

CONSTRUCTION OF PUBLIC SCHOOL FACILITIES

ANNUAL REPORT ON THE STATUS OF ALTERNATIVE PROCUREMENT, PROJECT
DELIVERY AND FINANCING FOR MARYLAND PUBLIC SCHOOL CONSTRUCTION

SUBMITTED TO THE BOARD OF PUBLIC WORKS

Governor Martin O'Malley
Comptroller Peter Franchot
Treasurer Nancy K. Kopp

September 2, 2009



Barbara Ingram School for the Arts
Washington County Public Schools
Hagerstown, Maryland

The Interagency Committee on School Construction

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BACKGROUND

In 2002, the Task Force to Study Public School Facilities was formed under the leadership of Treasurer Nancy K. Kopp to determine the adequacy of public school facilities in Maryland. Specifically, the Task Force would determine if these facilities were adequate to support the educational programs that were to be funded through the Bridge to Excellence in Education Act of 2002. The Task Force investigation was broad, including not only the adequacy of existing public schools but also the procedures and practices that govern their procurement, delivery, and financing. A subcommittee of the Task Force investigated the feasibility of using alternative financing mechanisms to assist in building and renovating Maryland's public schools (Appendix A). Based on the experience of school districts in the United States and Canada that have used alternative financing for school construction, the subcommittee developed recommendations that were included in the Final Report of the Task Force, issued in February 2004.

During the 2004 session of the General Assembly, school construction received a great deal of attention. The Public School Facilities Act of 2004 addressed many aspects of school construction procedure and funding, included a section on alternative financing (Appendix B). The statute contains provisions that enabled the LEAs and local governments to use several alternative financing arrangements: lease-leaseback, sale-leaseback, public-private partnerships, and performance based contracting. The use of finance-design-build, a variant on the traditional design-build (DB) project delivery methodology in which the DB entity also provides financing for the project, was also allowed. The Act also addressed Construction Management At Risk (CMR), a method of project delivery that had been successful in the private sector but was not previously used for public schools in Maryland because of procurement restrictions. To further these progressive financing and delivery approaches, the statute enabled the local jurisdictions, under appropriate justification, to use alternative methods of project procurement - competitive negotiation, unsolicited proposal, and quality based selection (QBS) – in place of competitive bidding, the sole previous option.

While the 2004 enabling legislation opened a vigorous discussion about alternative financing, and has permitted several local educational agencies (LEAs) to apply alternative procurement and project delivery methods, it is only in recent months that an entire school facility financed through an alternative arrangement has been completed. *Washington County Public Schools*, in collaboration with the City of Hagerstown and a community development non-profit organization, and with the input of a private consultant, private counsel, and the Public School Construction Program, developed a leaseback structure for the renovation of a historic building in downtown Hagerstown as a visual and performing arts high school. This project, described more fully below, utilized Maryland historic tax credits as a significant component of the financing arrangement. Although access to the historic tax credits presented WCPS with a unique advantage, in other respects the financing structure for this project may provide a valid model for more conventional school construction projects. In the current economic situation, in which the constraints on operating budgets may reduce the willingness or capacity of local governments to issue debt, interest in alternative financing appears to be gaining momentum among a few of the local jurisdictions.

REGULATIONS AND PROCEDURES

The 2004 statute charged the Board of Public Works with developing regulations to govern the Public School Construction Program, the implementation of alternative financing, and other provisions of the Act. In January 2005 a workgroup consisting of superintendents and facility planners from the Maryland school districts, representatives of local governments, and officials from several State agencies that have an interest in public school construction was convened to study the problem (Appendix C). It was quickly found that project financing, project procurement, and project delivery are thoroughly interwoven with one another. Consequently, in 2005 and 2006 attorneys from the Office of the Attorney General and the Board of Public Works met regularly with the Executive Director and Deputy Director of the Public School Construction Program to develop coordinated regulations on these topics (Appendix D). A consolidated set of regulations was approved by the BPW for publication on December 6, 2006, and following regulatory review, became effective on May 21, 2007 as COMAR 23.03.01 – 23.03.05 (available at http://www.dsd.state.md.us/comar/subtitle_chapters/23_Chapters.aspx).

In the field of construction procurement, delivery, and financing, new instruments as well as variants on traditional instruments are regularly developed. When interpreting the regulations, the consistent desire of the Interagency Committee has been to provide realistic guidance to facilitate innovation in the construction of public schools while honoring fundamental principles of public school procurement. These principles can be summarized as:

- Procurement must be open and fair, so that all vendors are provided with an opportunity to participate if they qualify;
- The process of procurement should result in the best value for the taxpayers of Maryland;
- The process should deliver public school facilities that meet the educational and building performance standards that are expected of all Maryland public school buildings, irrespective of how they are procured, delivered, or financed;
- State requirements for minority business participation, for use of prevailing wage rates, and for high performance buildings must be incorporated into projects procured, delivered and financed under alternative methods when applicable, as they would be for projects procured and financed through conventional methods.

While the regulations provide a great deal of procedural detail, they do not eliminate the need to develop sound procedures to address alternative methods of project procurement, delivery, and financing. From May to October 2008, and beginning again in May 2009, the PSCP and its three sister agencies within the interagency structure – the Maryland State Department of Education, the Maryland Department of Planning, and the Department of General Services – have met regularly to update the *Administrative Procedures Guide of the Public School Construction Program*. Development of procedures on the issues covered in this report forms a part of this multi-year task.

SCOPE OF THE LEGISLATION

The first project to be reviewed by the Office of the Attorney General for conformance with the alternative financing provisions of the Public Schools Facility Act of 2004 was the central administration building for *Harford County Public Schools* (HCPS). A description of the building and its financing structure is provided below on page 10.

In a letter dated September 21, 2004, the Office of the Attorney General indicated that projects of the type then proposed by HCPS fall under the authority of the Public School Facilities Act of 2004. Consequently, such projects were required to be procured in accordance with the requirements of the legislation and of regulations that had not, at that time, been drafted. However, because the HCPS project pre-dated passage of the Public School Facilities Act, the OAG also excused it from compliance with review by the IAC and from the competitive procurement methods outlined in the legislation.

Subsequently, discussion between the OAG and the PSCP has led to a reappraisal of the scope of the legislation. In brief, the position of the PSCP and of the OAG is that neither the intention of the original legislation nor the traditional review and approval functions of the IAC and its designees warrant an extension of these activities into the arena of central administration buildings. The legislation was focused on the capacity of school facilities to support educational programs, not on the other functions of public school systems. As administration buildings are not funded by the State under the Capital Improvement Program or the other programs that the PSCP manages, they have traditionally not been subject to the review and approval of the IAC. Nor do they contain the educational purpose that warrants review and approval of locally funded projects by the State Superintendent.

As a result of this discussion, COMAR 23.03.05.01.B explicitly excludes from the requirements of the regulation “a building that is not used primarily for the instruction of students, including an office building, warehouse, or vehicle maintenance or repair building.” Clarification of the scope of the Public School Facilities Act of 2004 with respect to central administration buildings not only preserves the traditional focus of the Public School Construction program on facilities that support educational programs, but also provides greater latitude to the LEAs to explore innovative solutions to their facility concerns. Currently, some of the most important and interesting alternative financing projects concern central administration facilities (see below, page 10). It is anticipated that these projects will provide lessons for the eventual application of alternative financing to school facilities.

SCHOOL DISTRICT INITIATIVES IN ALTERNATIVE FINANCING, PROJECT PROCUREMENT, AND PROJECT DELIVERY

Alternative Financing

As reported in September 2007, interest in the use of alternative financing methods to build schools continues to remain extremely hesitant. In previous reports, we have noted the risk-aversion that is inherent among local school districts in the construction of public schools and that restrains the adoption of innovative techniques, encompassing not only alternative financing but also alternative methods of procurement, delivery, and construction. Of greater importance is the question whether alternative financing offers any financial advantage over conventional financing using general obligation bond revenues. In 2005, *Charles County Public Schools* and *Harford County Public Schools* explored alternative financing for a new middle school and the replacement of an existing high school, respectively, and both concluded that their projects could be carried out at lower cost and with less risk using conventional bond financing. In the alternative financing proposals that were reviewed, neither school system found schedule advantages that might have warranted the higher financing costs that would have resulted from use of these methods. *Cecil County Public Schools* reported that it had abandoned study of alternative financing for the construction of a new technology high school. *Montgomery County Public Schools* reported that because of its AAA bond rating, it does not consider alternative financing to be effective (however, the school system remains receptive to its use under appropriate circumstances).

The general hesitancy of the LEAs to use alternative financing for school construction corroborates the findings of the alternative financing subcommittee of the Task Force to Study Public School Facilities. In 2003, the members of the subcommittee recognized that there was no evidence, all other things being equal, that a project can be delivered through alternative financing at lower cost than through the use of conventional general obligation bonds. The private sector does not have access to funds at the same favorable interest rates as do local and State governments, which can pledge the full faith and credit of the public to support the bonds. This disadvantage is fully acknowledged by almost all private sector vendors of alternative financing methods. Only two circumstances appear to warrant these additional costs: when alternate financing can accelerate a project sufficiently to address an urgent educational issue or to offset the increased finance cost by forestalling construction cost escalation; or when the LEA can leverage a valued but underutilized asset as a component of the financial transaction. Special circumstances, such as the historic tax credit used in the Washington County project described above, can also influence the decision to use alternative financing over more conventional financing methods.

The fiscal conservatism of local governments and the limitations of internal staff capacity in the school districts have also been cited as blockages to the use of alternative financing by smaller jurisdictions. While showing that alternative financing may allow a project to move forward in the absence of State and local capital funding, *Washington County Public Schools* also wrote in 2007 that “The coordination of multiple partners and potential donors can be cumbersome. Determining each party’s role and responsibility, and the scope of work outside of any donations, all while procuring the work within COMAR regulations can be daunting and time consuming.”¹ The fact that WCPS proceeded with a very complex financing arrangement for the Barbara Ingram School indicates that these barriers are not necessarily insuperable (see below).

Interest on the part of financiers in alternative financing for school buildings diminished significantly after 2004/2005. *Montgomery County Public Schools* states that developers have a strong interest in the parcels that the school system owns for its central administration buildings because of their location in high-use corridors, and a relatively weak interest in MCPS schools, because they are located in residential areas. Aside from administrative buildings, developer interest is now focused on the use of alternative *funding* sources in order to provide capacity to remove Adequate Public Facility Ordinance (APFO) closures to housing construction.

In counterpoint to these general trends, in the last year interest in alternative financing appears to have revived in at least two jurisdictions. The *Baltimore City Government* has partnered with *Baltimore City Schools* to explore alternative financing mechanisms for capital projects, inclusive of school construction; a consultant’s report was recently provided and is now under review. *Wicomico County Public Schools* reports that it is studying alternative financing in order to achieve an early start on a replacement middle school, taking advantage of the high level of contractor competition and attendant lowered construction costs that have resulted from the current economic downturn. In early 2009 the school system formed an Alternative Finance Committee composed of a variety of financial, political and school facility stakeholders to investigate alternative financing options to address its large backlog of project needs. Based upon the committee’s input, the system is working with a consultant to align specific capital project needs with the appropriate alternative finance option. The system is interested in exploring fast track methods to take advantage of the current positive bidding climate.

Current Projects and Programs Using Alternative Financing

- *St. Mary’s County Public Schools* has used \$2 million in tax-exempt financing to purchase school-based equipment, STEM (Science, Technology, Engineering, and Mathematics) equipment, and busses.
- *Prince George’s County Public Schools* procured the furnishings and equipment for the new Dr. Henry A. Wise, Jr., High School, which opened in August 2006, through a lease-purchase financing agreement for \$6,500,000 in moveable and infrastructure equipment. School board operating funds are being used to repay the five-year financing agreement. Redirecting the cost of this equipment to the operating budget released county debt to complete the construction of the school.
- *Washington County Public Schools* has renovated a historic structure in downtown Hagerstown to house a visual and performing arts high school, the Barbara Ingram School for the Arts. This project is noteworthy not only for its innovative financing approach, but also because it is a component of the redevelopment of downtown Hagerstown as a cultural and arts center for Western Maryland, and because the educational program uses the nearby public library, a downtown theater, and a University of Maryland facility to supplement the facility requirements of the program, with the renovated building serving for core program offerings in the arts. While in many respects this educational program is modeled on the very successful Baltimore School for the Fine Arts, its use of public and private institutions in the urban surroundings to extend the

¹ Boyd Michael, Assistant Superintendent for School Operations, Washington County Public Schools, email dated August 9, 2007.

educational opportunities available to the students is a genuine innovation that has larger planning implications. If new schools are to be built within growth areas in order to promote walkability and become centers of community activity, it is likely that school districts will need to consider smaller sites that may not be able to support a full array of physical education and interscholastic sports facilities. Working models for the joint use of neighboring facilities owned by other government or community entities will assist school districts to acquire smaller sites without sacrificing their educational programs.



Historic Structure, Potomac Street
Hagerstown, MD

The existing Hagerstown building, a three story iron-frame and masonry office structure dating from 1903, was donated to the City of Hagerstown specifically to house the arts high school. In turn, the City transferred the building title to a local non-profit corporation, the Hagerstown Neighborhood Development Partnership (HNDP). Washington County Public Schools (WCPS) entered into a 20 year, triple-net operating lease with HNDP, with a stipulation that ownership of the facility will be transferred to the school system at the end of the lease term. A private consultant engaged jointly by WCPS and HNDP competitively solicited financing for \$8.3 million to pay for the largest component of the renovations and additions required to support the educational program. The results on bid day exceeded expectations, and in combination with the historic tax credit, delivered project financing at a total cost below conventional general obligation bond financing.



Barbara Ingram School for the Arts, Rear Facade
Hagerstown, MD



Meeting Space Renovated as Dance Studio

The proceeds of the private financing were placed in an escrow account under an Escrow Manager. Once a financing vendor was selected, HNBP assigned the lease to the vendor but retained responsibilities as owner of the facility. HNBP and WCPS were jointly responsible for engaging the constructor; HNBP held the contract but WCPS supervised it as agent to HNBP, drawing from the proceeds of the lease transaction as needed to provide payments. WCPS was responsible for all costs that exceed the available financing; however, conservative management allowed the project to be completed within the established budget.

The cost of this project was \$10.6 million and has been funded from various sources in addition to the \$8.3 million component. As a private entity, HNBP is eligible for State of Maryland Historic Tax Credits equal to 20% of the eligible costs of construction, a credit now estimated at \$1,250,000. Once secured at the completion of the renovation, the tax credit will be assigned to WCPS.² The balance of the funds needed (\$1,062,000) was obtained through Legislative Bond Bills, a Maryland Department of Business and Economic Development (DBED) grant, and a Community Legacy Grant.

All parties in this arrangement demonstrated a great willingness to comply with the State regulations governing alternative financing of public school facilities, and provided both the required preliminary determination of justification as well as drafts of the comprehensive agreement and other legal instruments for early review by the PSCP. As a locally funded project that has never been submitted for State approval in the Capital Improvement Program, the agreement and the construction contract were subject to approval by the State Superintendent, not the IAC. However, in accordance with the spirit and letter of the regulations, the PSCP advised the Superintendent on the viability of the arrangement, and in particular its conformance to State requirements regarding competitive solicitation of the financing. The PSCP provided an informational report to the Interagency Committee on September 19, 2007. The separate construction contract, once submitted to MSDE for approval by the State Superintendent, was reviewed similarly to other construction contracts. The architectural design was fully reviewed by MSDE and was approved to proceed to bid by the State Superintendent.

There has been ample discussion among the parties about how State CIP funds can be accessed in the future to support the project on a reimbursement basis. If the project is submitted for approval in the FY 2011 or subsequent CIP requests, it will be reviewed according to the same factors that govern any project, namely local priority, enrollment, educational program, schedule, cost, and availability of funds. Although highly unique, the Barbara Ingram project is not without precedent: in 2004 the Board of Public Works approved for planning and subsequently for funding the renovation and expansion of the Baltimore School for the Fine Arts, a project completed in 2007. In that case, no alternative financing arrangement was involved, although a substantial amount of the funding was provided through private fund-raising as well as historic tax credits. Since the Barbara Ingram School does involve a long-term lease-purchase arrangement, the possibility exists that the State could use a long-term investment approach to funding the project rather than the lump-sum grant approach that is typically applied to project funding. An alternative involves a multi-year series of small annual requests by WCPS. Both arrangements, which could save the State a very substantial amount of funds, will be fully investigated if and when Washington County Public Schools submits the project for State approvals.

Although many school districts are under intense pressure to build new schools and renovate existing schools, they generally do not believe that the urgency is sufficient to warrant the uncertainties or costs associated with alternative financing approaches. Two exceptions to this general observation are energy performance contracting and central administration buildings:

² The transfer of credits has been reviewed and approved by the Attorney General for the Maryland Historic Trust.

Energy Performance Contracting (EPC, also called Performance Based Contracting and Guaranteed Performance Contract)

A number of LEAs are now involved with energy performance contracting, in which savings that accrue from energy-related improvements are used to finance the improvements over an extended amortization period. As energy costs continue to rise, this approach has become increasingly attractive in order to improve the energy performance and the comfort of Maryland's many older facilities, which were frequently built to low energy standards in the 1960s and 1970s. The scope of work may include both projects that result in energy savings, for example a roof and boiler replacement, as well as components that may have no energy-saving potential, e.g. expansion of a media center. By combining projects in this way, greater efficiency in procurement and better overall costs are obtained. Since the energy service companies (ESCOs) that provide the improvements must guarantee savings for a number of years (typically 15), they are obligated to provide routine preventive maintenance on the equipment that they install. If the savings are not realized, the ESCO is obliged to reimburse the "lost" savings to the local board. Following are current instances of this approach:

- *Baltimore City Public Schools (BCPSS)* has entered into agreements with four ESCOs under the Department of General Services EPC program. Each ESCO has and will provide energy improvements to a number of schools, and each is in addition contracted to provide preventive maintenance (PM) for mechanical systems in the schools that receive energy improvements as well as in other geographically related schools, irrespective of whether the HVAC equipment was installed by the ESCO or not. The HVAC preventive maintenance tasks that lie outside of the ESCO's normal obligations with respect to the equipment they install are funded through the school system's operating budget. Due to budget constraints, the PM responsibilities for items not installed by the ESCOs were not as extensive as originally envisioned when the idea was broached in 2005. The energy improvements are often funded from several sources, for example lump-sum funding through the State's Capital Improvement Program and Aging School Program is combined with financing secured by the long-term energy savings and other local funds to execute the capital projects. As BCPSS has closed a number of schools in the 2006 through 2009 school years, priority has been given in recent summers to capital projects in the schools that were assigned to receive students from the schools scheduled to close; these schools also received other improvements unrelated to the EPCs, e.g. painting and new ceilings. Energy savings are reported to have been less than anticipated because of community use of the facilities in non-school hours.

Reports in late summer 2006 indicated that the ESCOs performed above expectations and that the level of quality was high. The Chief Operating Officer reported in 2009 a significant decrease in the number of complaint calls that are received from schools. However, it has also been found that staff oversight is an important factor in maintaining the quality of PM that is performed by the ESCOs. In addition, BCPSS has developed the practice of evaluating each capital project to determine if it is more economical to procure it through one of the ESCOs or to follow conventional procurement and project delivery practices.

BCPSS has provided a model of how a school system with an aged and deficient building inventory can accomplish significant upgrades, improve building performance, and concurrently implement a PM program for building components that have a considerable impact on occupant health and productivity.

- *Carroll County Public Schools* has entered into a fourth performance contract with an energy management company that includes new air conditioning (AC) projects for three schools in addition to energy saving projects (lighting, bathroom fixtures, control upgrades, high efficiency HVAC equipment, billing evaluation services, etc). With the year of installation and the first year of operation included in the performance period of July 1, 2007 to June 30, 2008, a net cost avoidance of \$1.6 million has been achieved, exceeding by \$767,000 the cost avoidance that was originally estimated for the period.

- *Cecil County Public Schools* approved in 2005 a \$9.3 million performance contract with an energy management company for energy related facility improvements to all 29 schools in the county as well as the central office. Projects ranged from boiler replacements to lighting upgrades, as well as a complete wide area network (WAN) technology. These upgrades are expected to show a payback over a 15 year period, with the energy management company guaranteeing the energy savings. The school system received a favorable opinion from the county's bond council on the issue of how bond ratings are affected when capital projects are funded through this method. The performance contract is now complete and some benefit in utility usage has already been experienced. The LEA reports that central office renovations not only provided for greater energy efficiency, but also allowed for architectural upgrades which are difficult to fund through conventional funding sources.
- *Howard County Public Schools* is in the fourth year of a multi-year energy performance project. To date, 13 schools have been contracted for conservation measures. An estimated \$600,000 in annual savings has been projected for the 13 schools. The school system is reviewing a recently completed systemwide facility assessment in order to determine whether it should proceed to a third phase involving a larger number of schools.
- *Prince George's County Public Schools (PGCPS)* is utilizing a Department of General Services' Energy Performance Contract (EPC) to upgrade, replace, and maintain building and energy components in schools and offices. PGCSP operating funds are used to service the debt on the financing agreement. Debt service and other costs of the projects will be fully recovered over a 15 year period through guaranteed lower energy and maintenance costs resulting from the improvements. Contracts totaling \$50.5 million are in place, funded from a combination of existing CIP systemic project resources (\$15.8 million) and lease-purchase financing (\$34.7 million). Implementation of the contract began in fiscal year 2007, with installation of the approved energy conservation measures scheduled over the following two years.

A second phase of the Energy Performance Management initiative is under consideration that will expand efforts by another \$100 million, to include additional schools and offices funded from a combination of existing CIP resources (approximately \$35 million) and future lease-purchase financing (approximately \$65 million). Prince George's County Public Schools writes that use "of alternative financing...provides a cost-effective vehicle (i.e., cost neutral over the financing term due to lower guaranteed energy and maintenance operating costs) for accelerating needed facilities improvements that would otherwise be deferred to future years based on available bond or pay-go funding."³

- *St. Mary's County Public Schools*. Over the last 15 years, SMCPS has entered into three energy performance contracts for the majority of its schools. A recent benchmark analysis by the vendor showed that St. Mary's County public schools use considerably less energy per square foot than the national medians for these types of facilities. The study also found few opportunities for additional equipment modifications to realize further savings over a 15 year term.
- *Somerset County Public Schools* engaged the services of Energy Education, Inc. (EEI) to help manage and track energy consumption. The contract is restricted to human behavior issues, not capital equipment; however, this is a performance contract in that if SCPS does not save enough in energy expenditures to cover the costs of the consultant, the latter will write a check for the difference. A base year has been established, and at the conclusion of the first anniversary a determination of savings will be made. Settlement will occur after reconciliation of figures by both parties, a process that will account for changes in energy sources and weather conditions. Thus far the system has saved about \$250,000. Other LEAs have used a similar human behavior approach, but without the guarantee of savings: Allegany County Public Schools was the first county to run a full four year contract cycle, which they renewed after the initial contract period.

³ Eric Walker, Interim Chief Administrator for Supporting Services, Prince George's County Public Schools, letter dated August 10, 2007.

On the Eastern Shore, other LEAs that participate with EEI are Queen Anne's, Talbot, Kent, Dorchester and Caroline.

- *Wicomico County Public Schools* is investigating performance based contracting for HVAC systemic project as a means to leverage limited funding, broadening this concept beyond the typical opportunities for potential energy savings.

Central Administration Buildings

Aside from the projects described above in Washington County and Prince George's County and the investigations being undertaken by Baltimore City Schools and Wicomico County Public Schools, activity in alternative financing of LEA facilities is currently focused on central administration functions. Investor interest may have shifted to this type of facility for several reasons:

- A reluctance on the part of county governments to issue debt for administration facilities, in which the State does not participate through its capital funding programs.
- Anticipated improvement of administrative and operating efficiencies by consolidating functions previously housed in geographically separated and obsolete buildings into a single facility, sometimes using the avoided costs of rent payments or the sales of the former administration buildings to offset the costs of the new structure.
- The view of developers and financiers that administration buildings that are built to office standards offer more possibilities for re-use and marketability than do school buildings, and consequently offset the risks associated with potential non-appropriation of lease payments.
- As noted above, developers appear to have a stronger interest in the parcels that the school system owns for its central administration buildings because of their location in higher density corridors, while schools tend to be located in low-density residential areas.

The following central administration projects are at various stages of development or completion:

- *Harford County Public Schools (HCPS)*. In 2005, HCPS completed a 73,000 square foot central administration building in downtown Bel Air through a lease-leaseback financing arrangement. Central office functions previously housed in an administration building dating from 1872 and in four other leased offices were consolidated into the new facility. Avoided rents on two of these administrative offices are used to partially fund the lease payments. The deteriorated condition of the existing facilities precluded their further use as administrative quarters. It is expected that the administration of the school system will improve in efficiency through centralization of central office functions. Following competitive negotiation to procure a combined construction and finance package, the construction contract was awarded, but it was then decided to procure the financing separately through competitive negotiation with a number of banks. The term of the lease-leaseback finance agreement is 25 years, with a ground lease on the land only and assumption of title by the Board of Education after 25 years. There is no pre-payment penalty. Construction funds were placed in an escrow account through a Mutual Fund consisting of US Treasuries.

It is anticipated that the savings generated through avoided lease costs will reach a break-even point at 7.5 years. In the analysis of the payback period, HCPS compared renting an equivalent amount of space vs. the lease-leaseback option. The new administration building was designed to achieve a LEED (Leadership in Energy and Environmental Design) Silver certification, but was actually awarded a higher ranking of LEED Gold.⁴

⁴

A Powerpoint presentation on this project is available on request

- *Frederick County Public Schools (FCPS)* will not use any alternative financing approach in the foreseeable future to build a school facility; they wrote in August 2005 that “public financing is judged to be least expensive for long term project financing.” However, the school system is in the process of implementing an alternative financing arrangement for a proposed central administration office in the City of Frederick that will consolidate functions now housed in four inefficient buildings located several miles apart. Although the Frederick County government did not want to issue debt for the project, the County and Board agreed that the new administrative building could be funded through the Board’s operating budget.

An original concept, in which a developer would build and lease the facility to the Board, was rejected because the developer would not have access to tax-exempt debt and the property would be subject to real property taxation. Instead, the Board will execute a tax-exempt lease-purchase agreement that will fund land acquisition from the City of Frederick, construction of the project, contingencies, and costs of closing. The Board will ground-lease the land for 40 years to the selected lease provider, which will in turn leaseback the land and the building, once constructed, for 25 or 30 years to the Board. The transaction will be structured as a conditional purchase agreement, whereby the Board will own the property at the end of the 25 or 30 year period. Purchase installments, which will be considered a current expense of the Board subject to non-appropriation and not as debt, will have a principal and interest component. The interest will reflect tax-exempt rates that are approximately 30-40 basis points over general obligation debt, due to the non-appropriation risk and the illiquidity of the lease purchase agreement.

Advantages that FCPS sees in this arrangement are:

- The 40-year ground lease enables the lease provider to realize the economic value of the property in the event that the Board of Education does not appropriate funds to make the purchase installments.
- The arrangement overcomes several obstacles, including County constraints on issuance of debt for the administration building, the inability of the Board to issue debt on its own or secure real estate with a deed of trust, and the requirement of the Board and the County that payments fall within preconceived limits.
- While the interest component of the purchase installments is above what the County would have paid had it agreed to issue general obligation debt, issuance costs are lower. In addition, the occupancy cost will be significantly lower than if a developer had built and leased the building directly to the Board of Education.

In December 2006, FCPS issued a Request for Proposals (RFP) for design-build services for the new building, with alternates regarding the size of the building (75,000 or 90,000 square feet) and the extent to which it would be finished and furnished. Technical proposals from five entities were received, of which three were invited by the Evaluation Committee to submit cost proposals. One proposal submitted by a local team was approved by the Board of Education in June 2007. Financing through Sun Trust was approved in October 2007 and settlement on the land with the City of Frederick occurred in December 2007. Since that time design and permitting of the project has taken place and the new building is presently under construction. A summer 2010 occupancy date is planned.

- *St. Mary’s County Public Schools (SMCPS)* used tax-exempt financing from a 15 year mortgage through Sun Trust for the purchase and construction of an addition to its main administrative facility in 2002. As a result of its conservative fiscal practices, SMCPS has accumulated a sufficient fund balance to pay off the remaining mortgage balance eight years ahead of schedule.

Alternative Funding

Three school districts, two of which have expressed no current interest in alternative financing, are using or exploring alternative *funding* mechanisms to build public school facilities. In alternative funding, construction monies are provided from a third source – private developer, private foundation, non-profit organization, grants – to replace part or all of the local obligation for a project. The local government may use conventional general obligation bond revenues for the balance of their project funding, and the project is procured and delivered through conventional means, with the addition of State funds if the project is approved through the CIP process. Several current examples of alternative funding are provided below. Not included are charter schools facilities, which are funded through private fund-raising or other mechanisms: although charter schools in Maryland are approved by the local boards of education and their students are public school students, they are typically housed either in facilities already owned by the board of education, or are in buildings that are privately owned or leased. These facilities generally do not add to the building stock in the local board's inventory.

- *Frederick County Public Schools* has three projects that have been or are using alternative funding sources:
 - A wing for a new high school was funded entirely by a private developer to allow housing projects to move forward against an APFO restriction. The project, which was designed and procured according to FCPS standard methodologies, opened in phases, with the first phase completed for the beginning of the 2007-08 school year and the second phase for the second half of the school year. Funds were accessed by FCPS through a line of credit. This project has been successfully completed and closed out.
 - A \$4.5 million earth-space science laboratory is being partly funded through private donations in the amount of approximately \$800,000. This highly popular program, which is attended by every elementary school child in the school system, has been housed in an obsolete wing of an existing school in Frederick City. The replacement structure will be co-located on the same site with the school, which is now under renovation. This project is scheduled for completion for the beginning of the 2009-10 school year.
 - An addition to a middle school that opened in September 2006 received partial funding from a developer. To stay on schedule, the county funded and the school system built the addition even in the absence of State planning approval. The developer agreed to pay the interest for up to seven years on the funds that the County borrowed in advance of the State share it anticipated receiving through the CIP approval process. If State funds had not been received at the end of seven years, the county agreed to assume the interest payments from the developer. However, State funding for the project was completed in FY 2008, releasing the developer from the obligation.
- *Garrett County Public Schools* has completed an addition to Grantsville Elementary School that includes spaces for both kindergarten and a Head Start program. The Head Start portion of the addition is funded by a federal Community Development Block Grant (CDBG) secured by Community Action, a local non-profit entity. This approach mirrors projects carried out elsewhere that have used funds from public sector entities or non-profits, e.g. the Maryland-National Capital Park and Planning Commission in Prince George's County, to build facilities that provide services to the public in the same facility that houses a school. The approach reinforces the identity of the school as a community center.
- *Montgomery County Public Schools*. In 2008 MCPS entered into a cooperative financing agreement with Real Maryland, a professional soccer team, to help finance the installation of an artificial turf field at Richard Montgomery High School. In exchange for funding approximately 30 percent of the cost of the field, the team was granted preferred scheduling of the field during non-school activity hours. The arrangement also provides additional hours of use for other community users through the county's office of Community Use of Public Facilities. A similar arrangement

has been approved for a local youth soccer organization to help finance an artificial turf field at Walter Johnson High School as part of the school's renovation project.

- *Washington County Public Schools.* In 2002 a community group approached WCPS to build a stadium and track for North Hagerstown High, which did not have a stadium and shared facilities with South Hagerstown High School. The community group obtained \$3,500,000 in pledges and donations for design and construction costs in the form of funds and in-kind donations from private and corporate donors, contractors and suppliers, the State's Program Open Space (POS) fund, the City of Hagerstown, and State general obligation bond proceeds (outside of the Public School Construction Program). On the basis of pledges for future and periodic donations secured by the community group, the County Commissioners have provided interim cash flow and financing for the project.

The project, now substantially complete, was delivered through a Construction Management Agency method using competitive sealed bidding of trade contractors. Using this project as a model, the Board is encouraging other community groups to develop similar cooperative projects.

The use of historic tax credits can also be considered a form of alternative project funding. As described above, both the Baltimore School for the Fine Arts and the Barbara Ingram School for the Arts in Hagerstown have used historic tax credits for the renovation of their facilities. Since these credits are only available to private entities, access to them requires establishing a third party, typically a non-profit 501(c)3 corporation, as intermediary. There are few school buildings in Maryland that are eligible for historic designation, but this source of funding can be considered in unique circumstances.

Project Procurement

Competitive sealed bidding remains the preferred procurement method among the LEAs for construction services. The method has the advantage of complete objectivity, since selection is based on a single factor, price. The simplicity and transparency of the method are also attractive. St. Mary's County Public Schools writes, "Given ample planning time and quality design documents, competitive sealed bids have consistently resulted in cost effective and high performance educational facilities."⁵ A major drawback, however, is the potential for the bid prices to be substantially higher than the budget allows, because estimates by the owner, architect, or even professional estimator may not reflect the precise bid climate that prevails on bid day. If costs are high relative to budget, the owner has three options, all unattractive: seek additional funds from the local fiscal authority; re-bid the project with the same scope, with the risk that market conditions may be even worse on the new bid day; or re-scope the project, incurring substantial delays and again with no assurance about the condition of the bidding market on a now distant bid day.

A further drawback to this procurement method is that a bidder who has not adequately covered the project scope will have a strong incentive to reduce quality during construction. Both problems increase during a time of rapid construction escalation, since the bidder must shoulder enormous cost risks, particularly for items or systems that have volatile pricing, e.g. petroleum-based products, or that have very long lead times, e.g. mechanical equipment and windows. The adversarial relationship between owner and contractor can result in large change orders or lack of accountability for schedule delays. While payment and performance bonds, required of all general contractors and of major subcontractors in some jurisdictions, alleviate some of these risks, dissatisfaction with this form of security has increased due to the slowness of the cure process and, in a few instances, the refusal of sureties to cure the defaults of their bond holders. General experience indicates that institutionalized security can only supplement, not substitute for, the experience, integrity, and personal commitment provided by a good contractor.

As a result of the liabilities inherent in competitive sealed bidding, a number of jurisdictions have embraced the multi-step sealed bid process, which requires bidders to pre-qualify for the specific project,

⁵ J. Bradley Clements, Chief Operating Officer, St. Mary's County Public Schools, letter dated June 23, 2009

often in addition to a general pre-qualification that applies to all projects. Short-listed constructors can then submit bids for the project. This approach typically results in a higher quality of bidder and consequently less risk to the owner, particularly with respect to change orders, schedule adherence, and a general improvement in teamwork and professionalism. School systems that use this method report a high level of satisfaction with the results, and the PSCP actively promotes the use of the approach whenever it is realistic. However, in locations where the supply of contractors and subcontractors is limited, there is concern that use of a method of selection based on any factor other than cost will diminish future competition by shrinking “an already small pool of prospective bidders. If, for example, the same electrical contractor was selected based on quality of bid rather than price, other prospective electrical bidders may stop coming to the table.”⁶

Montgomery County Public Schools uses a variant of the multi-step sealed bid process in which contractors are pre-qualified for groups of projects based on their past experience with projects of similar size. MCPS typically has three categories of projects, those below \$3 million, those between \$3 million and \$15 million, and those over \$15 million. These amounts are adjusted for inflation each year. In addition, MCPS uses a project-specific pre-qualification process for the major bidders on trades that will be assigned to a Construction Manager At-Risk (CMR) for its major building projects (see below).

Competitive negotiation, in which a vendor is selected based initially on qualifications followed by negotiation over scope of services and cost, continues to be the preferred method of obtaining professional design and Construction Management Agency (CMA) services. In these areas of professional practice, quality of service is a paramount concern and the measures of successful service are less objective than the cost of “bricks and mortar.” This method is also being successfully used to procure the services of the construction manager in Construction Management At-Risk (CMR) projects; generally, this procurement method is combined with competitive sealed bidding for the trade packages. While there is still hesitation to pay more than the lowest price for hard construction costs, competitive negotiation substitutes the concept of “best value” for “best price,” under the argument that a well-constructed, professionally delivered facility will ultimately be of greater value, and potentially of less cost, to the public than one that is fraught with defects and has been built through a contentious and possibly litigious process. Competitive negotiation is the only procurement method that seems reasonable when the project is at less than 100% completion of design on the date of award, for example in the Design-Build or in some variants of the Construction Management At-Risk delivery methods, because it allows the owner to work with the constructor and others to arrive at the scope of services and project scope that fit the budget objectives.

Maryland has seen an increase in intergovernmental purchase agreements for school construction projects, a process in which an LEA procures construction services through another governmental agency’s previously competed contract with a vendor. The method appears to work best for small projects that involve very uniform materials, standard construction details, and extensive, multi-project scopes, such as roofing and paving. *Baltimore County Public Schools* has procured roofing replacements through the Pennsylvania Education Joint Purchasing Council (PAEJPC), a member of the twenty-two state Association of Educational Purchasing Agencies (AEPA). The AEPA solicits bids for products and services through national advertisements and makes award to the lowest, responsible, and responsive bidder. PAEJPC members who use the program benefit from the ability to pick from quality contractors at pre-established bid prices for any type of roofing system. Since members do not have to solicit their own bids, project approval times can be significantly reduced. All multi-state vendors are fully bonded and have met the bidding requirements for the various states in which they propose to work. BCPS reports that it has enjoyed guaranteed, quality workmanship overseen by the PAEJPC, and that the ability of the roofing services vendor to pick qualified roofing contractors has provided an almost risk-free roof replacement program. The services that are currently being provided include full time project management, saving roofing inspector man-hours for the school system.

⁶ Joseph Price, Facility Planner, Worcester County Public Schools, email dated August 1, 2007.

Project Delivery

With the high level of State and local funding now dedicated to school construction, project procurement has become a lively arena for investigating new methods and discussing lessons learned. Project delivery affects every aspect of the project: the design approach, the schedule, the costs, the quality, and ultimately the satisfaction of the owner and the building's users. On September 11, 2007, the Public School Construction Program led a discussion among LEA facility planners to assess their current perceptions of the advantages and disadvantages of the various delivery methods described below. While experiences vary widely, the Construction Management At-Risk (CMR) delivery method offers schedule, cost, teamwork, and risk advantages that make it an attractive alternative to more traditional approaches. Use of this trend was made possible through the 2004 legislation that liberalized project procurement requirements to allow for competitive negotiation in place of competitive sealed bid.

General Contracting (GC) remains the project delivery method used for the majority of public school construction projects. It is appropriate for straightforward projects in which the design is complete on bid day and there are no unusual schedule, site logistic, or construction demands. The simplicity of having a single point of responsibility and of knowing all costs on bid day recommends this method. Most school systems pre-qualify their bidders; however, since the capacity of most LEAs to conduct in-depth investigations into contractors' experience and qualifications is highly constrained by their limited staff and time, the ability of the contractors to obtain bonding often stands as a substitute for other, more complex pre-qualification criteria. Unfortunately, experience shows that bonding can be easily obtained by contractors who later prove to be irresponsible, under-qualified, or unresponsive, and that bonding does not always provide sufficient protection to the owner in the event of contractor default. The result has been, in some cases, excessive change orders, poor coordination among subcontractors, and deficient quality requiring extensive close-out corrections and proceedings. In these circumstances, the architect as agent to the owner and author of the construction documents is frequently placed in an adversarial role relative to the contractor, a time-consuming situation that works at odds with the concept of a team approach. Consequently, some LEAs have moved toward other forms of project delivery, as well as to the use of the multi-step competitive sealed bid approach in order to pre-qualify general contractors for specific projects or types of projects.

Construction Management Agency (CMA), in which the LEA holds multiple trade contracts but engages a professional construction manager to provide pre-construction consultation as well as construction-phase management services, has in the last fifteen years joined general contracting as a conventional project delivery approach for Maryland public schools. Some school systems, for example *Howard County Public Schools* and *Anne Arundel County Public Schools*, use it for all or almost all their major projects. CMA is advantageous during periods of economic prosperity when there are a large number of bidding opportunities available to general contractors in the private and public sectors, often making it difficult for school projects in general, and school projects in remote areas in particular, to receive sufficient competition. Since CMA allows local trades to bid directly on projects, the owner and CM can reach out to smaller trade contractors who otherwise would only participate through a general contractor. Depending on the local capacity in a particular trade, the results have been very mixed, but the method allows an owner to re-bid specific trade packages when the results of the initial solicitations are not satisfactory. The method also allows the owner to break up trade packages into smaller components, making them more accessible to firms with lower bonding capacity, increasing the participation of small and disadvantaged contractors. *Anne Arundel County Public Schools* writes "AACPS will continue using CMA for our large projects and general contractors for smaller projects. This method is currently the best way for us to attract local small and minority businesses and compete for the contractors who are working on the many federal construction projects that are in our area."⁷

CMA is also attractive because the constructor is not in an adversarial relation to the owner and therefore can act as an extension of staff, a point that is particularly important for large jurisdictions executing multiple projects, or for small jurisdictions with severe staff limitations. *Worcester County Public Schools* writes:

⁷ Sandra Hughes, Manager of Facilities, Anne Arundel County Public Schools, email dated June 29, 2009.

“WCBOE Facilities Department consists of one individual. This staffing makes the use of construction management (agency) delivery method invaluable. CM is responsible for execution of the work and management of the prime contractors reducing the amount of project oversight required of the Facilities Department as compared to general contractor method.”⁸

Experience indicates that the most important common factor in projects that have used CMA successfully is the experience and commitment of the construction management firm itself, implying that selection of the CM needs to be done carefully and using well-tested procurement instruments that fully define the scope of services that are expected to be provided. A negative aspect of CMA is that the construction manager, as agent to the owner but not holder of trade contracts, is not at risk for the schedule, cost, or quality of the project. This point has become increasingly prominent in recent years, and has led some LEAs to adopt the Construction Management At-Risk (CMR) method described below. LEAs that like the CMA method have tended to use the same construction management firms for repeat projects, building up a solid client-consultant relationship and mitigating the effects of problematic projects with those that run smoothly. There have been instances, however, in which LEAs experienced excessive CMA fees when projects were extended past their completion dates due to bankruptcy or other performance issues among the trade contractors. LEAs also report that not being at risk, CMAs appear to be less inclined to fight for the owner’s interests in disputes with the trade contractors, and to demand the level of accountability and contract follow-up that is necessary to maintain the schedule.⁹ Just as CMA procurement needs to ensure that the construction manager is capable of forcefully managing the project with the owner’s interests in mind, CMA contracts need to be written very carefully in order to limit the liabilities of the LEA in the event of unforeseen conditions, an extended schedule, or trade contractor default.

Construction Management At-Risk (CMR) is a method in which a construction management entity is involved in the project during design and then offers a Guaranteed Maximum Price (GMP) prior to the start of construction. It is frequently stated that CMR combines the advantages and corrects the deficiencies of both the General Contracting and the Construction Management Agency delivery methods. Like General Contracting it establishes a single point of responsibility, the CMR, which carries all risk for the project schedule and cost; like Construction Management Agency, it allows this constructor to be deeply involved in the early design process, helping to tailor the project scope to the approved budget *before* the owner is obligated to make a decision to proceed, and it provides considerable flexibility in the selection of the trade contractors.

In the private sector, in which negotiated contracts are the rule, the GMP is generally offered before the construction documents are complete, allowing the owner to work with the CM to arrive at a final scope of work that meets both the performance objectives of the project and the owner’s project budget. In the public school construction arena, LEAs that have used CMR have selected the CM through a competitive negotiation process early in the design process, giving high priority to the CMR’s qualifications, including previous experience with similar projects and their overall record of responsibility, integrity, and responsiveness. However, in contrast to the private sector, these LEAs have elected to have the trade contractors selected through a competitive sealed bid process, based on 100% complete construction documents. While this approach reduces the flexibility of the CMR to put forward value engineering suggestions in order to align the project scope with the budget, it also has a level of objectivity that virtually ensures that protests will not be upheld based on a charge of subjectivity in the selection of the trade contracts. The process of trade selection is already very familiar to the bidding community, and one that allows Minority Business Enterprise goals and subgoals to be established for each individual trade package. In distinction to the individual package goals and subgoals that apply to the trade contractors, the CMR is obligated to meet or exceed the overall *project* MBE goal and subgoals, or to request a waiver. Those LEAs that have put CMR into effect anticipate that teamwork will improve on the project, change orders will be reduced, and project schedules will be adhered to.

⁸ Joseph Price, Facility Planner, Worcester County Public Schools, email dated August 1, 2007

⁹ Brian Foret, Director of Facilities Services, Wicomico County Public Schools, email dated September 5, 2007

Since the CMR approach works best if the GMP can be negotiated between the owner and the CM, it was not widely used for public schools in Maryland before the Public School Facilities Act of 2004 enabled the use of competitive negotiation for project procurement. In the standard method for procurement described above, the entirety of the construction value is awarded either through competitive negotiation or through competitive sealed bid. Under the regulations that govern delivery of public school construction projects (COMAR 23.03.04.06), this approach avoids the necessity for the LEA to re-solicit the entire GMP, a procedure that could possibly result in engagement of a different CMR during the construction phase from the CM which provided services during pre-construction.

- *Carroll County Public Schools* is utilizing CMR for a large high school HVAC replacement project. The CMR was selected via a two step procurement process utilizing qualifications to develop a short list and sealed competitive bids for the selection of the successful firm, establishing the GMP. This method was possible because the design documents were 100% complete and pre-construction services had been provided by a firm other than the successful firm.
- *Caroline County Public Schools* and *Dorchester County Public Schools* are utilizing CMR services, respectively, for renovation of a major high school and replacement of a Career and Technology High School facility. In each case, the CMR was selected through competitive negotiation and the trade packages through competitive sealed bid. The facility planner for Dorchester County Public Schools, who has extensive private-sector experience with a variety of delivery methods, has written:

“[We] are convinced that CM at Risk is the best delivery method to control cost, schedule, engender a team approach to the project and ultimately to deliver a high quality, well thought out facility that will stand the test of time. The project team has the incentive to pursue both quality and profit in an atmosphere of trust and mutual respect. The owner mitigates the risk on the front end by knowing the “price tag” for a given scope at the outset.”¹⁰

- *Montgomery County Public Schools* has used a modified form of the CMR approach, in which the LEA procures certain major trades independently through a multi-step sealed bid process and then assigns them to the CMR as part of the GMP. The balance of the trade packages are procured by the CMR through competitive sealed bids.
- *Prince George’s County Public Schools* has obtained pre-construction and construction-phase services for a major high school replacement project through a process of competitive negotiation that was exceptionally objective, involving a rigorous point system. The CMR will present the GMP during the Design Development phase, i.e., at approximately 50% to 70% of design completion. The trade packages will be procured through competitive sealed bidding, obligating the CMR to re-bid or re-scope individual packages as necessary in order to bring costs within the GMP.
- *Wicomico County Public Schools* is using CMR for the replacement of James M. Bennett High School. Since the construction documents were 100% complete, the CMR was selected using a two-step competitive negotiation process. The GMP was then finalized by using competitive sealed bidding for the individual trade packages. Based upon this experience, WCPS intends to use CMR with a similar procurement approach for the replacement of Bennett Middle School.

Design-Build (DB), in which a single entity is responsible for both design and construction of the project, has been used only for small projects, e.g. replacement of a portion of a mechanical system, science classroom renovations, and open space classroom enclosures. No large school construction project in Maryland has been carried out using DB. This is partly due to the increased management responsibilities placed on the owner, requiring qualified owner staff or contracted outside services to ensure proper

¹⁰ Christopher Hauge, School Facilities Engineer, Dorchester County Public Schools, email dated July 24, 2007

oversight. In addition, there are concerns about releasing control of the design process to an entity other than the owner's architect, who serves as an independent check on the constructor. In a 2005 experience, the constructor wing of the DB entity refused to honor its initial cost estimate for a major addition project because of cost escalation, and withdrew from the project just before construction was to begin. Since a performance bond is not normally in effect for the pre-construction part of the DB process, the LEA in this situation had no recourse but to convert the project to a conventional general contracting approach, with attendant delays and costs. This failure of the DB to deliver as promised stands as a warning about a potential vulnerability in the DB process when applied to large projects.

Job Order Contracting (JOC), in which a constructor bids only on the overhead and profit associated with an extensive fixed-price list of construction items, has been used successfully for smaller projects by several LEAs. It can be used with a design-build approach, for example with mechanical system retrofits and open space classroom renovations that are relatively small in scope but require initial investigation to uncover existing conditions and arrive at the best solution. With the exception of locally-funded science classroom and open space classroom renovation projects in Prince George's County, no school system has used this method to build a major project. *Montgomery County Public Schools* writes that "for most systemic projects, it is less expensive to do public bids with defined scopes and drawings."¹¹

CONCLUSION

Following enactment of the Public School Facilities Act of 2004, the private sector was active in soliciting the interest of school boards and county governments to use alternative financing arrangements for school construction. To date, the response of the LEAs has been largely tentative: many are interested, but almost all want to see a successful educational project completed in another jurisdiction before they are willing to engage in the complexity and risk of developing their own procurement. However, two jurisdictions have initiated studies to determine if, in today's relatively favorable market, alternative financing can accelerate needed projects or expand the range of projects that can be undertaken. The Barbara Ingram School for the Arts project in Washington County may serve as the test case that will encourage other LEAs to investigate alternative financing for their school construction tasks. Meanwhile, interest on the part of both the LEAs and the private sector continues to shift toward the construction of central administration facilities.

While interest in alternative financing remains hesitant, the liberalized procurement and project delivery methods made available by the Public School Facilities Act of 2004 have substantially broadened the range of tools available to the LEAs to achieve their school needs. The ability to negotiate scope and price when justified by circumstances opens the field of public school construction to the Construction Management At-Risk project delivery method, which is currently being applied successfully in a limited number of major projects around the state. Through these techniques and through access to potential private capital, the range of tools available to school districts and county governments to meet their school facility needs has been greatly expanded by enactment of the Public School Facilities Act of 2004.

¹¹ James Song, Director, Division of Construction, Montgomery County Public Schools, letter dated August 2, 2007

APPENDICES

A. Alternative Financing Subcommittee, Task Force to Study Public School Facilities

- Dr. David Lever, Chair, Executive Director, Public School Construction Program
- Ms. Jan Gardner, County Commissioner, Frederick County Board of County Commissioners
- Dr. Nancy Grasmick, State Superintendent of Schools
- Mr. David Harrington, Member, Prince George's County Council
- Senator Patrick J. Hogan
- Mr. Roy Kirby, President, Roy Kirby Construction, Inc.
- Mr. Brian Morris, Member, Board of School Commissioners, Baltimore City Public Schools
- Mr. Daniel Smith, private environmental consultant
- Dr. Yale Stenzler, former Executive Director, Public School Construction Program
- Mr. Konrad Wayson, Member, Board of Education, Anne Arundel County Public Schools
- Mr. Tim Woodring, Member, Board of Education, Allegany County Public Schools

B. Senate Bill / 787House Bill 1230: Public School Facilities Act of 2004

Public School Facilities Act of 2004

Article - Education

Provisions on Alternative Financing and Project Delivery

4-114.

- (a) All property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system:
- (1) Except as provided in subsection (c) of this section, shall be held in trust for the benefit of the school or school system by the appropriate county board; and
 - (2) Is exempt from all state and local taxes.
- (b) Money invested in trust for the benefit of the public schools for any county or city is exempt from all state and local taxes.
- (c)
- (1) A private entity may hold title to property used for a particular public school or local school system if the private entity is contractually obligated to transfer title to the appropriate county board on a specified date.
 - (2) The conveyance of title of school property to a private entity for a specified term under this subsection may not be construed to prohibit the allocation of construction funds to an approved school construction project under the Public School Construction Program.
 - (3) A county or county board may convey or dispose of surplus land under the jurisdiction of the county or county board in exchange for public school construction or development services.

4-126.

- (a) In this section, "alternative financing methods" includes:
- (1) Sale-leaseback arrangements, in which a county board agrees to transfer title to a property, including improvements, to a private entity that simultaneously agrees to lease the property back to the county board and, on a specified date, transfer title back to the county board;
 - (2) Lease-leaseback arrangements, in which a county board leases a property to a private entity that improves the property and leases the property, with the improvements, back to the county board;
 - (3) Public-private partnership agreements, in which a county board contracts with a private entity for the acquisition, design, construction, improvement, renovation, expansion, equipping, or financing of a public school, and may include provisions for cooperative use of the school or an adjacent property and generation of revenue to offset the cost of construction or use of the school;

- (4) Performance-based contracting, in which a county board enters into an energy performance contract to obtain funding for a project with guaranteed energy savings over a specified time period; and
 - (5) Design-build arrangements, that permit a county board to contract with a design-build business entity for the combined design and construction of qualified education facilities, including financing mechanisms where the business entity assists the local governing body in obtaining project financing.
- (b) Except when prohibited by local law, in order to finance or to speed delivery of, transfer risks of, or otherwise enhance the delivery of public school construction, a county may:
- (1) Use alternative financing methods;
 - (2) Engage in competitive negotiation, rather than competitive bidding, in limited circumstances, including construction management at-risk arrangements and other alternative project delivery arrangements, as provided in regulations adopted by the Board of Public Works;
 - (3) Accept unsolicited proposals for the development of public schools in limited circumstances, as provided in regulations adopted by the Board of Public Works; and
 - (4) Use quality-based selection, in which selection is based on a combination of qualifications and cost factors, to select developers and builders, as provided in regulations adopted by the Board of Public Works.
- (c) The Board of Public Works shall adopt regulations requiring a project that qualifies for alternative financing methods under this section to meet requirements regarding the advantages of the project to the public that include provisions addressing:
- (1) The probable scope, complexity, or urgency of the project;
 - (2) Any risk sharing, added value, education enhancements, increase in funding, or economic benefit from the project that would not otherwise be available;
 - (3) The public need for the project; and
 - (4) The estimated cost or timeliness of executing the project.
- (d) Projects that qualify for alternative financing methods under this subsection:
- (1) Shall meet the educational standards, design standards, and procedural requirements under this article and under regulations adopted by the Board of Public Works; and
 - (2) Consistent with the requirements of this article, shall be approved by:
 - (i) The county governing body;
 - (ii) The state Superintendent of Schools; or
 - (iii) The Interagency Committee on School Construction and the Board of Public Works.
- (e) Use of alternative financing methods under this section may not be construed to prohibit the allocation of state funds for public school construction to a project under the Public School Construction Program.
- (f) A county board may not use alternative financing methods under this section without the approval of the county governing body.
- (g) The Board of Public Works shall adopt regulations recommended by the Interagency Committee on School Construction to implement the provisions of this section, including:
- (1) Guidelines for the content of proposals, for the acceptance and evaluation of unsolicited proposals, and for accepting competing unsolicited proposals;
 - (2) Requirements for the content and execution of a comprehensive agreement governing an arrangement authorized under this section;
 - (3) Guidelines for content and issuance of solicitations;
 - (4) Requirements for the prequalification of bidders or offerors;
 - (5) Requirements for public notice of solicited and unsolicited proposals and proposed execution of a comprehensive agreement;
 - (6) Regulations that require compliance with requirements applicable to qualified projects that would otherwise be in effect under the state procurement law if the procurement were competitively bid; and
 - (7) Regulations that require that contracts and subcontracts adhere to the requirements of title 17, subtitle 2 and title 14 of the State Finance and Procurement Article *if the requirements would otherwise be applicable*.

C. Workgroup on Project Procurement, Delivery, and Alternative Financing

- Dr. David Lever, Chair, Executive Director, Public School Construction Program
- Mr. Adam Zimmerman, Vice-Chair, Program Manager, Public School Construction Program
- Mr. Donald Arnold, Member, Board of Education, Baltimore County Public Schools
- Dr. William AuMiller, Superintendent, Allegany County Public Schools
- Mr. Ray Barnes, Executive Director, Frederick County Public Schools
- Mary Jo Childs, Esq., Counsel, Board of Public Works
- Mr. Bernard Fox, Supervising Budget Examiner, Department of Management & Budget
- Ms. Jan Gardner, County Commissioner, Frederick County Commissioners
- Mr. Dick Hawes, Director, Facilities Management, Montgomery County Public Schools
- Mr. Carl LaVerghetta, Director of Procurement, Department of General Services
- Mr. Rupert McCave, Capital Improvement Program Officer, Prince George's County Public Schools
- Sheila McDonald, Esq., Executive Secretary, Board of Public Works
- Mr. Gary McGuigan, Project Director, Maryland Stadium Authority
- Mr. Mark Moran, Facilities Planner (retired), Anne Arundel County Public Schools
- Mr. John O'Neill, Director of Administration, Harford County Government
- Elizabeth Roese, Esq., Director, Public Finance, Office of the Attorney General
- Dr. Bernard Sadusky, Superintendent, Queen Anne's County Public Schools
- Elliott Schoen, Esq., Assistant Attorney General, Office of the Attorney General
- Dr. Beatrice Tignor, Chair Board of Education, Prince George's County Public Schools; Director of Procurement, Montgomery County Government
- Dr. Jerry Weast, Superintendent, Montgomery County Public Schools

D. Workgroup on Public School Construction Regulations

- Mr. Allen Abend, RA, Deputy Director, Public School Construction Program
- Mary Jo Childs, Esq., Counsel, Board of Public Works
- Dr. David Lever, Executive Director, Public School Construction Program
- Sheila McDonald, Esq., Executive Secretary, Board of Public Works / Treasurer
- Elliott Schoen, Esq., Assistant Attorney General, Office of the Attorney General