
CULTURAL FACILITIES PROJECT APPROVAL GUIDELINES

Subject: Project Approval Guidelines
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Code Section/Reference: ORC Chapters 123 & 3381
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APPLIES TO

Cultural Facilities Projects

I. Background

This guideline outlines the major steps that the Ohio Facilities Construction Commission (the “Commission”) and the Commission staff undertake in the review and approval of a bond-funded Cultural Facility Project (the “Project”) based upon relevant information, including materials provided by the applicant (the “Project Sponsor”).

The Project Sponsor will submit requisite information per a grant checklist provided by the Commission. The Commission staff then verifies, reviews, and analyzes several critical factors, considering all relevant laws, the requirements related to the tax-exempt bonds used to fund Commission projects, and public policy standards for proper use of public funds. Once the Commission staff completes their review, analysis and assessment, the Commission staff develops a recommendation to the Executive Director for approval.

Once the grant is approved by the Executive Director and the state Controlling Board, the Project Sponsor and the Commission enter a Cooperative Use Agreement (CUA). The CUA fully describes the understanding between the two parties regarding use of the grant funds and continuing obligations over the life of the capital bonds that finance the project.

II. Due Diligence Prior to Approval

A. Sponsor Organization

As required in ORC Section 123.28, the Commission staff verifies whether the Project Sponsor is a governmental agency or Ohio nonprofit corporation that occupies, will occupy, or is responsible for the Ohio cultural facility or a regional arts or cultural district as defined in ORC Section 3381.01.

If the Project Sponsor is not a local government, Commission staff will verify that it is:

1. A 501(c)(3) corporation in good standing;
2. In good standing with the Attorney General’s Office, Charitable Law Section;
3. In good standing with the Secretary of State’s Office; and

4. Not listed in the Auditor of State's Findings for Recovery database per ORC Section 9.24.

B. Scope

1. Qualifying Work

- The Commission staff verifies that the Project scope is for "construction" as defined in ORC Section 123.28, which can include acquisition, including acquisition by lease-purchase, demolition, reconstruction, alteration, renovation, remodeling, enlargement, improvement, site improvements, and related equipping and furnishing.

2. Presentation of Culture

Commission staff verifies that culture is presented or will be presented at the facility that satisfies ORC Section 123.28, including, but not limited to:

- Visual, musical, and dramatic arts provision of education in the arts
- The presentation of principles of science and its use in business and industry
- The preservation and presentation of features of archeological, architectural, environmental or historical interest

3. Local Historical Facilities

ORC Section 123.28, establishes criteria for facilities that may receive grants through the Commission as "Local Historical Facilities." In some cases, Local Historical Facilities are historical in nature but might not become fully operational after the Project funded by the Commission. If the facility is not open and operable at the conclusion of the Project, or the only attribute of the project that meets the definition of "Culture" under ORC Section 123.28 is the preservation or restoration of a historic facility, two standards must be met:

- The facility must be recognized as having historic significance, (i.e., it is listed on or is eligible for listing on the National Register of Historic Places [the "National Register"] or on a local or regional historic register, or is a contributing building [as that term is defined by the Secretary of the Interior]) in a National Register historic district or a local or regional historic district recognized by a local or regional governmental agency or historic preservation organization; and

The facility must also present culture (local history) to the public. Commission staff considers the following factors in this evaluation:

- Availability of tours of the site or the facility that interpret and convey local history and/or the history of the facility or site
- Availability of interpretive brochures or inclusion of information about the historic significance of the site in brochures or other media
- Presence of or plans to install a plaque, historic marker or other permanent method for providing interpretive information that conveys the historic significance of the facility and/or site to the public

For the purpose of these guidelines, meeting these two standards will satisfy the statutory requirement that the completed Project can be completed and ready for full occupancy as defined in ORC Section 123.281(B)(5). The Project Sponsor will submit evidence and Commission staff will verify that the Project meets these two standards.

C. Financial Considerations

1. Full Funding

- The Commission staff reviews the Project costs and the available funding to determine whether the Project can be constructed with the available funds, as required by ORC Section 123.281(B)(5) and measured by the Commission's fully funded project standard, as described below.
- The Project Sponsor will submit to the Commission a project cost estimate prepared by a design or construction professional. This estimate will be used as the basis for full funding.
- A fully funded Project is one in which the Project Sponsor can demonstrate that the funds to pay for all hard and soft costs of the Project have been raised. "Raised" means written pledges from credit-worthy entities, written funding commitments from governmental entities and/or written guaranties and/or cash receipts, or a combination of these supported by evidence to the Commission staff's satisfaction.

Any lines of credit, loans, local bonding, bridge financing and/or other cash flow mechanisms must be secured by acceptable written agreements. These agreements include written pledges or written guaranties from credit-worthy entities, written funding commitments from governmental entities, and/or a combination of these. These written agreements are the only instruments acceptable as security for such financing.

Adequate funding is additionally based on the idea that the Project Sponsor can:

- Show a positive cash flow during the construction period
- Demonstrate that capital Project debt is not financed by projected revenues from future operations
- Verify that any loans and lines of credit are backed up by written pledges or legally binding written guaranties for the full loan amount

In the event that the Project is not fully funded, Commission staff may recommend that the Project enter into a Cultural Facility Memorandum of Understanding. Please see Section III.E (Memorandum of Understanding) below for applicable conditions.

2. Local Matching Contributions

In accordance with statutory requirements {ORC Section 123.281(B)(2)}, the Project Sponsor must prove to the Commission staff, prior to expenditure of state funds on a Project, that the governmental agency or cultural organization has local contributions amounting to not less than 50 percent of the total state funding for the Project.

The Commission staff verifies that the Project Sponsor can demonstrate that it has obtained non-state resources equal to at least 50 percent of the total state funding. The match must represent funds that will be used for the current improvements project and, depending on the Project circumstances, may be satisfied by the following:

- Written fundraising pledge letters or pledge cards signed by donors to a capital campaign
- Documentation that other grants have been fully approved for the Project, and are not subject to other, still unmet, qualifications
- Certification of cash on hand or in a capital fund account
- Endowment funds, which must be newly raised and restricted or designated for operations and/or maintenance of the Project
- Verification of the site value through a property tax valuation, an appraisal, or a property insurance certificate stating the value of the site
- Substantiated value of in-kind contributions of goods or services to the capital Project

D. Real Estate and Construction

1. Property Title

The Project Sponsor certifies that the Project site (the “Premises”) is, and will be, free of any restrictions of record with respect to the Premises or the Project, including without limitation, any encumbrances, liens or other matters, which would interfere with or otherwise impair the use of the Premises as an Ohio cultural facility or restrict the rights and obligations granted by the Project Sponsor to the Commission. Commission staff may request supporting documentation, including but not limited to:

- Deed and legal description of the property, and site survey map, if available
- Title opinion letter or title insurance commitment letter and/or title insurance policy
- Loan or mortgage documents and/or liens against the property identifying any bond documents, letters of credit or security/collateral agreements and a loan pay-down plan
- Facility lease agreement—if the property is not owned by the Project Sponsor, plus written approval from the owner of the Premises to enter into agreements with the Commission

2. Schedule

The Project Sponsor will be required to submit a Project Schedule with a start and end date. In the Cooperative Use Agreement, the Project Sponsor will be required to affirm that it will reasonably adhere to the schedule, and construct the Project with reasonable speed.

3. Construction Self-Performance

Pursuant to Section 123.281(B) of the ORC, construction administration services may be provided on a Project by a governmental agency or cultural organization that occupies, will occupy, or is responsible for the Ohio cultural facility.

If the Project Sponsor is not retaining the services of a professional construction administrator and is planning on self-performing construction administration, the Commission staff may assess

the qualifications of the construction administration team, as submitted by the Project Sponsor. The review may take into account relevant factors including, but not limited to, the experience of the proposed administration team to:

- Oversee the selection process for hiring design and/or construction management consultants
- Oversee an appropriate selection process for construction contractors
- Oversee a Project of the size, type and construction as proposed
- Control costs of the proposed Project
- Ensure compliance with all applicable laws and regulations

4. Historic Preservation Evaluation

Per ORC Section 149.53, the Commission cooperates with the Ohio Historical Society and Ohio Historic Preservation Office (OHPO) in the evaluation of capital improvements at historic properties. Proposed changes to all properties of a historic nature (50 years old or more) should be evaluated. The Commission requests that the Project Sponsor provide their plans, in advance of commencing work, to the Ohio Historic Preservation Office for review. OHPO will evaluate whether the proposed actions meet the Secretary of the Interior's Standards for Treatment of Historic Properties.

E. Operations and Maintenance

In accordance with best practices for the use of public funds, contractual obligations, and Internal Revenue Service requirements, the Commission staff will analyze whether or not the Project Sponsor will be able to operate the facility and present culture to the public over a sustained period of time. Commission staff will first conduct an initial review based upon the Project Sponsor's publicly available IRS Form 990, Return of Organization Exempt from Income Tax. Commission staff may request supporting documentation in an attempt to substantiate the Project Sponsor's current and historical financial condition, including but not limited to:

- Audited financials for the last two years
- An operating pro forma which projects income and expenses for the organization for a time commensurate with the Project or as determined by Commission staff, but typically not less than five years
- A fundraising report and cash flow schedule for any anticipated funds
- Any loan or mortgage documents

In cases where the Project Sponsor is facing financial challenges, the Commission may require, as a condition of approval, additional security from the Project Sponsor to better protect State bond funds through a guaranty of repayment of State funds, or a guaranty of performance of contractual obligations, in the event of default by the Project Sponsor.

Some of the alternatives that may be used include, but are not limited to, the following:

- Letter of Credit: A bank names the Ohio Facilities Construction Commission as beneficiary of a letter of credit in the amount of the state appropriation. The bank would pay the state an amount equal to the unamortized bonds outstanding.

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- **Third-Party Guaranty:** A credit-worthy third party signs a financial guaranty for repayment in the amount of the state appropriation. (The standard for “credit worthy” is net assets or net worth of 10 times the amount of the guaranty). The amount of the guaranty would automatically reduce each year on a straight-line basis over the life of the bonds (assume a 10-year period).
 - **Restriction of Funds:** Dollars are set aside in an amount equal to the appropriation, usually restricted against an endowment or reserve. The amount restricted would automatically reduce each year on a straight-line basis over the life of the bonds (assume a 10-year period).
 - **Performance Guaranty:** A performance guaranty by a responsible third party [a 501(c)(3) or a local government] to perform under the contract in the event the Project Sponsor is unable to do so. This would involve the guarantor providing cultural programming to the public and operating and maintaining the facility for the time period the bonds are outstanding.
 - A combination of guaranties and/or restriction of funds totaling the amount of the appropriation, per the descriptions above.

In all cases, Commission staff analyzes the risks to the state, as the risk pertains to the Project Sponsor’s sustainability, and makes a recommendation to the Commission.

F. Risk Management

The Project Sponsor is required to submit documentation that it maintains, and will continue to maintain, commercial general liability and property insurance, in an amount sufficient to cover the full replacement costs of the improvements funded. Alternatively, if the Project Sponsor is self-insured, it may fulfill the insurance requirement by naming the State as an additional insured.

III. Approval of the Project and Authorization of Expenditure of Funds

The Commission may approve the Project and authorize reimbursement to the Project Sponsor for certain costs of the Project.

A. Delegation of Authority to the Executive Director

In accordance with ORC Section 123.21, the Commission delegates its authority to approve projects, authorize the expenditure of funds, and enter into legal agreements for all cultural facility projects to the Executive Director of the Commission. A report of project approvals is provided to the Commission at the next quarterly Commission meeting and is incorporated into the minutes for that meeting.

B. Legal Agreements

1. Upon full approval of the Project, the Project Sponsor and Commission must enter into legal agreements prior to expenditure of state funds.
2. Pursuant to ORC Section 123.281 and to the terms of the bonds used to fund Commission projects, the Commission must enter into a Cooperative Use Agreement (CUA) for each approved Project, which provides for the cooperative use of the facility. The CUA must be signed by an authorized representative of the Project Sponsor. Commission staff may request

a copy of the Project Sponsor's resolution or ordinance authorizing its execution of agreements.

3. All matters related to the reimbursement of approved Project-related expenses are documented in the CUA.
4. In cases where the Project Sponsor leases the facility, the Commission, the fee simple owner and the Project Sponsor enter into a Non-Disturbance and Estoppel Agreement ("NDE") dated the effective date of the CUA. The NDE identifies all restrictions or encumbrances affecting the premises so the Commission may determine that the Project can be constructed on the premises and operated for the term of the agreement.

C. State Controlling Board Approval

The State Controlling Board or the director of the Office of Budget and Management approves and certifies the release and availability of funds.

D. Reimbursement of Project Costs

The overall cost of the Project may include, but is not limited to, administration and consulting costs, facility construction, fixtures, furniture and equipment, start-up costs, and the cost of debt.

Commission staff reviews the Project budget to ensure that only expenses that meet the criteria for reimbursement are included in the Project costs submitted to the Commission for reimbursement approval. Criteria for allowable capital expenditures are set forth in the Revised Code and in each capital bill and capital re-appropriation bill, and may be amended from time to time.

Reimbursement of Project costs is made on a pro rata basis, up to the lesser of (a) the available state appropriations for the Project or (b) the available funds due to any other cap established in legislation. Payments to the Project Sponsor are made after costs are incurred and in accordance with the terms of the CUA. The CUA provides, among other things, that the Project Sponsor submit invoices no less frequently than on a quarterly basis to the Commission, with sufficient documentation to substantiate each invoice and certifications that the work being invoiced is completed.

E. Memorandum of Understanding

If a Project Sponsor is unable to satisfactorily complete certain conditions for Project approval, the Executive Director may wish to enter into a Memorandum of Understanding (MOU) with the Project Sponsor. The purpose of the MOU is to assist the Project Sponsor in understanding and fulfilling the requirements that need to be met in order to permit the Commission to approve release of the state funds.

Upon satisfaction of the conditions outlined in the MOU and based on Commission staff recommendation, the Executive Director may approve the Project and authorize the expenditure of state funds.