

TITLE 2 PUBLIC FINANCE
CHAPTER 61 STATE INDEBTEDNESS AND SECURITIES
PART 6 BOND PROJECT DISBURSEMENTS

2.61.6.1 ISSUING AGENCY: State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM 87501.

[2.61.6.1 NMAC - N, 02-28-02]

2.61.6.2 SCOPE: All agencies with respect to draw down of bond proceeds from severance tax bonds, supplemental severance tax bonds, or general obligation bonds.

[2.61.6.2 NMAC - N, 02-28-02; A, 01-15-09]

2.61.6.3 STATUTORY AUTHORITY: Section 6-1-1 (E) NMSA 1978 provides for the state board of finance to have general supervision of the fiscal affairs of the state and securities belonging to or in custody of the state, and that the board may make rules and regulations for carrying out these provisions.

[2.61.6.3 NMAC - N, 02-28-02]

2.61.6.4 DURATION: Permanent.

[2.61.6.4 NMAC - N, 02-28-02]

2.61.6.5 EFFECTIVE DATE: February 28, 2002, unless a later date is cited at the end of a section.

[2.61.6.5 NMAC - N, 02-28-02]

2.61.6.6 OBJECTIVE: This rule provides general guidance regarding the financial and legal requirements for draw down of bond proceeds.

[2.61.6.6 NMAC - N, 02-28-02]

2.61.6.7 DEFINITIONS:

A. "Agency" means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of the state. It also includes the purchasing division of the general services department and the state purchasing agent, but does not include local public bodies.

B. "Board" means state board of finance.

C. "Capital expenditure" means cost of a type that is properly chargeable to a capital account under general federal income tax principles.

D. "Draw requests" means agency request for bond proceeds on a form approved from time to time by board staff.

[2.61.6.7 NMAC - N, 02-28-02; A, 01-15-09]

2.61.6.8 INTERPRETION OF AUTHORIZING LANGUAGE:

A. In accordance with New Mexico law, bond proceed expenditures shall not be made for purposes other than those specified in an appropriation and any other relevant law, and must meet the definition of capital expenditure unless otherwise authorized by law. It is crucial to determine whether the purpose for a draw request falls within an appropriation's permitted use. The following provides general direction and clarification in the interpretation of authorizing language. Agencies may also refer to the Uniform Statute and Rule Construction Act, 12-2A NMSA 1978 for guidance.

(1) Straight-forward language- some appropriation language is relatively unambiguous, either because it is quite specific or quite general, and it should not be difficult to determine whether the draw request falls within the appropriation language. The following examples use both specific and general language.

(a) "To purchase a van" - the specificity would not permit the purchase of a bus or truck or multiple vans. Using the appropriation to prepay rent on a leased vehicle would not be permitted.

(b) "For (a jail, an engineering study, specific type of equipment, etc.)" - "for" permits the broadest interpretation of the items that could be covered. The words act as a substitute for a particular verb or verbs that might raise interpretive questions or otherwise limit the use of funds. For example, "for a jail" could include purchasing an existing building, purchasing real estate, demolition, the planning and designing, constructing, equipping, furnishing and all other things of capital nature incident to completing the jail.

(2) Standard appropriation language - appropriation language uses certain verbs routinely to anticipate how appropriations will be applied. In order for agencies to be able to make draw requests with certainty based on frequently used verbs or combinations thereof, the following are the board's interpretations of frequently used verbs in authorizing language.

(a) Acquire - obtain something already in existence; does not mean to construct, build or otherwise create the thing to be acquired.

(b) Build - construct a structure or space including fixtures and other built-ins, but not including furnishings or moveable equipment; may include demolition and the design and planning process but does not include acquisition of underlying land; may include the use of modular and prefabricated buildings; may include the cost of commissioning a building for energy efficient green building standards (i.e. LEED certification), as required by law; used interchangeably with "construct".

(c) Construct or construct improvements - see "build".

(d) Design - planning process including location and feasibility studies, architectural drawings and plans, engineering, archaeological and environmental surveys or clearances, zoning, design activities necessary if seeking LEED certification, and all other steps incident to creating a plan for a final product.

(e) Develop - establish the process for future implementation of a project; similar to "design" however less tangible and more conceptual.

(f) Equip or equip improvements - supply tools, furnishing and other implements that are of a permanent or non-depletable nature and are reasonably necessary in the use of the building or other asset for its intended purpose; for example: wood chips and shade structures for playgrounds; used interchangeably with "furnish" (however the nouns "equipment" and "furniture" have different meanings, the former referring to mechanical, technological or recreational items, while the latter is generally limited to objects necessary to make a room comfortable).

(g) Expand - increase size or capacity.

(h) Feasibility study - a preliminary study undertaken to determine and document a project's viability, the results of which are used to make a decision whether or not to proceed with the project.

(i) Furnish - is generally interpreted to mean provide furniture for a building; however, may be used interchangeably with "equip" to mean the provision of items essential for the use of a building or asset for its intended purpose.

(j) Furniture - see "furnish".

(k) Governmental entity - a public body such as state agencies, cities, counties, school districts (including charter schools), governmental instrumentalities created by statute.

(l) Improve - enhance the quality or function of something; encompasses "construct", "equip", "remodel", "renovate" and "upgrade"; may include items such as the purchase of books and desks for a library.

(m) Information technology - includes hardware, software when the software is needed for the intended use of the facility and is a one-time expense, wiring, cooling (where necessary) and related costs, but does not include remodeling, space dividers or other furniture; does not include consumables such as toner, batteries, CD-ROMs, etc, unless included as part of the package or otherwise allowed.

(n) Install - bring into service, including necessary labor and parts directly related to the installation, but does not include the cost of the item actually being installed.

(o) Plan - see "develop".

(p) Prepare - make ready for a future purpose, use or activity.

(q) Purchase - see "acquire".

(r) Remodel - see "improve".

(s) Renovate - see "improve".

(t) Repair - return to usefulness.

(u) Replace - substitute with identical or similar item.

(v) Upgrade - see "improve".

B. Special meanings in road/street context - Unless specifically limited by the legislature, "to improve a road" includes anything that will make the existing road better and is deemed appropriate in the discretion of the agency responsible for the project, and could include acquisition of rights-of-way. However, the department of transportation has taken the position that "to construct a road" does not include planning, designing, right-of-way activities and acquisition, environmental documentation, environmental clearances, and other pre-construction project development tasks. Preliminary activities such as those would only be included if the legislature specified for "planning and designing."

C. Training of government employees - if training is purchased from the vendor or other third party in connection with the acquisition of any permitted property, which training is necessary to the initial use of the property, the appropriation may be used for such training costs. However, no part of the appropriation shall be used to pay for the salaries or wages of government employees during training, or travel costs for government employees to attend training.

D. Litany - when multiple verbs are listed in the appropriation, assume that they are used deliberately and to the exclusion of those not listed. When “and” is used in a list, the appropriation must be applied to all the purposes listed, unless the appropriation act provides that when the amount appropriated is not enough to pay for all the purposes listed, the funds may be expended on fewer than all of them. When “or” is used, the appropriation may be applied to any or all of the purposes listed.

E. Unusual or special appropriation language - if the appropriation language is not clear, the following interpretation guidelines may be helpful.

Technical term - determine whether a technical term or term of art has an established meaning within a particular field, industry or context, such as the following examples:

(1) “software” - software that is a one time expenditure if necessary for intended use of hardware;

(2) accounting term - if the term is commonly thought of as an accounting term, apply generally accepted accounting principles (GAAP) and government accounting standards board (GASB) interpretations;

(3) tax term - if the term is commonly thought of as a tax term, consult the Internal Revenue Code for meaning.

F. Errors in appropriation language - if the entity, location or object erroneously referenced in the appropriation actually exists, then the funds cannot be applied otherwise, regardless of a suspected different legislative intent. If the entity, location or object erroneously referenced in the appropriation is non-existent, then the funds can be applied to the appropriate cause, if there is sufficient evidence that was the intended use.

G. Other considerations - the interpretations must make sense and not violate applicable law.

(1) Avoid unconstitutional results:

(a) Anti-donation - the appropriation cannot be given to a non-governmental entity; the item to be purchased or constructed must be owned by a governmental entity.

(b) Control of state - no appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state.

(2) Consider the appropriation in terms of the current context/situation of a project.

(3) Favor an interpretation that would make full use of the appropriation and avoid unachievable results.

(4) Assess the sufficiency of funds to support the interpretation (however, if an appropriation for a project is not sufficient to complete all the purposes specified, the appropriation may be expended for any portion of the purposes specified in the appropriation, if the appropriation act so states).

(5) Avoid interpretations that may jeopardize any tax-exempt bonds issued to finance the appropriation:

(a) Capital expenditure - appropriations should be used for a capital expenditure.

(b) Private use - if the item acquired or created will be used principally by one or a few private sector entities (including a non-profit organization) this should be brought to the attention of the board, unless previously discussed.

(c) Reimbursement and refinancing - if the funds are to be used to reimburse an expense paid prior to the issuance of the bonds, or to pay off a loan used to pay for such expense, this should be brought to the attention of the board, unless previously discussed. Generally the look back period for reimbursement is 60 days prior to the date a bill is approved by the governor (severance tax bonds) or approved by the voters (general obligation bonds).

(6) Operating expenses - unless expressly provided for by statute, bond proceeds may not be used to pay for operating expenses (e.g. salaries and in-house labor).

(7) Indirect expenses - generally, the legislation authorizing the issuance of bonds prohibits the use of its proceeds for indirect expenses (e.g. penalty fees or damages other than pay for work performed, attorney fees, and administrative fees). Such use of bond proceeds shall not be allowed unless specifically authorized by statute.

H. Interpretive memoranda - in order to develop consistency in interpretations, the board will document specific interpretive decisions that arise. The interpretive memoranda will be provided to agencies

making draw requests based on interpreting language, and may be relied on for future interpretations of the same or similar terms.

[2.61.6.8 NMAC - N, 02-28-02; A, 01-15-09; A, 10-15-2009]

2.61.6.9 PAYMENT OF CAPITAL PROJECT EXPENSES, DRAW REQUEST PROCEDURES:

A. The recipient of bond proceeds is the governmental entity that will carry-out the completion of the project. In many cases, the agency named to receive the appropriation will also be the entity responsible for the project. In other cases, the named agency will be an intermediate agency that is expected to make a grant to a local government entity to carry out the completion of the project. Either an intermediate agency may make a draw request to the board on behalf of a local government entity as recipient, or an agency itself as recipient may make the request directly to the board, unless otherwise approved by the board director.

(1) Documentation to support draw requests from agency:
(a) one draw request form for each project (1 original and 2 copies);
(b) proof of payment - notarized certification from an authorized signatory that expenditures are valid or actual receipts;
(c) ACH transfer information;
(d) evidence that conditions have been satisfied if applicable;
(e) certification that the statements made in the original certification and questionnaire remain true, including use of facility.

(2) Intermediate agencies typically submitting draw requests to the board on behalf of local entity recipients: environment department, department of transportation, Indian affairs department, local government division, public education department, higher education department and aging and long term services department:
(a) one draw request form for each project (1 original and 2 copies);
(b) proof of payment - a notarized certification from an authorized signatory that expenditures are valid or actual receipts;

(c) ACH transfer information;
(d) evidence that conditions have been satisfied if applicable;
(e) certification that the statements made in the original certification and questionnaire remain true, including use of facility.

B. Frequency - draw requests are due in the board of finance office by 3:00 p.m. on the 10th and 20th day of each month or by 9:00 a.m. the next business day if the 10th or 20th falls on a weekend or holiday (the “draw request deadline”). Draw requests submitted on or before the draw request deadline will result in funds available six business days after the draw request deadline.

C. The minimum draw request amount per project shall be \$1,500 unless it is the final draw request or otherwise recommended by the intermediate agency.

D. State executive agencies may request a direct payment to a contractor or other entity.

(1) The agency must submit the payment voucher to department of finance and administration financial control division six business days after the board of finance deadline unless notified by board of finance of processing delay due to additional information or legal review being required.

(2) If a direct payment to a contractor or other entity is requested and the agency mails the payment directly to the payee or transfers the funds electronically via ACH, the agency must send state treasurer’s office a copy of the warrant or a copy of the ACH no later than two business days after the payment has been made.

[2.61.6.9 NMAC - N, 02-28-02; A, 01-15-09; A, 10-15-2009]

2.61.6.10 ART IN PUBLIC PLACES (AIPP) ACT:

A. A portion of appropriations for construction and major renovations shall be set aside for the acquisition or commissioning of works of art to be used in, upon or around public buildings.

(1) “Appropriations for construction and major renovations” include appropriations for that purpose to any public entity from severance tax bonds, general obligation bonds, or supplemental severance tax bonds, both taxable and tax-exempt.

(2) Under the AIPP Act, all agencies shall set aside the lesser of \$200,000 or one percent of the amount appropriated for new construction or major renovation (exceeding \$100,000) to use for art in, upon or around the building being constructed or renovated. In addition, an amount of money equal to the lesser of \$200,000 or one percent of the amount appropriated for new construction or major renovations of auxiliary buildings, as defined in the AIPP Act, shall be accounted for separately and expended for acquisition and installation of art for existing public buildings, as defined.

B. The board's role in administering the AIPP Act is as follows.

(1) After each bond issue, the board submits a list of approved projects to the arts division of the department of cultural affairs, which administers the AIPP fund. The arts division determines which projects the AIPP Act applies to and advises the board accordingly. Based on that determination, the board sets aside the requisite amount from each applicable project in a separate AIPP pooled fund for each bond issue.

(2) When the arts division of the department of cultural affairs is ready to purchase or commission art, the office submits a draw request to the board which then makes the disbursement out of the AIPP project.

C. Frequency - Draw requests are due in the board of finance office by 3:00 p.m. on the 10th and 20th day of each month or by 9:00 a.m. the next business day if the 10th or 20th falls on a weekend or holiday (the "draw request deadline"). Draw requests submitted on or before the draw request deadline will result in funds available six business days after the draw request deadline.

[2.61.6.10 NMAC - N, 02-28-02; A, 01-15-09; A, 10-15-2009]

2.61.6.11 EXCEPTIONS TO THE RULE: In the absence of specific legislative authority or board-issued guidance to the contrary, this rule governs the disbursement of all bond proceeds to agencies. Further, the executive director of the board, in consultation with bond and board counsel, may approve exceptions to the provisions herein when circumstances warrant."

[2.61.6.11 NMAC - N, 01-15-09]

HISTORY OF 2.61.6 NMAC: [RESERVED]