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LAW FIRM

Capital Projects: Tips, Trends, & Best Practices

Legal & Financial Issues for South Carolina
Special Purpose Districts

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Concentrating on public finance, governmental and utility representation.

Presentation Overview

- Know Your Borrowing Tools.
- Know Your Professionals.
- Know Your Transaction Structure.
- Capital Planning Tips.
- Comply with Securities and Tax Regulations.

Know Your Borrowing Tools

- General Obligation Bonds
- Revenue Bonds
- Lease-Purchase Agreements
- Interim Financing

General Obligation Bonds

- Are bonds secured in whole or in part by a pledge of “the full faith and taxing power” of a governmental entity?
- Require support and approval of the maximum borrowing amount by County Council.
- For SPDs, the county auditor is responsible for setting an appropriate levy for authorized debt service and the county treasurer collects and pays debt service.
- Typically used for “bricks and mortar projects,” but available for any “public purpose” (must match useful life to maturity of bonds).

General Obligation Bonds

- 8% Debt Limit
 - 8% of Assessed Value, not Appraised Value
 - Referendum Exception
- Petition of Governing Board
- Ordinance of County Council
- Resolution of Governing Board
- Debt Limit Certificate
- Debt Filing

General Obligation Bonds

- 8% Debt Limit

Fiscal Year	Tax Year	Real Property	Personal Property	Total AV*
2013-2014	2013	\$70,000,000	\$30,000,000	\$100,000,000

- $\$100,000,000 \times 0.08 = \$8,000,000$ of Debt Limit
- If \$5,000,000 in GO Bonds are outstanding, \$3,000,000 of capacity remains

General Obligation Bonds

- Sale Process
 - Public Competitive Sale
 - Public simply means a newspaper advertisement 7 days prior to the sale.
 - Competitive means you solicited more than one bid.
 - Negotiated Sale
 - Only if both less than \$1.5M and <10 year maturity.
- Debt Service Timing
 - Must have time to put on the mills to make first payment. This can be an issue with a fall sale. Most county auditors enroll the tax bills in September/October. Most banks don't like the first payment more than a year off.

Revenue Bonds

- Security
 - Cannot include any pledge of the full faith, credit and taxing power of an entity.
 - May pledge nearly any recurring revenue source. Typically, these are utility fees (water, sewer, gas, electricity).
 - Other recurring revenues may be suitable (ask your favorite bond lawyer).

Revenue Bonds

- Covenants
 - The presence of covenants and the lack of a tax pledge are the primary differentiators between GO bonds and revenue bonds.
 - Purchasers of revenue bonds will expect you to bind yourself to certain market-driven covenants. These covenants constrain your behavior for the benefit of the underwriter, so pay close attention to them.
 - You will in all likelihood be required to covenant as to a funds “waterfall” to control the flow of revenues.
 - Debt service on the bonds that comes before O&M expenses is known as a gross pledge and after is known as a net pledge.

Revenue Bonds

- Covenants
 - Coverage Ratios
 - Rate Covenant – requires that rates be maintained at a certain level (a multiple of O&M and debt service).
 - Additional Bonds Test – requires certain coverage before the issuance of new debt.
 - Additional Debt
 - “Parity” bonds enjoy the same lien status as the prior bonds, and must meet the additional bonds test.
 - Junior lien bonds may be issued at any time.
 - Special projects, lease/purchase exceptions in bond documents.

Lease-Purchase

- Not a “True” Lease
 - Financing institution provides funds and “leases” the assets to the municipality.
 - Lease payments have principal and interest components.
 - Assets will pass to municipality free and clear upon conclusion of lease term.

Lease-Purchase

- Debt Limit Considerations
 - Previously all lease-purchase transactions were exempt from the debt limit.
 - Statute passed in 1995 disallows debt-limit exemption for real property and fixtures.
 - Now lease-purchase agreements are used almost exclusively for vehicles, equipment, and rolling stock.
 - Paid out of Operations; Not considered debt – Now limited by Act 388.

Lease-Purchase

- Documentation Requirements
 - Approving Resolution
 - Lease Purchase Agreement
 - Non-Appropriation and Non-Substitution Clauses, indemnity not allowed.
 - IRS Filings
 - Is Bond Counsel Necessary?

Interim Financing

- Tax Anticipation Notes (TANs)
- Bond Anticipation Notes (BANs)
- Grant Anticipation Notes
- Interim Financing for Federal Programs

Members of the Financing Team

- Bond Counsel
 - Delivers validity and tax opinions.
 - Determines legal feasibility for transaction.
- Local Counsel
 - Delivers issuer focused opinion (validly existing, no litigation).
 - Scope of opinion varies by transaction, from limited (GO) to more involved (installment purchase, conduit, revenue).
- Financial Advisor
 - Structures transaction, provides alternatives and weighs options.
 - Increasingly important to retain an FA.
- Trustee/Registrar and Paying Agent
 - Makes payments to bondholders, holds and monitors the critical accounts.

Members of the Financing Team

- Other Counsel:
 - Underwriter's Counsel
 - Drafts bond purchase agreement in revenue bond transactions.
 - Historically drafted disclosure document in revenue bond transactions, this is becoming less popular.
 - Disclosure Counsel
 - Drafts disclosure document and continuing disclosure undertaking.
 - Trustee's Counsel
 - Advised the Trustee, focused on defaults and remedies in default.
 - Delivers opinion on validity of Trustee documents.
 - Issuer's Counsel
 - Represents tax-exempt issuer in conduit transactions where there is a separate borrower and separate

Members of the Financing Team

- Bond Purchasers:
 - Competitive Sale
 - Underwriters – bid using Parity online at a time and date certain.
 - Regional Banks and Local Banks – regime is not set in stone, typically takes the form of a letter or email solicitation.
 - Negotiated Sale
 - Underwriters – agree to purchase bonds, typically will work closely with others on the finance team to structure transaction.
 - Placement Agents (not a bond purchaser, but an intermediary) – connect you with direct purchasers (insurance funds, etc.).

Structural Considerations

- Term
 - Driven by useful life of asset and ability to amortize debt.
 - Will impact manner of sale.
- Issue Size/Type/Security
 - Driven by need and ability to meet debt service from available revenues.
- Flexibility
 - Call protection.
 - Banks v. Public Sale.
- Issuance Costs
 - Rate differential v. total COI.
- Disclosure Issues
 - Identify early and be proactive.
- Rate Differentials
 - Be aware of rates in different capital pools.

Other Structural Considerations

- Taxable v. Non-Taxable
- Bank Qualified v. Non-Bank Qualified
 - \$10M annual (calendar year) limit
- Private Placement v. Public Sale
- G.O. v. Revenue v. Installment Purchase v. Lease v. P3

Tips for a Smoother Borrowing Experience

- Financial Statements (be timely).
- Define the project: sizing of issue.
- Stability in financial administration.
- Stability in professionals, including bank and bond counsel.
- Pricing is important, but not sole determining factor.
- Discussion on front end regarding expectations – don't agree to things you do not understand.

Securities Compliance

- . SEC Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, as amended, provides that it is unlawful for any person, directly or indirectly:
 1. to employ any device, scheme, or artifice to defraud;
 2. to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
 3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Securities Compliance

- . What are we talking about?
 - . Whether there is substantial likelihood that the inclusion or omission of a fact would significantly alter the “total mix” of information about a security in the view of the reasonable investor.

Securities Compliance

- . When is this relevant?
 - . Primary Market Disclosure – official statements, transaction documents.
 - . Secondary Market Disclosure – continuing disclosure, and other statements “calculated to reach the market.”

Securities Compliance

- . What Disclosure is Calculated to Reach the Market?
 - . It seems fairly intuitive that Official Statements and EMMA filings pursuant to Continuing Disclosure Undertakings are calculated to reach the market and need to be accurate.
 - . However, “[m]unicipal issuers have an obligation to make sure that information that is released to the public that is reasonably expected to reach investors and trading markets, even if not specifically published for that purpose, does not violate the antifraud provisions.” SEC Release 69515, May 6, 2013.

Securities Compliance

- . The SEC has taken the position that in the absence of EMMA filings, “investors may be more likely to rely upon statements from public officials.”
- . In this case, public officials’ statements become “the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market.”
- . Full and complete public disclosure on EMMA reduces the likelihood that public statements will alter the total mix of information.

Securities Compliance

- . In several instances, the SEC is pursuing individual fines for violations of securities laws.
- . Nontraditional Media
 - . Harrisburg, PA – Public Statements
 - . South Miami, FL – Unrelated Documents
- . Traditional Primary and Secondary Disclosure
 - . San Diego, CA – Understatement of Pension Liability
 - . Victorville, CA – Inflation of TIF Property Values
 - . Miami, FL – Pattern of Misbehavior

Securities Compliance – Best Practices

- . Designate an individual in your organization to be responsible for continuing disclosure obligations. This person should also have a primary role in the creation and review of the offering document (official statement).
- . Know what you are required to bring forward each year pursuant to your continuing disclosure undertaking.
- . Work with your auditor to include that information in your audit or CAFR.
- . Timely file your CAFR on EMMA (typically prior to February 1 for the FY ending June 30 of the prior year).

Tax Compliance

- . The ability to issue tax-exempt debt is based on status and behavior. You must be a particular type of entity and must agree to behave in a certain way.
- . As an entity, you must qualify under the federal tax code. As an SPD, you qualify.
- . However, you must also expect to spend the proceeds of your tax-exempt borrowing within the bounds of the federal tax code. There are provisions that bear on what you can spend the money on as well as on how fast that money must be spent.
- . Usage restrictions typically pertain to the amount of private use a facility may expect.
- . The IRS regulations consider financing that has more than 10% in private use (on a per square foot basis) and 10% in private money for repayment to be a “private activity bond” and not eligible for tax exempt status.

Tax Compliance – Best Practices

- . Know and understand your tax covenants.
- . Know and understand your arbitrage and rebate responsibilities.
- . Document the expenditure of bond proceeds (as well as any interest earnings thereon).



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