



The State University  
of New York


Office of Capital Facilities

State University Plaza  
Albany, New York 12246

www.suny.edu

## MEMORANDUM

TO: Campus Business Officers and Facilities Management

FROM: Robert M. Haelen   
Vice Chancellor for Capital Facilities & General Manager of the Fund

DATE: May 26, 2011

SUBJECT: SUNY Hospital and Educational Facilities Capital Program –  
Compliance with applicable laws and procedures

To ensure the continued success and quality of our capital program, it is prudent to take this time to reinforce the requirements that must be met for all capital projects, including campus let projects. In order to ensure compliance with these requirements, a revised "Project Funding Request Form" (Attachment 1) has been created for use by campuses when requesting coding for capital funding from the Fund. In the revised "Project Funding Request Form", a campus must certify the following before coding can be issued:

1. The project is in compliance with the Tax Certificate. Each bond sale issued to fund the Educational Facilities Capital Program has a Tax Certificate signed by SUNY and the Fund that certifies that all projects that will be funded from the bond proceeds will comply with the Federal Tax Law and rules and regulations of the Internal Revenue Service pertaining to tax exempt bond proceeds. The certification implies continued compliance of the use of the project for the life of the bond issue. Compliance to date has been largely managed centrally with reliance on the campuses to disclose potential tax issues prior to bonding the project. As you know, a critical part of determining compliance is the completion and review of the annual "Private Use Survey". However, a couple items have necessitated that additional due diligence procedures be instituted. Namely, SUNY is becoming more entrepreneurial in the use of its facilities and DASNY has asked SUNY to consider measures to ensure ongoing compliance with Tax Law in addition to the annual review. This area of the law is rather complicated. Attachment 2 contains a simplified summary of the key areas SUNY needs to be aware of to assure compliance. Attachment 3 contains the most recently executed Tax Certificate. In the near future, we plan to provide campuses additional information on this subject. Nonetheless, when requesting **design** coding for funding for campus let projects, campuses must certify that the project and its use will comply with the Tax Certificate.

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2. A SEQR determination has been made before design is complete. Please note that under the SEQR law and regulations, no agency involved in an action, such as the design and construction of a campus project, may undertake, fund or approve the action until it has complied with the provisions of SEQR. This determination must be made, at the latest, before design is completed.
3. Division of the Budget - Bulletin B-1184 approvals have been obtained. Separate approvals are needed prior to advertising for a design consultant and prior to advertising for construction bids. A copy of the approved B-1184 must be attached to all future Project Funding Request submissions. B-1184 approval is also required for all contract amendments, including non-monetary items such as extensions of time.
- 4.) The design is in compliance with NYS Building Code and applicable coded permitting activities will be completed and required inspections will be completed during construction.

One other procedural item that needs to be changed involves the Fund's Wick's Law Exemption. Please be advised that even though contracts for campus let projects no longer need the approval of the Attorney General or State Comptroller, campuses that desire to utilize the Fund's Wick's Law Exemption must still request a Wick's Waiver from the Fund. This request must be made before the project is advertised for bidding by submitting a Wick's Law Waiver Request in accordance with the Campus Administered Project Procedures. If appropriate, the Fund will issue a Wick's Waiver letter, but instead of sending the letter to the State Comptroller's Office, as has been done, the Waiver letter will be sent to the campus official who requested the Waiver. A copy of the letter must be retained by the campus within its project files to support post audit of the procurement by the Office of the State Comptroller.

Lastly, there is a long standing history and expectation that there are opportunities in the construction industry to promote MWBE participation. New York State enacted Article 15-A of the Executive Law to promote equal opportunity in State contracting for all persons without discrimination for minority group members and women and business enterprises. The Governor has encouraged compliance with the Law and is looking for increased MWBE participation throughout the State. In support of this effort, I want to remind campuses to make sure that language regarding MWBE goals is part of the procurement/contract documents, that good faith efforts are made, and procedures to monitor efforts towards achieving goals are in place. Appropriate documentation that good faith efforts were achieved, as well as, ongoing monitoring of actual progress towards meeting the goals should be maintained by the campus.

As stewards of the lands and facilities that are an important part of SUNY, we must ensure that the State funds used for the Educational Facilities Capital Program are prudently spent and remain in compliance with all applicable laws, rules, regulations and procedures. Your cooperation and vigilance will ensure that our capital program continues to be successful. Please call Bob Fraser, Karren Bee-Donohoe, or myself if you have any questions concerning this matter.

Copy: M. Rimai  
B. Howard  
K. Bee-Donohoe  
B. Fraser

Attachment 1  
**STATE UNIVERSITY CONSTRUCTION FUND  
PROJECT FUNDING REQUEST**

<b>Campus:</b>	
<b>SUCF Project Number:</b>	
<b>Project Title:</b>	

The following funding is being requested in accordance with the State University Construction Fund's procedures for Campus Administered Projects and the MOU signed by the Campus.

Funding Type	Total Project Budget	Previously Issued Funds	Additional Funds Requested	Comment
Design	\$	\$	\$	
Construction	\$	\$	\$	
Construction Contingency	\$	\$	\$	
Equipment	\$	\$	\$	
Direct Labor				
Professional Staff	\$	\$	\$	
Site Representative	\$	\$	\$	
Land	\$	\$	\$	
Other _____	\$	\$	\$	
<b>Total</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	

For projects with a Total Budget of \$2.5 Million or more, the attached Cash Flow Schedule must accompany this request.

Check the appropriate box below for each item related to this funding request:

YES	NO	
		This Project and its use will be in full compliance with the Tax Certificate issued in connection with the funding for this project.
		If construction funding is requested, the SEQR has been completed.
		The approved B1184 authorization has been obtained and a copy is attached to this request.
		If construction funding is requested, applicable building code permitting activities are complete.
		These funds will be encumbered within 120 days and are available within the Campus' Capital Plan.
		This project is located on SUNY property and in support of SUNY educational and related facilities.
		Direct Labor, if applicable, will be fully dedicated to supporting the capital program and will not have any day-to-day facility or routine responsibilities on the campus.
		There will be no administrative or SUNY tithe applied to this project.

\_\_\_\_\_  
Vice President for Administration

\_\_\_\_\_  
Date

*Submit this completed form to the SUCF Program Manager*

## Attachment 2 TAX COMPLIANCE

### Private Use

Facilities financed with tax-exempt debt are subject to private use restrictions.

Private use is use of a facility by persons or entities other than state or local governmental entities. **Use by the Federal government, a private entity, or a not-for-profit entity is private use.** Use by SUNY, SUCF, or the RF is not considered private use. In general, use by a non-governmental entity is private use as a result of actual or beneficial use of, including a possessory interest in, a facility pursuant to a lease or other contractual arrangement. Private use includes a special economic benefit to a non-governmental entity derived from its use of a facility.

Use of a facility by persons or entities other than state or local governmental entities on a basis other than as a member of the general public, by permit or otherwise, is private use. Generally, an arrangement that conveys priority rights or other preferential benefits to the use of a facility results in private use. Arrangements providing for use that is available to the general public at no charge or on the basis of rates that are generally applicable and uniformly applied do not convey priority rights or other preferential benefit.

Incidental use of a facility by non-governmental entities (e.g. vending machines, pay telephones, kiosks and similar issues) is disregarded if such use does not exceed 2.5% of the proceeds of a bond issue and the use does not involve the transfer to the non-governmental person of possession or control of space that is separated from other areas of the facility by walls, partitions or other physical barriers (i.e. located in common areas). Incidental use is required to be reported as part of the annual private use survey even if it is less than 2.5%.

Generally, contracts for services by a non-governmental entity that are incidental to the primary governmental functions are not treated as private use (e.g. contracts for janitorial, office equipment repair, hospital billing or similar services).

An agreement by a non-governmental entity to sponsor research performed by SUNY may result in private business use depending on the facts and circumstances.

Generally, SUNY limits private use to 5% of the amount of the proceeds of a bond issue that finances the construction, repair or maintenance of a facility. Use of financed property is treated as use of bond proceeds. Common methods of measuring private use are (i) computing the percentage of floor space of a facility used by non-governmental users or (ii) computing the proceeds of a bond issue expended for private use facilities versus proceeds of the bond issue expended for governmental use.

While private and incidental use is required to be reported as part of the annual private use survey, they should be considered and disclosed at the time a project is created.

**Attachment 2**  
**TAX COMPLIANCE**

**Other**

Bond proceeds must be used for capital costs, not working capital.

Bond proceeds may not be loaned, directly or indirectly, to a non-governmental entity.

At least 85% of bond proceeds must be expended within three years from the date the bonds are issued.

Capital expenditures made prior to 18 months before the bonds are issued are not eligible for reimbursement with bond proceeds.

The weighted average maturity of the bonds may not exceed 120% of the reasonably expected useful life of the capital projects financed. The weighted average maturity of bonds issued for hospital and educational facilities has been approximately 19 years.

Unless DASNY gives consent, financed projects must be owned by SUNY, SUCF, the State of New York or DASNY.

Sale or other disposition of financed facilities requires prior approval by bond counsel.

**CERTIFICATE OF THE STATE UNIVERSITY OF NEW YORK AND  
THE STATE UNIVERSITY CONSTRUCTION FUND  
WITH RESPECT TO  
STATE UNIVERSITY OF NEW YORK HOSPITAL/EDUCATION FACILITIES  
FINANCED BY THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK**

The undersigned, authorized officers of the State University of New York (the “SUNY”) and the State University Construction Fund (the “SUCF”), are executing this certificate in connection with the issuance by the Dormitory Authority (the “Authority”) of the State of New York (the “State”) of its \$562,510,000 State Personal Income Tax Revenue Bonds, Series 2010E (the “Bonds”).

Capitalized terms used herein and not otherwise defined shall have the meanings assigned to them in the Resolution, as such term is defined in the Tax Certificate of the Authority executed and delivered in connection with the issuance of the Bonds to which this certificate is attached as Exhibit D-1 (the “Tax Certificate”), or in the Tax Certificate.

In executing this certificate, the SUNY and the SUCF have reviewed contracts, and other relevant information including advices of Co-Bond Counsel with particular attention to the organization, operation, use and management of the financed facilities, and compensation arrangements with respect thereto.

The SUCF and the SUNY hereby each make the following representations and certifications as to the capital costs of SUNY hospital/education facilities that are to be financed with proceeds of the Bonds and investment earnings thereon (collectively, the “SUNY Projects”) and the proceeds of the portion of the Bonds (the “Allocable SUNY Bonds”) allocable to the financing of the SUNY Projects (for purposes of this certificate, use of the SUNY Projects constitutes use of the proceeds of the Allocable SUNY Bonds that financed such SUNY Projects):

Section 1. Private Use Restrictions.

(a) No portion of the proceeds of the Allocable SUNY Bonds has been or will be used directly or indirectly to provide student loans, to fund pension liabilities, or to provide an output facility (within the meaning of Section 141(b)(4) of the Code).

(b) No portion of the proceeds of the Allocable SUNY Bonds has been or will be loaned or permitted to be loaned within the meaning of section 141(c) of the Code, directly or indirectly, to any persons other than a state or local governmental units within the meaning of Section 141(b)(6) of the Code, such persons being referred to in this Section 1 as “nonexempt persons”.

(c) No more than 10% of the proceeds of the Allocable SUNY Bonds has been or will be used in the trades or businesses of nonexempt persons, including organizations described in Section 501(c)(3) of the Code (“Private Use”, as further

defined in paragraph 1(f)), where more than 10% of the debt service on the Allocable SUNY Bonds, is directly or indirectly:

- (i) secured by any interest in property used in such trades or businesses;
- (ii) secured by any interest in payments in respect of property used in such trades or businesses; or
- (iii) derived from payments in respect of property or borrowed money used or to be used in such trades or businesses.

Proceeds of the Allocable SUNY Bonds that finance property that is used in a Private Use will be referred to herein as “**Private Use Proceeds**” to the extent that the debt service on the Allocable SUNY Bonds that financed such Private Use Proceeds is (i) secured by any interest in property used in such trades or businesses; (ii) secured by any interest in payments in respect of property used in such trades or businesses; or (iii) derived from payments in respect of property or borrowed money used or to be used in such trades or businesses.

(d) The Private Use Proceeds of the Allocable SUNY Bonds used for (i) Private Use which is unrelated to any governmental use of such proceeds and (ii) any Private Use which is disproportionate to a related governmental use will not, in the aggregate, exceed 5% of the proceeds of the Allocable SUNY Bonds. For this purpose, the disproportionate related business use proceeds is an amount equal to the excess of the proceeds of the Allocable SUNY Bonds which are to be used for Private Use over the proceeds of the Allocable SUNY Bonds, which are to be used for the governmental use to which such Private Use relates (“**Disproportionate Related Use Proceeds**”).

(e) The SUNY and the SUCF shall not apply proceeds of the Allocable SUNY Bonds in a manner that causes the Private Use Proceeds to exceed the portion of the \$15,000,000 limitation set forth in Section 141(b)(5) of the Code that the Authority has allocated to the Allocable SUNY Bonds (the “**Allocable Share**”). The Authority has advised the SUNY and the SUCF that the initial Allocable Share is \$3,506,000.

(f) For purposes of this Tax Certificate, the Authority has advised the SUNY and the SUCF that the term “**Private Use**” means any activity that constitutes a trade or business that is carried on by persons or entities other than state or local governmental entities, and that any activity carried on by a person other than a natural person is treated as a trade or business. The leasing of property financed (or refinanced) with the proceeds of the Allocable SUNY Bonds or the access of a person or entity other than a governmental unit to property or services on a basis other than as a member of the general public (the “**General Public Use**”) is to be treated as Private Use unless the Authority or the SUNY or the SUCF obtains an opinion of Bond Counsel to the contrary. Bond Counsel has advised the Authority that use of property financed (or refinanced) with proceeds of the Allocable SUNY Bonds by any person, other than a state or local governmental unit in its trade or business constitutes General Public Use only if the property is intended to be available and is in fact reasonably available for use on the same basis by natural persons not engaged in a trade or business, and in most cases Private Use

will occur only if a nongovernmental person has a special legal entitlement to use the financed (or refinanced) property under an arrangement with the Authority or the SUNY or the SUCF, including ownership or actual or beneficial use of the property financed (or refinanced) with the proceeds of the Allocable SUNY Bonds pursuant to a lease, management or incentive payment contract, output contract, research agreement or similar arrangement. In the case of property that is not available for General Public Use, the Authority has advised the SUNY and the SUCF that Private Use may be established solely on the basis of a special economic benefit to one or more nongovernmental persons, and that in determining whether special economic benefit gives rise to Private Use, it is necessary to consider all of the facts and circumstances, including one or more of the following factors:

- (i) whether the financed (or refinanced) property is functionally related or physically proximate to property used in the trade or business of a nongovernmental person;
- (ii) whether only a small number of nongovernmental persons receive the economic benefit; and
- (iii) whether the cost of the financed (or refinanced) property is treated as depreciable by the nongovernmental person.

Section 2. Management and Service Contracts and Research Agreement Guidelines.

(a) The Authority has advised the SUNY and the SUCF that the determination of whether a particular use pursuant to a management or service contract constitutes Private Use under the Tax Certificate shall be made on the basis of applying Revenue Procedure 97-13, 1997-1 C.B. 632, as amended by Revenue Procedure 2001-39, 2001-2 C.B. 38 (collectively, “**Revenue Procedure 97-13**”) as summarized in the Safe-Harbor Management Contract Guidelines, attached hereto as Attachment 1.

(b) The Authority has advised the SUNY and the SUCF that the determination of whether a particular conduct of scientific research pursuant to any research agreement between SUNY and any non-governmental unit pursuant to which such non-governmental unit acts as sponsor or financial supporter of such research constitutes Private Use under the Tax Certificate shall be made on the basis of applying Revenue Procedure 2007-47, 2007-29 I.R.B. 108 (“**Revenue Procedure 2007-47**”) as summarized in Safe-Harbor Research Agreement Guidelines attached hereto as Attachment 2.

(c) For purposes of determining the nature of a Private Use, the Authority has advised the SUNY and the SUCF that any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease. Consequently, an arrangement that is referred to as a management or service contract may nevertheless be treated as a lease, and in determining whether a management contract is properly characterized as a lease, it is necessary to consider all of the facts and circumstances, including the following factors:

(i) the degree of control over the property that is exercised by a nongovernmental person; and

(ii) whether a nongovernmental person bears risk of loss of the financed (or refinanced) property.

Section 3. No Arbitrage. The SUNY and the SUCF have not taken or permitted, and shall not take or permit, any action that would cause the Allocable SUNY Bonds to be “arbitrage bonds” under Section 148 of the Code.

Section 4. Expenditure, Time and Due Diligence Tests. At least eighty-five percent (85%) of the net sale proceeds of the Allocable SUNY Bonds will be allocated to expenditures for the SUNY Projects within three years from the date hereof. Either the Authority, the State or the undersigned have incurred or expect to incur within six months of the date hereof substantially binding obligations (*i.e.*, not subject to contingencies within the control of the Issuer, the undersigned or a related party) to third parties to expend at least five percent (5%) of the net sale proceeds of the Allocable SUNY Bonds on costs of the SUNY Projects. The allocation of the net sale proceeds of the Allocable SUNY Bonds to expenditures for the SUNY Projects will proceed with due diligence to completion thereof.

Section 5. Maturity of Bonds, Economic Life. The weighted average maturity of the Allocable SUNY Bonds as computed by the Underwriter (not more than 6.51 years) does not exceed 120% of the reasonably expected useful life of the capital projects financed by the Allocable SUNY Bonds. For the purposes of determining the average reasonably expected economic life of such facilities, the determination has been made as to each discrete component of the SUNY Projects as of the date hereof, taking into account the period until such component has reached the degree of completion which would permit its use or operation at substantially its design level and is in fact in operation at such level, and, further, land has not been taken into account (unless 25 percent or more of the sale proceeds of such bonds was used to finance land).

Section 6. Reimbursement. To the extent proceeds of the Allocable SUNY Bonds are to be used to reimburse the SUCF, the SUNY, the Authority or the State for any expenditures paid prior to the date of issue of the Bonds, (i) the expenditures to be reimbursed are capital expenditures (ii) the expenditures to be reimbursed were originally made not more than sixty (60) days prior to the adoption by the State of a declaration evidencing an intention to reimburse such expenditures from the proceeds of a tax-exempt bond, (iii) the SUNY and the SUCF will make a reimbursement allocation for such expenditures to be reimbursed, which is a written allocation that evidences the use of proceeds of the Allocable SUNY Bonds to reimburse the expenditure, no later than eighteen (18) months after the later of the date on which the expenditure is paid or the SUNY Project is placed in service or abandoned, but in no event more than three years after the date on which the expenditure is paid and (iv) amounts corresponding to such reimbursements will not be used in a manner that creates “replacement proceeds” of any tax-exempt bond.

Section 7. No Other Funds; No Other Issues. Other than the Funds and Accounts established under the Resolution, neither the SUNY nor the SUCF have or will establish any account or fund the amounts in which are expected to be used to pay debt service on the

Allocable SUNY Bonds. Neither the SUNY nor the SUCF are aware of any other issues of tax-exempt bonds other than the Authority's State Personal Income Tax Revenue Bonds (General Purpose), Series 2010F, that will be (a) sold at substantially the same time as the Bonds (*i.e.*, within 15 days of October 5, 2010, the date on which the Bond Purchase Agreement with respect to the Bonds was executed); (b) sold pursuant to the same plan of financing with the Bonds; and (c) reasonably expected to be paid from substantially the same source of funds as will be used to pay the Bonds (determined without regard to third-party guarantees).

Section 8. Not Hedge Bonds. The SUNY and the SUCF reasonably expect that at least 85 percent of the net sale proceeds of the Allocable SUNY Bonds will be spent to carry out the governmental purposes of the Allocable SUNY Bonds within three years of the date hereof and not more than 50 percent of such proceeds of the Allocable SUNY Bonds will be invested in Nonpurpose Investments having substantially guaranteed yields for four years or more.

Section 9. Ownership of the SUNY Projects. All portions of the SUNY Projects will be owned (for Federal income tax purposes) by the Authority, the SUNY, the SUCF or the State of New York until the final maturity of the Allocable SUNY Bonds, unless the Authority has provided prior written consent to the SUNY and the SUCF to apply proceeds of the Allocable SUNY Bonds to pay costs of property owned by another person or entity.

The SUNY and the SUCF will not use any proceeds of the Allocable SUNY Bonds to make any advance to Buffalo 2020 Development Corporation ("**Buffalo 2020**") or otherwise pay for any costs of property to be acquired or used by Buffalo 2020, including, without limitation, the property described in (i) the Contract for Purchase and Sale of Condominium Unit, dated December 4, 2009, between Kaleida Health and Buffalo 2020, and (ii) the property known as the Gateway Project, which is expected to be transferred to Buffalo 2020, without the prior written consent of the Authority. Furthermore, the SUNY and the SUCF acknowledge that, unless the Authority has advised it in writing to the contrary, any proceeds (including investment earnings thereon) of the Allocable SUNY Bonds to pay costs of property owned or leased by or to Buffalo 2020 will be Private Use Proceeds

Section 10. No Disposition of the SUNY Projects. Neither the SUNY nor the SUCF expect to sell or otherwise dispose of any portion of the SUNY Projects prior to the final scheduled maturity date of the Allocable SUNY Bonds, unless, first, the Internal Revenue Service shall have ruled, or the SUNY or the SUCF shall have delivered to the Authority an opinion of nationally recognized bond counsel satisfactory to the Authority, to the effect that such sale or other disposition will not adversely affect the exclusion from gross income of the interest on the Bonds for purposes of Federal income taxation.

Section 11. Compliance with Tax Certificate. The SUCF and the SUNY each reasonably expect that to the extent that it has responsibility for matters set forth in the Tax Certificate, it will comply with the Tax Certificate, as such Tax Certificate may be supplemented from time to time. Accordingly, in any instance where the Tax Certificate, as supplemented, is inconsistent with the expectations described herein, the SUCF and the SUNY each intend and expect that it will comply with said Tax Certificate as supplemented.

Section 12. No Purchase of Bonds. Neither the SUNY, the SUCF nor any related party, as defined in Section 1.150-1(b) of the Treasury Regulations, will purchase the Bonds in

an amount related to the amount of the Allocable SUNY Bonds used to finance the SUNY Projects.

The SUCF and SUNY understand that Co-Bond Counsel may rely upon this certification, among other things, in providing their opinions that interest on the Bonds is excluded from gross income for federal income tax purposes.

I am an officer of the SUCF or the SUNY, as the case may be, who has the authority to make the representations and certifications set forth herein and who, with others, is responsible for the acquisition and financing, and refinancing, of the SUNY Projects. The SUCF and the SUNY each has discussed, with such professionals as we have deemed necessary (including Co-Bond Counsel), the provisions of this Certificate, the Code and the applicable Treasury Regulations. Based on these discussions, we are satisfied that (a) we understand the certifications and representations which we have made in this Certificate and (b) we understand the basis for continuing compliance with the representations made in this Certificate in order to maintain the exclusion from gross income for federal income tax purposes of the interest on the Bonds.

The statements contained herein fully and accurately represent the facts as known to the SUCF and the SUNY, and are, in their opinion, true and correct, and no information available to the SUCF and the SUNY has been omitted herefrom, the omission of which would tend to render misleading any of the statements therein contained in the circumstances in which they are made.

[SIGNATURE PAGE IS NEXT]

**IN WITNESS WHEREOF**, the State University Construction Fund has signed this certificate on this 14th day of October, 2010.

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Authorized Officer

**IN WITNESS WHEREOF**, the State University of New York has signed this certificate on this 14th day of October, 2010.

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Authorized Officer