

ACT 200

S.B. NO. 1054

A Bill for an Act Relating to the Management of Financing Agreements.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 37D, Hawaii Revised Statutes, is amended by adding a new section to read as follows:

“**§37D-9 Line of credit.** The department may contract with a financial institution for one or more lines of credit in such amounts and for such periods as the legislature shall from time to time determine. 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 such line of credit, the department shall apply the proceeds thereof to the repayment of such amount or amounts.”

SECTION 2. Section 37-62, Hawaii Revised Statutes, is amended by amending the definition of “financing agreement” to read as follows:

““Financing agreement” means any lease purchase agreement, installment sale agreement, loan agreement, line of credit, or any other agreement to finance the improvement, use, or acquisition of real or personal property that is or will be owned or operated by the State or any agency or to refinance any such previously executed financing agreement including certificates of participation[-] relating thereto.”

SECTION 3. Chapter 37D, Hawaii Revised Statutes, is amended to read as follows:

“~~[H]~~CHAPTER 37D~~[H]~~
MANAGEMENT OF FINANCING AGREEMENTS

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

“Agency” or “participating agency” means the judiciary, any executive department, any independent commission, any board, any authority, any bureau, any office, any other establishment of the State (except the legislature and its agencies), or any 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 shall not be governed by this chapter for any financing agreement unless it elects to do so.

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

“Available [~~funds~~]²² moneys” means [~~funds~~] 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 ~~[funds]~~ 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 the State or an agency due under any financing agreement.

“Credit enhancement agreement” means any agreement or contractual relationship between the State [or any state agency], the department, 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 to finance the improvement, use, or acquisition of real or personal property that is or will be owned or operated by [the State or any state agency,] one or more agencies of the State, the department, or any participating 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 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 a participating agency with the proceeds of a financing agreement provided to the participating 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(5)-] 37D-3(4).

“Software” includes software, training, and maintenance contracts related to the operation of computer equipment.

§37D-2 Financing agreements. [Only with the approval of the director, and]

(a) 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 such information as the department shall require. Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation, only with the approval by the attorney general as to form and legality[-, may the agency] and upon the written request of one or more participating agencies may the department 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 [at the] by the department on behalf of one or

more participating agencies at any time (before or after commencement or completion of any [improvement] improvements or acquisitions to be financed) and shall be upon terms and conditions the [agency] 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 [agency] department without the [approvals] approval required by this section shall be void and of no effect. A single financing agreement 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. The department shall bill any participating agency that benefits from property acquired with the proceeds of a financing agreement for such participating 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 a financing agreement. Any participating agency receiving such a bill shall be authorized and shall pay the amounts billed from the available moneys.

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

- (1) Amounts payable by [the] a participating agency to or upon the direction of the department in respect to a project and by the department under a financing agreement shall be limited to available [funds.] moneys. In no circumstance shall the [agency] department be obligated to pay amounts due under a financing agreement from any source other than available [funds.] moneys. If, by reason of insufficient available [funds.] moneys or other reason, amounts due under a financing agreement are not paid when due, the lender may exercise any property right that the [agency] department 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 [agency] department 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) [Except] Notwithstanding any other law to the contrary, and except for the Hawaii health systems corporation and as otherwise provided in this section with respect to the University of Hawaii, [the] and except as provided in chapter 323F as to the Hawaii health systems corporation, an agency shall not [enter-into-financing-agreements-under-any-provision-of-law-other-than-this-chapter-if-the-principal-amount-of-the-financing-agreement-together-with-the-principal-amount-of-any-financing-agreement-previously-issued-by-the-agency-for-the-same-project, exceeds-\$100,000; and] have the power to enter into a financing agreement, except through the department 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 University of Hawaii, the sale, assignment, or other disposition of any financ-

ing agreements, including certificates of participation^[,] relating thereto, shall require the approval of the director^{[-];} and

- (5) The department shall not be subject to chapter 103D and any and all other requirements of law for competitive bidding for financing agreements.

§37D-3 Related agreements. With the approval of the ~~[director and the approval by the]~~ attorney general ~~[of]~~ as to form and legality, [an agency] the department 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 such rights of, the lessor or other party thereto, and to issue certificates of participation for the right to receive payments due from the ~~[agency]~~ department under a 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 such rate or rates payable at such time or times as the financing agreement may provide. The certificates of participation may be in one or more series; may bear such date or dates; may mature at such 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 such medium of payment at such place or places within or without the State; may carry registration privileges; may be subject to such terms of redemption, to tenders for purchase or to purchase prior to their stated maturity at the option of the State or the holder, or both; and may contain such terms, covenants, and conditions; and may be in such 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 ~~[agency]~~ department in such 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 ~~[agency,] department,~~ be credited to the accounts held by the trustee and applied in payment of sums due under ~~[a]~~ such 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 ~~[funds]~~ moneys and amounts received from the exercise of property rights granted under such 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) Use a single financing agreement to finance property to be used by multiple agencies;~~

- (5) (4) Grant leases of real property subject to section ~~[37D-2(2).]~~ 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 ~~[agency]~~ department or the participating agency, as the case may be, and exclude it from posses-

sion of the real property for the term of the lease, if the [agency] department or the participating 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;

- [(6)] (5) Grant security interests in personal property subject to section ~~[37D-2(2);]~~ 37D-2(b)(2). The security interests shall attach and be perfected on the date the [agency] department or the participating agency, as the case may be, takes possession of the personal property, or the date the lender 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 [agency] department 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;
- [(7)] (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;
- [(8)] ~~Bill any other agency that benefits from property acquired with the proceeds of a financing agreement for an appropriate share of the financing costs, including debt service, on a monthly or other periodic basis, and deposit payments received in connection with the billings with a trustee as security for a financing agreement. Any agency receiving such a bill shall be authorized and shall pay the amounts billed from the first amounts legally available to it;~~
- (9) (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 [their] its interest, and covenant to maintain such insurance while the financing agreement is unpaid, so long as available funds are sufficient to purchase such insurance; and
- [(10)] (8) In connection with any financing agreement by which [any agency] 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 [agency] department may lease or sell, on such terms as the [agency] department shall determine, to that party the site or property to be improved or otherwise to be leased or sold back to the [agency-] department.

§37D-4 Inclusion [in] of budget request. For each fiscal period, there shall be included with respect to each participating agency in the executive [and-judiciary] 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 [under] 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 such 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.

[H§37D-5[H]] Financing agreements not a general obligation of State.

Financing agreements shall:

- (1) Not be obligations for which the full faith and credit of the [agency is] State, the department, or any participating agency are pledged; and
- (2) Have no claim or lien on any revenues or other moneys of the State, the department, or any participating agency except moneys appropriated or otherwise held in trust for such 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 participating agency to pay such financing agreements or the interest thereon and no moneys other than amounts appropriated or otherwise held in trust for such purpose shall be required to be applied to the payment thereof. Each financing agreement issued under this chapter shall recite in substance that such agreement, including the interest component thereof, shall not be an obligation for which the full faith and credit of the [agency is] State, the department, or any participating agency are pledged, and that such financing agreement shall have no claim or lien on any revenues or other moneys of the State, the department, or any participating agency except moneys appropriated or otherwise held in trust for such purpose.

[H§37D-6[H]] 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 ~~[or chair of the 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 ~~[insure]~~ 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 which would affect the exclusion of interest on such 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 ~~[or chair of the agency that entered into the financing agreement]~~. Failure to receive the approval of the director ~~[or chair of such agency]~~ shall render any change, amendment, or modification void.

[H§37D-7[H]] Financing agreements legal investments. All public officers and agencies, all political subdivisions, all insurance companies and associations, all banks, savings banks, and savings institutions, including building or savings and loan associations, all credit unions, all trust companies, all personal representatives, guardians, trustees, and all other persons and fiduciaries in the State who are

regulated by law as to the character of their investment, may legally invest [~~funds~~] moneys within their control and available for investment in financing agreements of the [~~agency-~~] department. 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 [~~funds~~] moneys held on deposit, for the purchase of any financing agreements of the [~~agency-~~] department.

§37D-8 Exemption from taxation. All real and personal property owned or operated by the State, the department, or any participating 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 [~~agency~~] State or any county or other political subdivision thereof, except inheritance, transfer, and estate taxes.

~~[[§37D-9]]~~ **§37D-10 Litigation; jurisdiction.** The director [~~of finance~~] may petition the supreme court for an opinion as to the validity of any financing or related agreement entered into pursuant to [~~the provisions of~~] this chapter. The petition shall constitute a case for purposes of section 602-5, and the supreme court 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.”

SECTION 4. Section 103D-102, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Notwithstanding subsection (a), this chapter shall not apply to contracts by governmental bodies:

- (1) Solicited or entered into before July 1, 1994, unless the parties agree to its application to a contract solicited or entered into prior to July 1, 1994;
- (2) To disburse funds, irrespective of their source:
 - (A) For grants or subsidies as those terms are defined in section 42F-101, made by the State in accordance with standards provided by law as required by article VII, section 4, of the State Constitution; or by the counties pursuant to their respective charters or ordinances;
 - (B) To make payments to or on behalf of public officers and employees for salaries, fringe benefits, professional fees, or reimbursements;
 - (C) To satisfy obligations that the State is required to pay by law, including paying fees, permanent settlements, subsidies, or other claims, making refunds, and returning funds held by the State as trustee, custodian, or bailee;
 - (D) For entitlement programs, including public assistance, unemployment, and workers' compensation programs, established by state or federal law;
 - (E) For dues and fees of organizations of which the State or its officers and employees are members, including the National Association of Governors, the National Association of State and County Governments, and the Multi-State Tax Commission;
 - (F) For deposit, investment, or safekeeping, including expenses related to their deposit, investment, or safekeeping;

- (G) To governmental bodies of the State;
 - (H) As loans, under loan programs administered by a governmental body; and
 - (I) For contracts awarded in accordance with the provisions of chapter 103F;
- (3) To procure goods, services, or construction from a governmental body other than the University of Hawaii bookstores, from the federal government, or from another state or its political subdivision;
- (4) To procure the following goods or services which are available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State:
- (A) Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including administrative quasi-judicial proceedings;
 - (B) Works of art for museum or public display;
 - (C) Research and reference materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
 - (D) Meats and foodstuffs for the Kalaupapa settlement;
 - (E) Opponents for athletic contests;
 - (F) Utility services whose rates or prices are fixed by regulatory processes or agencies;
 - (G) Performances, including entertainment, speeches, and cultural and artistic presentations;
 - (H) Goods and services for commercial resale by the State;
 - (I) Services of printers, rating agencies, support facilities, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
 - (J) Services of attorneys employed or retained to advise, represent, or provide any other legal service to the State or any of its agencies, on matters arising under laws of another state or foreign country, or in an action brought in another state, federal, or foreign jurisdiction, when substantially all legal services are expected to be performed outside this State; [and]
 - (K) Financing agreements under chapter 37D; and
 - ~~[(K)]~~ (L) Any other goods or services which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State; and
- (5) Which are specific procurements expressly exempt from any or all of the requirements of this chapter by:
- (A) References in state or federal law to provisions of this chapter or a section of this chapter, or references to a particular requirement of this chapter; and
 - (B) Trade agreements, including the Uruguay Round General Agreement on Tariffs and Trade (GATT) which require certain non-construction and non-software development procurements by the comptroller to be conducted in accordance with its terms.”

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 6. This Act shall take effect upon its approval.

(Approved May 31, 2001.)

Note

1. Edited pursuant to HRS §23G-16.5.