1998, c 41, §6; am L 1999, c 31, §1; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1, c 220, §3, and c 290, §12]



§37D-2 Financing agreements. (a) [Subsection effective July 1, 2023. For subsection effective until June 30, 2023, see above.]

There is hereby established and authorized the financing agreement program of the State. Any agency desiring to acquire or improve projects through the financing agreement program established and authorized by this chapter shall submit a written request to the department providing any information that the department shall require. Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, only with the approval by the attorney general as to form and legality and upon the written request of one or more agencies may the department enter into a financing agreement in accordance with this chapter, and only with the approval by the attorney general as to form and legality, and by the director as to fiscal responsibility, and upon the written request of an agency, the agency may enter into a financing agreement in accordance with this chapter, except that the board of regents of the University of Hawaii may enter into a financing agreement in accordance with this chapter without the approval of the director and of the attorney general as to form and legality if the principal amount of the financing agreement does not exceed \$3,000,000. A financing agreement may be entered into by the department on behalf of one or more agencies, or by an agency, at any time (before or after commencement or completion of any improvements or acquisitions to be financed) and shall be upon terms and conditions the department finds to be advantageous. In each case of a written request by the judiciary to participate in the financing agreement program, the department shall implement the request; provided that the related financing agreement shall be upon terms and conditions the department finds to be advantageous. Any financing agreement entered into by the department without the approval, or by an agency without the approvals required by this section shall be void and of no effect. A single financing agreement entered into by the department may finance a single item or multiple items of

property to be used by multiple agencies or may finance a single item or multiple items of property to be used by a single agency. If the financing agreement is by the department, the department shall bill any agency that benefits from property acquired with the proceeds of a financing agreement for the agency's pro rata share of:

- (1) The department's costs of administration of the financing agreement program; and
- (2) The financing costs, including the principal and interest components of the financing agreement and insurance premiums,

on a monthly or other periodic basis, and may deposit payments received in connection with the billings with a trustee as security for the financing agreement. Any agency receiving such a bill shall be authorized and shall pay the amounts billed from available moneys.

If a financing agreement is by an agency, the agency shall deposit on a monthly or other periodic basis with the department, payments from available moneys with respect to the agency's financing costs, including the principal and interest components of the financing agreement and insurance premiums, which payments the department may deposit with a trustee as security for the financing agreement. The department may bill an agency for the department's costs of administering the agency's payments and the agency receiving such a bill shall be authorized to and shall pay the amounts billed from available moneys.

(b) Financing agreements shall be subject to the following limitations:

- (1) Amounts payable by an agency to or upon the direction of the department in respect to a project and by the department or an agency under a financing agreement shall be limited to available moneys. In no circumstance shall the department or an agency be obligated to pay amounts due under a financing agreement from any source other than available moneys. If, by reason of insufficient available moneys or other reason, amounts due under a financing agreement are not paid when due, the lender may exercise any property right that the department or the agency has granted to it in the financing agreement, against the property that was purchased with the proceeds of the financing agreement, and apply the amounts so received toward payments scheduled to be made by the department or the agency under the financing agreement;
- (2) No property rights may be granted in property unless the property is being acquired, is to be substantially

improved, is to be refinanced with the proceeds of a financing agreement, or is land on which the property is located;

- (3) Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and its regional system boards, and as otherwise provided in this section with respect to the department of education and the University of Hawaii, and except as provided in chapter 323F as to the Hawaii health systems corporation and its regional system boards, an agency shall not have the power to enter into a financing agreement, except as authorized by this chapter, and nothing in this chapter shall be construed to authorize the sale, lease, or other disposition of property owned by an agency;
- (4) Except as otherwise provided in this section with respect to the department of education and the University of Hawaii, the sale, assignment, or other disposition of any financing agreements, including certificates of participation relating thereto, shall require the approval of the director; and
- (5) The department or the agency proposing to enter into a financing agreement shall not be subject to chapter 103D and any and all other requirements of law for competitive bidding for financing agreements. [L 1996, c 119, pt of §2; am L 1998, c 41, §6; am L 1999, c 31, §1; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1, c 220, §3, and c 290, §12; am L 2013, c 157, §5]

" **§37D-3 Related agreements.** With the approval of the attorney general as to form and legality, the department may, and with the approval of the attorney general as to form and legality and of the director as to fiscal responsibility, an agency may:

- (1) Enter into agreements with trustees, within or without the State, to hold financing agreement proceeds, payments, and reserves as security for lenders to accept assignments of rights in the financing agreement from, and to enforce the rights of, the lessor or other party thereto, and to issue certificates of participation for the right to receive payments due from the department or agency under a financing agreement. A financing agreement by an agency shall provide that all payments due from the agency under the financing agreement shall be

deposited to or on the order of the department, or shall be for payment to or at the order of the lender in accordance with the financing agreement. The sale of certificates of participation shall be, at the option of the director, by negotiation or by competitive sale, in accordance with the procedures set out by section 39-55. The interest component of the certificates of participation shall be at the rate or rates payable at the time or times as the financing agreement may provide. The certificates of participation may be in one or more series; may bear the date or dates; may mature at the time or times not exceeding the lesser of:

(A) The weighted average economic life of the related project or projects; or

(B) Thirty years from their date;

may be payable in the medium of payment at the place or places within or without the State; may carry registration privileges; may be subject to terms of redemption, to tenders for purchase or to purchase prior to their stated maturity at the option of the department or the agency, or the holder, or both; and may contain terms, covenants, and conditions; and may be in the form, either coupon or registered, as the financing agreement may provide. Amounts held by a trustee shall be invested by the trustee at the direction of the department or the agency in investments as are permitted by state law and as shall be specified in the agreement with the trustee. Interest earned on any investment held by a trustee as security for a financing agreement may, at the option of the department or the agency, be credited to the accounts held by the trustee and applied in payment of sums due under the financing agreement;

- (2) Enter into credit enhancement agreements for financing agreements or certificates of participation; provided that the credit enhancement agreements shall be payable solely from available moneys and amounts received from the exercise of property rights granted under the financing agreements;
- (3) Use financing agreements to finance the costs of acquiring or refinancing property, plus the costs of reserves and credit enhancements and costs associated with obtaining the financing;
- (4) Grant leases of real property subject to section 37D-2(b)(2). The leases may be for a term that ends on the date on which all amounts due under a financing

agreement have been paid or provision for payment has been made or ten years after the last scheduled payment under a financing agreement, whichever is later. The leases may grant the lessor the right to evict the department or the agency, as the case may be, and exclude it from possession of the real property for the term of the lease, if the department or the agency, as the case may be, fails to appropriate or pay when due the amounts scheduled to be paid under a financing agreement or otherwise defaults under a financing agreement. Upon failure to pay or default, the lessor may sublease the land to third parties and apply any rentals toward payments scheduled to be made under a financing agreement;

- (5) Grant security interests in personal property subject to section 37D-2(b)(2). The security interests shall attach and be perfected on the date the department or the agency, as the case may be, takes possession of the personal property, or the date the secured party advances money under a financing agreement, whichever is later. A security interest authorized by this section shall have, except as otherwise provided by law, priority over all other liens and claims. Upon failure to pay or default, the secured party shall have the rights and remedies available to a secured party under chapter 490 or a first, perfected security interest in goods and fixtures. No later than ten days after a security interest authorized by this section attaches, the department or the agency, as the case may be, shall cause a financing statement for the security interest to be filed with the bureau of conveyances in the same manner as financing statements are filed for goods;
- (6) Pledge any amounts that are deposited with a trustee in accordance with a financing agreement. The pledge shall be valid and binding from the time it is made, the amounts so pledged shall immediately be subject to the lien of the pledge without filing, physical delivery, or other act, and the lien of the pledge shall be superior to all other claims and liens of any kind whatsoever;
- (7) Purchase fire and extended coverage or other casualty insurance, or liability, title, rental interruption, or other insurance for property that is acquired or refinanced with proceeds of a financing agreement, assign the proceeds thereof to a lender or trustee to the extent of its interest, and covenant to maintain

the insurance while the financing agreement is unpaid, so long as available funds are sufficient to purchase the insurance; and

- (8) In connection with any financing agreement by which the department, on behalf of an agency, leases or purchases property from another party, notwithstanding and without regard to chapter 171 or any other law, the department or the agency may lease or sell, on any terms as the department or the agency shall determine, to that party the site or property to be improved or otherwise to be leased or sold back to the department or the agency. [L 1996, c 119, pt of §2; am L 1998, c 41, §7; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-4 Inclusion of budget request.** For each fiscal period, there shall be included with respect to each agency in the executive budget requests or, in the case of the judiciary, the judiciary budget request, to the legislature, amounts sufficient to permit the payment of all amounts that will be due on unpaid financing agreements during that fiscal period, including any expenses and replenishment of any reserve funds up to the balances required by the respective financing agreements. Amounts so included in the judiciary budget request and so applied to the payment of any amounts due with respect to a judiciary project shall be deemed to be at all times for purposes of the judiciary budget act moneys of the judiciary, and not moneys of the department or any other executive department. [L 1996, c 119, pt of §2; am L 1998, c 41, §8 and c 263, §2; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-5 Financing agreements not a general obligation of State.** Financing agreements shall:

- (1) Not be obligations for which the full faith and credit of the State, the department, or any agency are pledged; and
- (2) Have no claim or lien on any revenues or other moneys of the State, the department, or any agency except moneys appropriated or otherwise held in trust for that purpose.

Financing agreements entered into under this chapter shall not constitute "bonds" within the meaning of section 12 of article VII of the Constitution of the State. No holder or holders of any financing agreement entered into under this chapter shall have the right to compel any exercise of taxing power of the

State, the department, or any agency to pay the financing agreements or the interest thereon and no moneys other than amounts appropriated or otherwise held in trust for that purpose shall be required to be applied to the payment thereof. Each financing agreement issued under this chapter shall recite in substance that the agreement, including the interest component thereof, shall not be an obligation for which the full faith and credit of the State, the department, or any agency are pledged, and that the financing agreement shall have no claim or lien on any revenues or other moneys of the State, the department, or any agency except moneys appropriated or otherwise held in trust for that purpose. [L 1996, c 119, pt of §2; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-6 Federal tax-exempt status; preference; protection.**

(a) To the extent practicable, financing agreements issued pursuant to this chapter shall be issued to comply with requirements imposed by applicable federal law providing that the interest on financing agreements shall be excluded from gross income for federal income tax purposes, except as certain minimum taxes or environmental taxes may apply. The director and, with the approval of the director, the head of an agency may:

- (1) Enter into agreements;
- (2) Establish funds or accounts;
- (3) Make rebate payments to the federal government; and
- (4) Take any action required to comply with applicable federal tax law.

Nothing in this chapter shall prohibit the issuance of financing agreements, the interest on which may be included in gross income for federal income tax purposes.

(b) To ensure that interest on a financing agreement issued pursuant to this chapter that is excluded from gross income for federal income tax purposes, except as provided in subsection (a), on the date of issuance shall continue to be excluded, no state officer or employee shall authorize or allow any change, amendment, or modification to a financing agreement that would affect the exclusion of interest on the financing agreement from gross income for federal income tax purposes unless the change, amendment, or modification shall have received the prior approval of the director. Failure to receive the approval of the director shall render any change, amendment, or modification void. [L 1996, c 119, pt of §2; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-7 Financing agreements legal investments.** All public officers and agencies, political subdivisions, insurance companies and associations, banks, savings banks, and savings institutions, including building or savings and loan associations, credit unions, trust companies, personal representatives, guardians, trustees, and other persons and fiduciaries in the State who are regulated by law as to the character of their investment, may legally invest moneys within their control and available for investment in financing agreements of the department or any agency. The purpose of this section is to authorize any person, firm, corporation, association, political subdivision, body, or officer, public or private, to use any funds or moneys owned or controlled by them, including without prejudice to the generality of the foregoing sinking, insurance, investment, retirement, compensation, pension and trust funds, and moneys held on deposit, for the purchase of any financing agreements of the department or any agency. [L 1996, c 119, pt of §2; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-8 Exemption from taxation.** All real and personal property owned or operated by the State, the department, or any agency, and any interests created in or transfer or recording of the property or any interest in the property, and payments made under the financing agreements to which the property is subject shall be exempt from all state, county, and municipal taxation, and fees and charges of every kind. Financing agreements issued pursuant to this chapter and the income therefrom, including without limitation the interest component of any lease payments, shall be exempt from all taxation by the State or any county or other political subdivision thereof, except inheritance, transfer, and estate taxes. [L 1996, c 119, pt of §2; am L 1998, c 41, §9; am L 2001, c 200, pt of §3; am L 2007, c 126, pt of §1]

" **§37D-9 Line of credit.** The department or, with the approval of the director, an agency may contract with a financial institution for one or more lines of credit in amounts and for periods as the legislature shall from time to time determine. The department, an agency, or the department on behalf of a requesting agency, may borrow under a line of credit and use the amount or amounts borrowed to pay the cost of the improvements, use, or acquisition of real or personal property comprising a project. Upon the execution and delivery of a financing agreement to refinance the amount or amounts borrowed

under the line of credit, the department or the agency that is party to the financing agreement shall apply the proceeds thereof to the repayment of any amount or amounts. [L 2001, c 200, §1; am L 2007, c 126, pt of §1]

Note

This section is new. Former §37D-9 renumbered as §37D-10.

" **§37D-10 Litigation; jurisdiction; appeal.** The director may petition the circuit court of the first circuit for an opinion as to the validity of any financing or related agreement entered into pursuant to this chapter. The petition shall constitute a civil proceeding for purposes of section 603-21.5(a)(3), and the circuit court of the first circuit shall have exclusive and original jurisdiction to receive and determine the question presented in the petition, irrespective of an actual controversy or dispute regarding the agreement or its validity. Any party aggrieved by the decision of the circuit court may appeal in accordance with part I of chapter 641 and the appeal shall be given priority. [L 1996, c 119, pt of §2; ren and am L 2001, c 200, pt of §3 and am c 251, §1; ree L 2007, c 126, pt of §1]

Case Notes

Financing agreements entered into in accordance with this chapter are not bonds as that term is used in article VII, §12 of Hawaii constitution and thus do not count toward the debt ceiling of article VII, §13. 85 H. 1, 936 P.2d 637.