



The Legislative Auditor's Summary of Public Lease Law

OVERVIEW

This document seeks to provide a brief summary of the laws applicable to leases of public property by public entities and leases by public entities of movable property. This document will discuss the differences between Capital and Operating Leases, specifically in regard to movable property, and the various laws that apply to each type of lease when utilized by public entities in Louisiana.

I. What is a Lease?

A lease is a contract generally with two parties, the Lessor, one who leases their property to another, and a Lessee, one who leases the property of the Lessor in return for payment of rent. La. C.C. Article 2668.

II. Capital v. Operating Lease

In discussing leases of property, especially movable property such as vehicles and equipment, there are generally two main types of leases. Capital Leases and Operating Leases.

A full discussion of the two types of leases-- operating and capital-- may 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 opinions 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.

A. Define Capital Leases

1. Capital leases are not defined by statute, but by FASB 13 (as amended), Paragraph 7. According to FASB 13, a lease that meets any one of the following criteria 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.

Criteria (c) and (d) do not apply if 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.

B. Define Operating Leases

1. Operating leases are not defined by statute, but by FASB 13, Paragraph 7. 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 time well before the end of the useful life of the leased assets.

C. The Role of the State Bond Commission (R.S. [39:1410.60](#)) with regard to Capital Leases and Debt

1. The State Bond Commission must provide consent and approval before any public body borrows money, incurs debt or issues bonds or other evidences of debt or levies taxes or pledges 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 approval of financing of purchases of movables and approval of leases of movables that are not excluded from the term “debt” in this Section. The Commission shall also adopt rules and regulations to provide 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 a purchase is involved, the lease must abide by Public Bid Law. The AG states that the lease must contain a non-appropriation clause that provides: 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. The clause, in essence, states that the contract is funded on a fiscal year to fiscal year basis and involves only currently appropriated revenue, and does not, therefore, 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. An anti-substitution clause would prohibit a public entity from replacing the leased equipment or service with a substitute, even through other means, when the lease is terminated by non-appropriation.

As stated in AG Op. No. 00-0433, the AG’s office has long taken the position that a “pure lease” of equipment need not be publicly bid because the Public Bid Law, by its language, applies only to “purchases,” and a lease is not a purchase. If, however, 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 that is subject to the bid requirements of the law.

D. 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 covered by R.S. [17:3361-3366](#). State Bond Commission approval is required, however, when the Board of a university or college assists a sponsored organization under its supervision to erect, construct, or maintain facilities on the university's or college's grounds by unconditionally endorsing or guaranteeing any loan for that purpose. The Supervisory 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 (political subdivisions, police juries, municipalities, school boards, or industrial development entities) 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 71 La. ADC Pt 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 71 La. ADC Pt III, §905.
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.

If however, the lease or installment purchase agreement is entered into in conjunction with the issuance of bonds, notes, certificates, or other obligations that otherwise require State Bond Commission approval, then State Bond Commission approval of the financing transaction shall continue to be required.

4. If a lease of a movable or an 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 factors 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 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 requirements for an expedited review stated in Section IV. 2 A-E must be submitted.

III. Lease of Public Property

There are several laws which provide specific requirements or restrictions on leases of certain types of public property by or to certain entities. However, R.S. [41:1211](#), et seq. provides for the general requirements for situations in which a public entity is seeking to lease immovable property, i.e. land, that it does not currently need to carry out its operations or functions.

A. Advertisement and Bids – [R.S. 41:1214](#)

Generally, if a public entity seeks to lease its unused lands, it must first advertise and award the lease through sealed-bidding.

R.S. 41:1214(B) provides that each bid for the lease of public land shall be submitted by hand, registered or certified mail or electronically. No bids may be accepted on holidays recognized by

the U.S. Postal Service. The provision requires all lessors to provide for electronic receipt of bids in accordance with the standards of the governor's office, the division of administration, and the office of technology services, unless the lessor meets certain exceptions. Lessors that are currently without high speed internet access are exempt from this provision until a time when the lessor does have high speed internet access. The law also exempts the following:

1. Parishes with police juries and populations less than 20,000.
2. Governmental subdivisions (i.e. municipalities) with populations less than 10,000.
3. Lessors that are unable to comply without securing and expending additional funding.

The provision also provides that Lessors shall have the option to require that all bids be submitted electronically for any competitive bid let out of public bid.

The provision requires that Lessors include all information regarding advertisement of bids as set forth in R.S. 41:1214(A).

B. Term of Lease – [R.S. 41:1217](#)

Leases of public property, except where otherwise authorized by law, may not be for a period exceeding ten years. The Lease may be extended for additional periods of time, varying from 10 -40 years, depending upon the value of improvements made by the Lessee. See R.S. 41:1217(A)(2).

C. Leases between Political Subdivisions and State Agencies – [R.S. 41:1291](#)

The Public Lease Law provides for specific authority and requirements in situations where a political subdivision or State agency seeks to lease public property from another public entity, including the Federal Government.

Such contracts may generally be accomplished without formal advertisement and bidding and may be for a period of time not to exceed 99 years.

IV. Additional Laws Governing Leases

I. Louisiana Centers of Excellence Financing Corporation Act

[R.S. 39:1800.21](#) through 1800.35 create 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.

II. Select Statutes and Administrative Rules in regard to Public Leases

R.S. 9:3301-3342	Leases of movables
R.S. 17:3361-3366	Leases of college and university properties
R.S. 33:4711	Sale, exchange, or lease of property by police jury
R.S. 33:4712	Sale, exchange, or lease of property by a municipality

R.S. 33:4712.1	Lease of air space above or below right of ways, streets, etc
R.S. 33:4715.1	Sale, sale-back, lease, sublease of public facilities as financing requirement
R.S. 38:2319 – 2319.10	Local government equipment-lease-purchase
R.S. 39:1551 - 1736	Louisiana Procurement Code (LPC)
R.S. 39:1751 - 1755	Telecommunications Procurement
R.S. 39:1761 - 1771	State equipment lease-purchases
R.S. 41:137	Sale, exchange, or lease of state lands
LAC 71:III.901-907	Bond Commission, expedited review of leases
LAC 71:III.1501	Bond Commission, debt limit

V. Select Attorney General Opinions

[AG Op. No. 18-0128](#) The Louisiana Public Lease Law is not applicable to a public charter school.

[AG Op. No. 17-0134](#) Utility pole attachment agreements pursuant to the Consumer Choice for Television Act (R.S. 45:1361, *et seq.*) are not subject to the Louisiana Public Lease Law.

[AG Op. No. 16-0111](#) An agreement between a school board and a non-profit health care facility to allow placement of a clinic on school sixteenth section lands in return for in kind credit towards treatment of children is a lease and must conform with both the requirements of R.S. 41:711, *et seq.*, regarding the lease of section sixteen school lands, and Article VII, §14 of the Louisiana Constitution, by ensuring that it receives fair market value in return for use of the public lands.

[AG Op. No. 15-0030](#) Nicholls State University may enter into a cooperative endeavor and lease agreement for a Congressional District Office, provided that it can effectively demonstrate that it has a reasonable expectation of receiving a value in cash, service, and/or benefits that is commensurate with the fair value of the leased office space.

[AG Op. No. 15-0002A](#) Clarifying La. Atty. Gen. Op. No. 15-0002 that the competitive process set forth in R.S. 17:3361(A)(5) is not required in the event that LSU seeks to lease its property pursuant to R.S. 17:3361(A)(2).

[AG Op. No. 14-0210](#) Lease payments derived from the use of private property, separate from the portion of the property on which a public fire station is located, owned by a private volunteer fire department should be classified as private funds.

[AG Op. No. 13-0191](#)

City must comply with the provisions of R.S. 33:4712 in order to lease its surplus immovable public property.

[AG Op. No. 11-0202](#)

Leases of sixteenth section school lands must be accomplished in strict compliance with La. R.S. 41:711, *et seq.*, which contains requirements for following the Public Lease Law, including advertising leases and receiving fair market value.

[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. 09-0211A](#)

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. [41:1211](#), *et seq.*), 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 the 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](#)

The Louisiana Constitution prohibits a Parish School Board from donating school property. . 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 that 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 property if for a public purpose and if just compensation is paid. The LAA is subject to the public bid and public lease laws.

[AG Op. No. 01-0167](#)

Pursuant to Louisiana's Public Lease Law, a parish may lease land that it owns.

[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](#)

When leasing a portion of a publicly owned building and property, a parish must comply with the procedures of the Public Lease Law, unless a special law grants the parish an exemption from the Public Lease Law.

The Constitution mandates that a parish may acquire property only 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, as this transaction would result in a disguised lease that would not comply with the requirements of the Public Lease Law.

[AG Op. No. 00-0440](#)

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. 00-0433A](#)

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 exceeds \$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 that span more than one fiscal year and that 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. 00-0433](#)

Contracts for lease of equipment that 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. 00-0351](#)

Aviation Board and City may lease property to nonprofit that will construct airport parking garage.

[AG Op. No. 98-0314](#)

General discussion of a cooperative endeavor agreement entered into between the Board of Supervisors of Louisiana State University, LSU Medical Center, Entergy Thermal, Inc. and the New Orleans Medical Center Complex, Inc. and the applicability of the Public Lease Law, the Public Bid Law and the Louisiana Procurement Code.

AG Op. No. 98-0258

Law enforcement district has the authority to enter into lease-purchase agreement for the acquisition of a prison facility. State Bond Commission approval is not required if no indebtedness is incurred by virtue of “non-appropriations” clause. Public Bid Law does not apply to the lease-purchase agreement itself, but should be followed with regard to construction of the prison facility pursuant to the agreement. (See also AG Op. No. 09-0003 for a discussion of sheriff’s office and lease term).

AG Op. No. 97-0250

The Madison Parish Hospital Association can enter into a management services agreement with a third-party whereby the third-party assumes the Association's management responsibilities, but the sixty day notice provision of R.S. [46:1055\(B\)](#) must be complied with before the management services agreement becomes valid.

The Madison Parish Hospital Association does not have to comply with the public bid law when entering into a management services agreement, but the public bid law must be complied with for the acquisition of “materials, supplies, and public works” pursuant to that agreement.

The Madison Parish Hospital Association can sublease the hospital to a third-party and may do so without the necessity of complying with the public lease law, but the sublessee must meet the same legal requirements as the original lessee. The sublease and/or the medical services agreement contractor can hold no greater rights than those held by the Madison Parish Hospital Association as provided in the original lease.

[AG Op. No. 97-0207](#)

Deals with several issues related to issuance of bonds for construction of a parking garage to be carried out by parking operator.

AG Op. No. 96-0440

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, if the 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. 95-0486

The board of commissioners operates, controls, and manages the assets of Catahoula Parish Hospital Service District No. 1 and may lease the hospital as authorized by LSA-R.S. [46:1074](#). Moreover, such leases are not subject to the public leasing law.

[AG Op. No. 95-0232](#)

Discussion of proposal for lease, lease-back to finance rehabilitation of university dormitory. Questions lease rental being adequate consideration. Mortgage would not 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. 95-0170** 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. 94-0471** 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. 94-0452** Discusses state's debt limitation.
- AG Op. No. 93-0389** Lease contract between Alexandria Port Authority and private company must adhere to the Public Lease and Bid Laws unless the 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 a road construction contract, regardless of whether the contract is executed by the Authority or the private company.
- [AG Op. No. 92-0821](#) Where hospital service district wishes to lease to a physician a medical office building or facility owned by it, it may do so without the necessity of compliance with the public lease law.
- [AG Op. No. 92-0426](#) Lease of state university property to a non-profit organization is regulated by L.S.A. - R.S [17:3361](#).

VI. 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), writ denied 778 So.2d 1146 (La. 01/05/01).

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).

See *Arnold v. Board of Levee Com'rs of Orleans Levee Dist.*, 366 So.2d 1321 (La.1978) and *Hall v. Rosteet*, 247 La. 45, 169 So.2d 903 (1964) (both establishing the rule of law that any exemptions from the Public Lease Law, La. R.S. 41:1211, *et seq.*, must be express) *Louisiana Associated Gen. Contractors, Inc. v. Louisiana Dept. of Agric. & Forestry*, 2005-0131 La. 2/22/06, 924 So.2d 90, 96.