

**The Legislative Auditor's  
Summary of the Public Lease Law**

There are two types of leases: operating and capital. A full discussion of these leases can be found within the following court cases: (1) *United States v. Archer-Daniels-Midland Co.*, 584 F.Supp. 1134 (S.D. Iowa 1984), and (2) *Yost v. Early*, 87 Md. App. 364, 589 A.2d 1291 (Maryland Court of Special Appeals, 1991). Other cases dealing with operating and capital leases include: *Wercinski v. International Business Machines Corp.*, 982 F.Supp. 449 (S.D. Tex., 1997); *Cargill Inc. v. U.S.A.*, 91 F.Supp. 2d 1293 (D.Minn., 2000); See also *Universal Health Services of Nevada, Inc. v. Shalala*, Not Reported in F.Supp., 1996 WL 233037 (D.Nev.).

Additional discussion of these leases is found in Financial Accounting Standards Board (FASB) Statement 13 and in Attorney General (AG) Op. No. 94-0452.

**I. Define Capital Leases**

1. Capital leases are defined by FASB 13 (as amended), Paragraph 7; they are not defined in the statutes. According to FASB 13, if a lease meets any one of the following criteria, it is a Capital lease from the perspective of the lessee (the one who leases):
  - a. The lease transfers ownership of the property to the lessee by the end of the lease term.
  - b. The lease contains an option to purchase the leased property at a bargain price.
  - c. The lease term is equal to or greater than 75 percent of the estimated economic life of the leased property.
  - d. The present value of rental and other minimum lease payments equals or exceeds 90 percent of the fair value of the leased property less any investment tax credit retained by the lessor.

The last 2 criteria are not applicable when the beginning of the lease term falls within the last 25 percent of the total estimated economic life of the leased property.

2. AG Op. No. 94-0452: A Capital lease appears to be the functional equivalent of an installment sales transaction.
3. *Black's Law Dictionary* equates a capital lease to a lease-purchase agreement.

## **II. Define Operating Leases**

1. Operating leases are defined by FASB 13, Paragraph 7; they are not defined in the statutes. According to FASB 13, a lease is an Operating lease if it does not fit the criteria of a Capital lease described in Section I(1.)
2. AG Op. No. 94-0452: An Operating lease expires at a point in time well before the end of the useful life of the leased assets.

## **III. The Role of the State Bond Commission (R.S. [39:1410.60](#)) in Regards to Capital Leases and Debt**

1. The State Bond Commission must give its consent and approval when any public body borrows money, incurs debt or issues bonds or other evidences of debt or levying taxes or pledging uncollected taxes or revenues for the payment thereof, EXCEPT for purchases made in the ordinary course of administration on terms of credit not to exceed 90 days.
2. The Bond Commission shall adopt rules and regulations for the approval of financing of the purchases of movables and the approval of leases of movables that are not excluded from the term “debt” in this Section for an expedited review procedure for certain categories of financing and shall determine which financing is to be reviewed under the expedited procedure.
3. No equipment-lease-purchase contract may be effected under the provisions of R.S. [38:2319-2319.10](#) (Local Government Equipment-Lease-Purchase Act) unless prior written approval of the form of the lease is obtained from the Bond Commission.
4. Difference between a lease and lease purchase agreement:

A pure lease is not a purchase. If there is a purchase involved, the lease must abide by Public Bid Law. The AG states that the lease must contain a non-appropriation clause which provides that, if for any reason, the political subdivision fails to appropriate or make available funds to meet its obligations under the agreement during any fiscal year, the agreement may be terminated, without penalty. Such a clause, in essence, states that the contract is funded on a fiscal year to fiscal year basis and only involves currently appropriated revenue, and, therefore, does not incur indebtedness. See [R.S. 39:1410.60\(C\)\(1\)](#). See AG Op. No.02-0165 for clause language. The lease cannot contain an anti-substitution or penalty clause. AG Op. No. 09-0003 states that a **penalty clause** is a clause by which the **lease** payments would be accelerated and the total amount of rent for the remainder of the term would become due upon the uncured failure to make timely rent payments.

The AG states in AG Op. No. 00-433 that his office has long taken the position that a “pure lease” of equipment need not be publicly bid since the Public Bid Law, by its language, is applicable only to “purchases”, and a lease is not a purchase. However, whenever a **lease** contract contains an option-to-purchase provision at any point during or at the end of the **lease** term, that **lease** is potentially a purchase and therefore must be treated as a contract for purchase and is subject to the bid requirements of the law.

#### **IV. Contrasting Procedures used by Universities and Political Subdivisions for Capital Leases**

1. Universities are not required to obtain State Bond Commission approval prior to entering into capital leases done under R.S. [17:3361-3366](#). However, State Bond Commission approval is required when the Board of a university or college assists a sponsored organization under the supervision of said university or college in the erection, construction or maintenance of facilities on the grounds of said university or college by unconditionally endorsing or guaranteeing any loan for that purpose. The Boards of Colleges and Universities may grant leases to organizations for terms not to exceed 99 years. See R.S. [17:3361-3366](#).
2. All other governmental entities whether political subdivisions, police juries, municipalities, school boards, or industrial development are required to submit the following documents to the State Bond Commission for approval through an expedited process. These rules were adopted by the State Bond Commission pursuant to R.S. [39:1410.60](#) C and LAC 71:III.901-907.
  - A. The resolution of the governmental entity authorizing the lease.
  - B. A copy of the lease agreement.
  - C. A copy of the governmental entity’s current budget, showing excess revenues pursuant to R.S. [33:2922](#).
  - D. A completed summary of the lease on forms approved by the State Bond Commission.
  - E. A certification from the governmental entity in the form approved by the State Bond Commission, attesting to compliance with all of the requirements of this rule.
3. The State Bond Commission does not consider the lease of a movable or an installment purchase agreement financing the purchase of a movable to be “debt” if the following conditions listed in R.S. [39:1410.60](#) are met:

- A. The lease or installment purchase agreement contains a non-appropriation clause; and
- B. The lease or installment purchase agreement does not contain an anti-substitution clause or penalty clause.  
(Author's note: Substitutions are allowed).

However, if such lease or installment purchase agreement is entered into in conjunction with the issuance of bonds, notes, certificates, or other obligations which would otherwise be required to be approved by the State Bond Commission, State Bond Commission approval of such financing transaction shall continue to be required.

- 4. If a lease of a movable or installment purchase agreement does meet the definition of a "debt," the State Bond Commission may approve the debt through the expedited review rules. To be eligible for an expedited review, which is done by the Staff rather than Commission Members of the State Bond Commission, all of the following must be met and certified in writing by the governmental entity. These rules were adopted by the State Bond Commission pursuant to R.S. [39:1410.60\(C\)](#).
  - A. The leased equipment must be specifically identified in the proposed lease agreement and the lease must be used to acquire movable property necessary to provide essential governmental services such as those related to safety, sanitation, road and highway construction and repair, health services, communication, education, and transportation.
  - B. If the lease agreement transfers ownership of the leased property to the lessee at the end of the lease term or contains an option to purchase the leased property at a nominal price, the lease agreement must have been entered into in compliance with the public bid law.
  - C. The governmental entity must have excess or sufficient revenues to cover annual debt service on the lease pursuant to the provisions of R.S.[33:2922](#).
  - D. The total amount of the lease cannot exceed the greater of \$100,000 or 10% of the governmental entity's annual revenues.
  - E. There must have been no default on any debt obligation within the previous five years.

Additionally, all of the requirements for an expedited review stated in Section IV. 2 A-E must be submitted.

**V. Louisiana Centers of Excellence Financing Corporation Act**

Act 556 of the 2010 Regular Session created the Louisiana Centers of Excellence Financing Corporation Act to provide for the financing and leasing of the centers of excellence and to authorize the lease and sublease of the facilities.

**VI. Select Statutes and Administrative Rules in regard to Public Leases**

R.S. <a href="#">9:3301-3342</a>	Leases of movables
R.S. <a href="#">17:3361-3366</a>	Leases of college and university properties
R.S. <a href="#">38:2319-2319.10</a>	Local government equipment-lease-purchase
R.S. <a href="#">39:1551-1736</a>	Louisiana Procurement Code (LPC)
R.S. <a href="#">39:1751-1755</a>	Telecommunications Procurement
R.S. <a href="#">39:1761-1771</a>	State equipment lease-purchases
R.S. <a href="#">41:137</a>	Sale, exchange, or lease of state lands
R.S. <a href="#">41:1211-1225</a>	Leases, public lands, general purposes
R.S. <a href="#">41:1291-1294</a>	Leases by political subdivisions and state agencies
LAC 71:III.901-907	Bond Commission, expedited review of leases
LAC 71:III.1501	Bond Commission, debt limit

**VII. Select Attorney General Opinions**

AG Op. No. 11-0074	Discusses application of leases to private lands subsequently acquired by the State.
AG Op. No. 10-0254	Placement of Private Broadband Equipment on Public Water Towers must be accomplished using Public Lease Law.
AG Op. No. 09-0211	Discussion of Indemnity Land. School Board property using a lease/exchange must be bid and sixteenth section land law applies.
AG Op. No. 07-0076	School Board must comply with the provisions of R.S. 17:87.6 and the Public Lease Law (La. R.S. <a href="#">41:1211</a> , <i>et seq.</i> ), including the advertising and competitive bidding requirements, when leasing school board owned property. (See also AG Op. Nos. 08-0288, 08-0118 and 08-0315)
AG Op. No. 06-0214	Addresses the restrictions on lease or exchange of Section 16 lands by school boards and cooperative endeavor agreements or intergovernmental agreements with Indian Tribes.

- AG Op. No. 05-0395 Port must comply with the provisions of the Public Lease Law (La. R.S. [41:1211 et seq.](#)), including the advertising requirements, when leasing port owned property unless such a lease is executed in accordance with a specific constitutional or statutory exemption such as the provisions of industrial inducement statute (La. R.S. [33:4717.2](#)).
- AG Op. No.10-0047 Parish School Board is prohibited from donating school property by the Louisiana Constitution. Other options for the disposition of the property include sale and lease. (See also AG Op. No.05-0172)
- AG Op. No. 03-0365 Restrictions on extension of current leases of immovable property owned by Plaquemine Parish Government is subject to amount of monetary improvements and maximum term of 99 years.
- AG Op. No.05-0395 Lease of property owned by Port for industrial inducement purposes executed in accordance with La. R.S. [33:4717.2](#) is excepted from the general public bidding requirements.
- AG Op. No. 02-0325 Subject to revocation of dedication, Police Jury may use, lease and/or sell Parish owned property that formerly housed the Parish Library and which is no longer needed for public purposes.
- AG Op. No. 02-0165 The La. Uniform Commercial Code Chapter 9 relative to secured transactions is applicable to some governmental transactions. Debts of political subdivisions require State Bond Commission approval. A security interest in public property is not enforceable as public property cannot be seized.
- AG Op. No. 02-0141 Louisiana Airport Authority has the authority to expropriate if for a public purpose and just compensation is paid. The LAA is subject to the public bid and public lease laws.
- AG Op. No. 01-0167 A parish may lease land that it owns pursuant to Louisiana's Public Lease Law.
- AG Op. No. 01-0048 NOBID must follow provisions of either Public Lease Law or inducement statute in R.S. [33:4717.2](#) to lease building. To loan money to the prospective lessee to rehabilitate the

building would violate constitutional provision against loaning money.

AG Op. No. 01-0045

In the absence of a special law granting a parish an exemption from the Public Lease Law, the procedures of the Public Lease Law must be complied with in leasing a portion of a publicly owned building and property.

The Constitution mandates that a parish may only acquire property for a public purpose. Therefore, before public property can be declared no longer needed for a public purpose, it must first have been acquired for a public purpose.

A parish would be prohibited from purchasing a lot and building at a reduced price in return for allowing the vendor to retain use of a portion of the property since this transaction would result in a disguised lease not complying with the requirements of the Public Lease Law.

AG Op. No. 00-440

Higher education board can lease without competitive process to any lessee that fits the requirements of R.S. [17:3361](#) (A)(1) through (4).

AG Op. No. 00-433A

The term “operating lease” has no significance in procurement determinations. Regardless of that term, any lease of equipment with an option to purchase provision must be publicly bid if the cost of the lease is in excess of \$15,000 during its term. R.S. [38:2319.7](#) & R.S. [38:2319.10](#) are irrelevant unless the lessor is a non-profit entity. Leases which span more than one fiscal year and which contain no non-appropriation clause, or a non-appropriation clause with an anti-substitution provision must be submitted to the State Bond Commission for approval.

AG Op. No. 00-433

Contracts for lease of equipment which contain an option for purchase of the equipment are treated as “purchases” under the Public Bid Law and are required to be publicly bid if the price exceeds the bidding threshold. Potential violations of the bid law must be examined on a case by case basis. Allegations of criminal conduct should be reported to local District Attorney.



AG Op. No. 96-440

This opinion addressed several issues.

1. May the state, acting through the Division of Administration (“Division”), lease state-owned land to OFC for use in connection with the development of a state office complex under and pursuant to a proposed state/OFC ground lease?
2. May OFC issue bid documents for the proposed development under and in compliance with the provisions of the Lease of Public Lands Law?
3. Do the proposed bid documents, including the proposed lease agreements, comply with the provisions of the Lease of Public Lands Law?
4. Are the proposed bid documents, including the proposed lease agreements for the proposed development, subject to the bidding requirements of the Public Bid Law pursuant to La. R.S. [38:2211](#) *et seq.*?
5. Is a ground lease of property from OFC to a private developer, setting forth as a component of the consideration for the lease, a requirement that the private developer construct improvements to the leased property, at the sole cost and expense of the private developer, which improvements will be owned by the private developer until termination or expiration of the lease term, subject to the Lease of Public Lands Law and not the Public Bid Law?
6. Are the proposed state/OFC ground lease, the proposed OFC/developer ground lease, the proposed master lease and the proposed agency leases subject to the Louisiana statutory and constitutional provisions on debt limitation (i.e., La. R.S. [39:1367](#) and [Article VII, Section 6\(F\)](#) of the Louisiana Constitution)?
7. Is OFC entitled, under the Lease of Public Lands Law, to consider in the selection process those criteria set forth in the proposed bid documents in determining the successful bidder for the proposed development project and to assign to the criteria the points set forth in the proposed bid package to adequately weigh these criteria in the selection of the developer for the proposed development?

- AG Op. No. 95-486      The board of commissioners operates, controls, and manages the assets of Catahoula Parish Hospital Service District No. 1 and may leave the hospital as authorized by LSA-R.S. [46:1074](#). Moreover, such leases are not subject to the public leasing law.
- AG Op. No. 95-232      Discussion of proposal for lease, lease-back to finance rehabilitation of university dormitory. Questions lease rental being adequate consideration. Mortgage wouldn't violate constitution under case law. Issuer of debt must not violate non-profit corporation law. Debt may not be net state tax supported debt.
- AG Op. No. 95-170      Sublease contract between the Northeast Economic Development District and a private managerial company need not be publicly bid, nor must the managerial service contract be publicly bid.
- AG Op. No. 94-471      Addresses several issues regarding the Orleans Levee District, the FloodComm Corporation and the lease entered into by FloodComm Corporation with LeveeComm of Louisiana, a for profit limited liability company, for the stated purpose of installing fiber optic network in the levee system, operated by OLD, as a means of flood control. Several follow-up AG opinions have addressed issues relating to officers. (See AG Op. No. 94-471(A), (B) and (C).
- AG Op. No. 94-452      Discussion of state's debt limitation.
- AG Op. No. 93-389      Lease contract between Alexandria Port Authority and private company must adhere to the Public Lease and Bid Laws unless said lease is an industrial inducement contract or is too complex to be the object of bidding. Any doubt should be resolved in favor of the application of the bid laws.
- The proposed lease payment to be made “in kind” by the company with the construction of a road to be owned by the Authority is permissible so long as it does not violate [Art. VII, Sec. 14](#).

In the absence of an exemption, public bid laws must be adhered to in executing the road construction contract, regardless of whether the contract is executed by the Authority or the private company.

AG Op. No. 92-821

Where hospital service district wishes to lease to a physician a medical office building or facility owned by them, they may do so without the necessity of compliance with the public lease law.

AG Op. No. 92-426

Lease of state university property to a non-profit organization is regulated by L.S.A. - R.S [17:3361](#).

### **VIII. Select Cases**

*ABL Management, Inc. and D'Wiley's Services, Inc. v. Board of Supervisors of Southern University and Agricultural and Mechanical College*, 773 So.2d 131 (La. 11/28/00).

*M.K.L. Development, L.L.C. v. City of New Orleans, World Trade Center of New Orleans, Inc. and International Trade Building Corporation*, 772 So.2d 711 (La. App. 4 Cir. 10/16/00).

*Kleiser, Inc. v. Airport Com'n of Airport Dist. No. 1 of Jefferson Davis Parish*, 640 So.2d 751 (La.App. 3 Cir. 6/1/94).

*Terral Barge Line, Inc. v. Madison Parish Port Com'n*, 577 So.2d 787 (La.App. 2 Cir., 1991).