

EXECUTIVE DEPARTMENT
DELAWARE ECONOMIC DEVELOPMENT AUTHORITY
Statutory Authority: 29 Delaware Code, Section 5029(a), (29 **Del.C.** §5029(a))

FINAL

ORDER

Proposed changes to Regulation 401 Procedures Regarding Non-State Guaranteed Bonds and Regulation 403 Administration and Operation of Council on Development Finance were published in the Delaware Register of Regulations on February 1, 2013. The comment period remained open until March 3, 2013. There was no public hearing on the proposed changes to Regulations 401. Public notice of the proposed changes to Regulations 401 and 403 in the Register of Regulations was in conformity with Delaware law.

Summary of the Evidence and Information Submitted

No comments were submitted by the public.

Findings of Fact

Based on Delaware law and the record in this docket, I make the following findings of fact:

Pursuant to 29 **Del.C.** §5053(k), The Delaware Economic Development Authority (the "Authority") is directed to prescribe such regulations as may be necessary to carry out the purposes of act creating the Authority, 29 **Del.C.** Subch. IV (the "Act"). The purpose of Regulation 401 is to regulate the administration of the Act, including, but not limited to, regulation of the process for applying to the Authority for the issuance of conduit bonds and the Authority's approval of such applications. The proposed regulations constitute a revision of the existing Regulation 401, to update fees and current practices. The requirements of the amended Regulation 401 best serve the interests of the public in that they reflect the actual process for processing and approving an application for conduit bond financing.

Pursuant to 29 **Del.C.** §5029(a), The Delaware Economic Development Authority (the "Authority") is directed to prescribe such regulations as may be necessary to carry out the purposes of the Council on Development Finance (the "Council".) The proposed regulations constitute a revision of the existing Regulation 403, to reflect current practices. The requirements of the amended Regulation 403 best serve the interests of the public in that they reflect the actual practices regarding the administration and operation of the Council.

Decision and Effective Date

Sections 5029(a) and 5053(k) of the Act authorize the Authority to draft rules and regulations to carry out its purposes. The Authority hereby adopts these regulations effective May 30, 2013.

Text and Citation

The text of the proposed amendments to Regulations 401 and 403 last appeared in the *Register of Regulations* Vol. 16, Issue 8, pages 831-837.

IT IS SO ORDERED this 30th day of May, 2013.

Alan B. Levin, Chairman, Delaware Economic Development Authority

401 Procedures Regarding Non-State Guaranteed Bonds

Effective: February 1, 1982

Amended: January 1, 1987

1.0 Enabling Legislation

Pursuant to 29 **Del.C.** §5053(k), The Delaware Economic Development Authority (the "Authority") is directed to prescribe such regulations as may be necessary to carry out the purposes of the act creating the Authority, 29 **Del.C.** Subch. IV (the "Act"). The following regulations have been adopted by the Authority pursuant to the foregoing provision of the Act.

2.0 Purpose

The purpose of this Regulation No. 2 is to regulate the administration of the Act, including, but not limited to, regulation of the process for applying to the Authority for the issuance of Bonds and the Authority's approval of such applications.

3.0 Definitions

Unless otherwise indicated, all capitalized terms used herein shall have the meaning ascribed to such terms in the Act.

4.0 Application Procedures

An application to the Authority for the approval of the issuance of a Bond shall be made on the application form provided by the Authority and must be completed according to the requirements stated therein. One (1) original and nine (9) copies of the completed application should be submitted to the Authority on or before the first (1st) day of the month preceding the month during which the council on Development Finance ("Council") will be asked to review an application. For example, for an application to be eligible for review by the Council at a May meeting, it should be submitted to the Authority on or before April 1.

5.0 Project Approval and Standards

- 5.1 Findings. In connection with the approval of the issuance of a Bond for a Project, the Act requires the Authority to make certain findings and determinations with respect to the Project. The Authority shall apply the following standards where applicable in making such findings and determinations:
 - 5.1.1 Employment Standard. For a proposed Project, the Authority will review the information submitted by an Assisted Person to determine whether the Project will tend to maintain or provide gainful employment within the State. The standards to be considered will include, but not be limited to, the wage scale applicable to persons to be employed as a result of the Project, the economic situation in the State, the effect of the Project on the tax base of the State and of the county or municipality in which the Project is to be located, and the expected effect that the Project will have on the development of new economic activity within the State.
 - 5.1.2 Abandonment Standard. When applying the "employment standard," the Authority will take into consideration whether the proposed Project will cause or result in abandonment of an existing facility elsewhere in the State by an Assisted Person or by the proposed operator or principal user of the Project. If a facility in the state is to be abandoned, a statement by the Assisted Person, operator or principal user that the existing facility in the State is to be abandoned because of obsolescence, lack of available labor or site limitations shall be prima facie proof that the Assisted Person has not violated the abandonment standard.
 - 5.1.3 Capability Standard. In determining whether a proposed Project "will serve a public purpose by contributing to the prosperity, health or general welfare of the citizens of the State," the Assisted Person shall demonstrate to the Authority that the Assisted Person, operator, or principal user has the capability to, operate and maintain the Project efficiently and effectively. Financial strength and prior related experience by the Assisted Person, operator or principal user may be considered as well as the qualifications of management.
 - 5.1.4 Operator and User Standard. An Assisted Person shall, if requested by the Authority or required in the application for financing, submit such information as is requested or required for each proposed operator or principal user of the Project. The Authority shall apply the same standards with respect to the operators and principal users of the Project as if they were the Assisted Person, unless there is good reason, established by the Assisted Person, to make the findings and determinations with respect to the Assisted Person alone. The financial strength of the Assisted Person and his capacity to manage or operate the Project, among other considerations, may be the basis for omitting such findings and determinations with respect to the operators or principal users.
 - 5.1.5 Commercial and Agricultural Business Standards. In making findings and determinations with respect to the capital investment in a Project for an Agricultural Business or for a Commercial Business, the Authority will consider capital investment made and to be made in the proposed Project during a period of time commencing one (1) year prior to the date on which an application for financing is submitted to the Authority and terminating one year following the issuance of a Bond with respect thereto. The term "capital investment" shall be applied in accordance with generally accepted accounting principles.
- 5.2 Adherence to Law. In making a finding and determination that the Assisted Person has not been cited for a major labor law violation or illegal conduct involving moral turpitude, the Authority may, in its discretion, rely on

a sworn affidavit of the Assisted Person or an officer of the Assisted Person in lieu of an opinion of counsel to the Assisted Person. If requested by the Authority, similar proof shall be obtained from any operator or principal user of a Project.

- 5.3 Speculative Buildings. The Authority may, after applying the foregoing standards, approve Projects to be financed with Bonds prior to a determination of the feasibility of the Project, provided that at the time the Bonds are issued, satisfactory evidence demonstrates to the Authority, in its sole discretion, the feasibility of the Project.

6.0 Initial Approval

- 6.1 Binding Obligation. The initial approval of a Project for financing by the Authority will constitute official action on the part of the Authority demonstrating its intention to adopt a resolution authorizing the issuance of a Bond, provided that circumstances have not substantially changed, in the Authority's sole discretion, between the time of initial approval and the adoption of the resolution authorizing the issuance of a Bond.
- 6.2 Approval Period and Extensions. The initial approval will be effective for a period of one (1) year. If the applicant demonstrates that the Project has not been changed significantly and that the method of financing continues as originally intended, the Authority may grant no more than two (2) six (6)-month extensions, making the maximum approval period two (2) years, beginning on the date of the initial approval. If it is necessary that the approval continue beyond two (2) years, then a revised application reflecting any subsequent changes, along with updated financial information, must be submitted for review by the Authority and the Council.

7.0 Closing Documents

- 7.1 Deadlines re: Closing Documents. To the maximum extent feasible, closing documents should be processed according to the following schedule:
- 7.1.1 Draft closing documents should be forwarded to the Authority's ~~special counsel~~ Deputy Attorney General for review by bond counsel not ~~less~~ fewer than thirty (30) days prior to the anticipated closing date.
- 7.1.2 Documents should be returned to bond counsel with suggested changes by all parties to the financing no ~~less~~ fewer than twenty (20) days prior to the anticipated closing date.
- 7.1.3 Final closing documents should be forwarded by bond counsel to the Authority's special counsel not less than ten (10) days prior to the scheduled closing.
- 7.2 Mandatory Provisions in Closing Documents. All closing documents with respect to the issuance of a Bond by the Authority shall contain, at a minimum, provisions acceptable to the Authority with respect to its own responsibilities and protection, including, without limitation, provisions with respect to limited liability of the Authority, continued operation of the Project at all times in accordance with the requirements of the Act (including the employment requirements of the Act), insurance, payment of fees and expenses, indemnity, inspection of the Project premises and records with respect to the Project, transfer or assignment of the Project property, and substitution of Assisted Persons (including, if applicable, transfer or assignment of interests in the Assisted Person).
- 7.3 Authority Not to Hold Title. All transactions should be structured so as to eliminate title to the Project property being at any time in the name of the Authority.
- 7.4 Financial Statements. Unless waived by the Authority in its sole discretion, the Assisted Person shall, during the time any Bond is outstanding, submit to the Authority, on an annual basis, financial statements prepared by an independent certified public accountant. Except in the case of Assisted Persons who are individuals, the Authority expects such statements to be audited, but may in its sole discretion accept a review. Such statements should include, at a minimum:
- 7.4.1 A balance sheet, income statement, statement of retained earnings, statement of changes in financial position, all accompanying notes to the financial statements, and the accountant's report.
- 7.4.2 If the Assisted Person is a publicly-held company, SEC Form IOK must accompany the financial statements.
- 7.4.3 If the Assisted Person is not a publicly-held company, annual financial statements of each principal of the Assisted Person may be required, in the sole discretion of the Authority.
- 7.5 Liability Insurance and Indemnity. Prior to the issuance of a Bond by the Authority, the Assisted Person shall establish to the satisfaction of the Authority that ~~(1) adequate liability insurance has been obtained to protect the Authority with respect to the Project during the period of time the Bond will be outstanding, and (2) adequate indemnity of the Authority has been provided against claims or losses resulting from the authorization and issuance of the Bond, or the refinancing of a Bond with respect to the Project.~~

7.6 Post Issuance Compliance and Record Retention. The Assisted Person shall certify, in a form acceptable to the Authority, that it shall comply with the DEDA Post Issuance Compliance and Record Retention Policy.

8.0 Fees

- 8.1 Application Fee. Each applicant shall deliver to the Authority with its application a check made payable to the Authority in the amount of Two Hundred Fifty Dollars (\$250) before an application will be considered by the Authority. Such application fee ~~is~~ shall not be refundable.
- 8.2 Approval Fee. ~~After initial approval of a Project, the applicant shall forthwith deposit Five Thousand Dollars (\$5,000) with the Authority. If a Bond is issued for the Project, the Assisted Person shall pay to the Authority on the day the Bond is issued any additional amount which, together with the Five Thousand Dollars (\$5,000) previously deposited with the Authority, will equal An amount equal to one-half percent (.50%) of the face amount of Bonds to be issued up to the first One Hundred Fifty Million Dollars (\$150,000,000) face amount of Bonds shall be payable to the Authority on the day the Bond is issued. If the face amount of Bonds to be issued exceeds One Hundred Fifty Million Dollars (\$150,000,000), the Assisted Person shall pay to the Authority on the day the Bonds are issued any additional amount which, together with the Five Thousand Dollars (\$5,000) previously deposited with the Authority, will equal the sum of one-half percent (.50%) of the first One Hundred Fifty Million Dollars (\$150,000,000) face amount of Bonds to be issued and An amount equal to one-quarter percent (.25%) of the face, amount of Bonds to be issued in excess of One Hundred Fifty Million Dollars (\$150,000,000) shall be payable on the day the Bond is issued. If a Bond is not issued for a proposed Project, the applicant can request a return of the deposit, the balance of which will be refunded after the Authority has deducted its reasonable expenses, determined in the Authority's sole discretion.~~
- 8.3 Administration Fees. ~~During the period of time a Bond is outstanding, administration fees of Thirty-Five Dollars (\$35) per hour for any work performed in connection with a Project will be charged by the Authority to each Assisted Person. The Authority expects that such Fees will shall be at least Four Hundred Dollars (\$400) per year, and may charge an annual administration fee based on this assumption or such other annual fee as the Authority, in its sole discretion, expects to approximate increase, at the Authority's sole discretion, to reflect the Authority's annual administration expenses in connection with a Project.~~
- 8.4 Fees Payable Unless Waived. The foregoing fees shall, unless otherwise waived by the Authority in its sole discretion, be paid with respect to all Bonds issued by the Authority, including, without limitation, refunding Bonds previously issued by the Authority.

403 Administration and Operation of Council on Development Finance

1.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

"Chairperson" means the Chairperson of the Council.

"Clawback" means an obligation by a grantee to repay a part or all of a grant for a failure to meet benchmark employment, cessation of operations in the State, or other terms contained in the grant agreement.

"Competitiveness Fund" shall have the meaning given pursuant to ~~75 Del. Laws, c. 308, §36(d) (July 1, 2004), 75 Del. Laws, c. 98, §39(d) (July 1, 2005), and 75 Del. Laws, c. 353, §40(d) (July 1, 2006).~~

"Council" means the Council on Development Finance.

"DEDA" means The Delaware Economic Development Authority.

"DEDO" means the Delaware Economic Development Office.

"Director" means the Director of DEDO in his or her capacity as Director, or as the Chairperson of DEDA.

"Member or Members" means the Members appointed to serve on the Council in accordance with 29 Del.C. §5007.

"Project or Projects" shall have the meaning given pursuant to 29 Del.C. §5052(12).

"Strategic Fund" shall have the meaning given pursuant to 29 Del.C. §§50247 – 5029.

"Substantive Changes" means

- a. a ~~40% or lower~~ decrease of more than 1 percentage point in the interest rate for any fixed or variable rate loan made by ~~DEDO or DEDA;~~
- b. any changes in the collateral of a loan which would ~~cause~~ result in a decrease in the security position of ~~DEDO or DEDA; and~~
- c. a 10% or greater increase in the amount of any loan or grant;

d. an extension of loan payment schedule; and v) a change employment benchmark date or clawback in a grant agreement.

2.0 Enabling Legislation

~~Pursuant to 29 Del.C. §5003, DEDO was established pursuant to 29 Del.C. §5003. Pursuant to 29 Del.C. §5007 The Council was established pursuant to 29 Del.C. §5007. Pursuant to 29 Del.C. §5053 DEDA was established pursuant to 29 Del.C. §5053. DEDO and DEDA have authority to make regulations pursuant to 29 Del.C. §§5005(11) and 5053(k).~~

3.0 Purpose

The purpose of this Regulation is to enhance the coordination between the Council and DEDO and set forth certain procedures to be used in the administration and operation of the Council.

4.0 Procedures

- 4.1 In the event of any Council vacancy, Members will encourage the Governor to fill such a vacancy promptly.
- 4.2 ~~The Council will request staff to develop an economic matrix that includes certain information on companies recommended for funding, including but not limited to, information on employee benefits such as health care and the potential for any unintended consequence stemming from the company's operations.~~
- 4.32 The Council will, consistent with the provisions of 29 Del.C. §§10001 – 10005 Ch. 100 and 8 DE Admin. C. 1500, make certain information contained in a company's application available to the public upon written request.
- 4.43 The Council will, when practicable, schedule and locate meetings of the Council in a way that achieves geographic balance and centrality.
- 4.54 Any ~~S~~substantive ~~C~~changes made to any agreement or contract excluding any agreement contract or associated document related to any conduit bond issued by DEDA, after initial review by the Council shall be resubmitted to the Council for additional review and recommendation.
- 4.65 DEDO will organize and provide orientation for all new Council Members ~~and will organize and provide an annual retreat for all Council Members.~~ The orientation will include:
 - 4.5.1 the responsibilities of Council Members and DEDO staff;
 - 4.5.2 discussion of applicable state law/regulations; and
 - 4.5.3 a briefing by the staff of the Delaware Public Integrity Commission on matters, including but not limited to, rules of conduct, conflict of interest, and public disclosure. ~~The retreat will include reports on industry trends, emerging issues and emerging financing programs.~~
- 4.7 ~~The Council requires staff to provide Members with periodic update reports on each recipient of all funding.~~
- 4.86 The Council will, consistent with the State Employees', Officers' and Officials Code of Conduct, 29 Del.C. §§5804, 5805 and 5806, Ch. 58, encourage Members to identify prospective companies and ~~to turn any information directly over to the Council staff for follow up business development opportunities to DEDO.~~
- 4.97 ~~DEDO shall present an annual operating budget report to Tthe Council will, once a year, cooperate with the staff of DEDO in matters relating to DEDO's strategic marketing plan, including the annual review of the plan for comment and review.~~
- 4.10 ~~The Council will cooperate with the staff of DEDO in matters relating to the utilization of the DEDO website for news and information about Council meeting dates, times, locations, agendas, meeting minutes and Member contact information.~~
- 4.118 ~~Any public disclosure of funding by DEDO, prior to approval by Tthe Council requires that: i) DEDO make no announcement regarding the awarding of any funding prior to review by the Council and approval by the Director; or ii) that any announcement regarding the awarding of any funding, when the matter is under DEDO control, include that the by DEDO shall include a disclaimer which indicates that such funding is subject to review and recommendation of the Council.~~
- 4.129 ~~Twice a year, DEDO staff will bring shall provide an annual Portfolio Report to the Council for review; which shall include, but not be limited to, compliance with benchmark employment levels percents above sustainable wages, company investments and the repayment status for outstanding loans made by DEDO and repayment status for outstanding loans made by DEDA.~~
- 4.1310 ~~Projects with approvals that are more than two years old without an executed agreement will be brought to the Council's attention. Council shall review any Strategic Fund loan or grant in which the applicant has not entered into a contract with DEDA within one year of approval.~~

- 4.14 ~~The Director will brief the Chairperson on Projects under consideration as soon as DEDO completes its internal review and before DEDO makes an offer.~~
- 4.15~~11~~11 DEDO staff will provide ~~reports~~ information to the Council on return on investment, gross State product and personal income tax data related to each Project where such information is used to determine the value of the Project in the Application Evaluation Report.
- 4.16~~12~~12 ~~DEDO will continue to inform~~ shall present biannual Strategic Fund cash management reports to the Council biannually on the fiscal status of all Projects including the ~~which shall include, but not be limited to total Strategic Funds available, balances, amounts encumbered (and corresponding dates of encumbrances), Strategic funds committed to future Projects and available Strategic Fund balances.~~
- 4.17 ~~DEDO will make sure that original offer letters for each Project are presented to the Council when the original offer letter resulted in an application being submitted to the Council for review and recommendation.~~
- 4.18 ~~DEDO will present the Council with recommendations regarding how the Strategic Fund and Competitiveness Fund balances should be used on an allocation basis to help various economic development sectors.~~

11 DE Reg. 927 (01/01/08)

17 DE Reg. 90 (07/01/13) (Final)