

REPEAL 14 NYCRR Parts 321 and 1055; ADD NEW Part 813

14 NYCRR PART 813
FINANCIAL ASSISTANCE FOR CAPITAL IMPROVEMENT PROJECTS

(Statutory authority: Mental Hygiene Law, §§ 19.05, 19.07; Article 32; Article 25
Facilities Development Corporation Act, § 5)

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§813.1 Background and intent

This Part sets forth the requirements and conditions for receipt of funding assistance for capital improvement projects proposed or undertaken by eligible providers of addiction services certified and funded by the Office of Alcoholism and Substance Abuse Services (“Office” or “OASAS”) to ensure appropriate use by providers and security of monies made available from state funding sources.

§813.2 Applicability

- (a) Certified programs operated by a municipality or a voluntary agency, as defined in this Part, or a proposed incorporator of a voluntary agency may apply to the Office for financial assistance for capital projects in the form of a state aid grant, the amount of which shall be available from amounts appropriated to the Office and approved by the Division of Budget (“DOB”).
- (b) Voluntary agencies, cities, and counties (towns are excluded) may also apply for financial assistance from the Dormitory Authority of the State of New York (DASNY), successor to the Facilities Development Corporation (FDC), through the Office as its agent.

§813.3 Legal base

(a) Section 19.09(b) of the Mental Hygiene Law authorizes the commissioner to adopt regulations necessary and proper to implement any matter under his/her jurisdiction and to assist local governmental units and non-governmental providers of addiction services in the development of local treatment programs and to make direct grants to nonprofit agencies for such purposes.

(b) Section 19.21(b) of the Mental Hygiene Law requires the commissioner to establish and enforce regulations concerning the licensing of programs for the provision of addiction services.

(c) Section 32.05 of the Mental Hygiene Law MHL authorizes the commissioner to issue operating certificates for the provision of chemical dependence treatment services.

(d) Section 32.01 of the Mental Hygiene Law authorizes the commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the MHL.

(e) Article 25 of the Mental Hygiene Law authorizes the Office, subject to the approval of the Office of the Budget (DOB), to provide state aid funding to programs or local agencies for the provision of addiction services and expenses related to the capital costs of such programs upon such terms and conditions as the Office deems appropriate.

(f) The Facilities Development Corporation Act (Chapter 359 of the Laws of 1968), authorizes the commissioner to promulgate regulations regarding financing or refinancing by voluntary agencies of treatment facilities with proceeds realized from the sale of tax exempt bonds and notes issued by the Medical Care Facilities Finance Agency and provided to the Facilities Development Corporation (FDC) for such purposes.

(g) Section five of the Facilities Development Corporation Act authorizes The Dormitory Authority of the State of New York (“DASNY”), created pursuant to chapter 392 of the Laws of 1973 as successor to the Facilities Development Corporation, to issue negotiable bonds and notes to provide funds for the financing or refinancing of capital improvements to mental hygiene facilities.

§813.4 Definitions

- (a) “Applicant” means a certified program operated by a municipality or a voluntary agency or a proposed incorporator of a voluntary agency applying for a state aid grant pursuant to article 25 of the Mental Hygiene Law; or a certified program operated by a county, city or voluntary agency applying for DASNY financing pursuant to section five of the Facilities Development Corporation Act.
- (b) “Capital costs” means the costs to a program operated by an applicant with respect to the acquisition of real property estates, interests, and cooperative interests in realty, their design, construction, reconstruction, rehabilitation and improvement, original furnishings and equipment, site development, and appurtenances of a facility.
- (c) “DASNY loan” means a loan to an eligible applicant from proceeds of a DASNY bond sale for all or part of the actual approved capital costs of a facility for the treatment of addictive disorders, subject to the terms and conditions of a mortgage and financing agreement.
- (d) “Local governmental unit” (LGU) means the unit of local government given authority to provide local or unified services to persons and their families who suffer from addictive disorders.
- (e) “Letter of Understanding and Intent” (LOUI) means a commitment letter issued by the commissioner authorizing an eligible applicant to secure private financing for the maximum amount approved by Division of Budget for a capital project, such private financing to be subsequently refinanced with a DASNY loan.
- (f) “State aid grant” means state aid, pursuant to article 25 of the Mental Hygiene Law, for all or part of the actual approved capital costs of a facility for the treatment of addictive disorders, subject to a lien, mortgage or other security required by the commissioner.
- (g) “State Aid Grant Lien” means a recorded lien on a facility improved with financing from a state aid grant or refinanced by a DASNY loan, such lien to secure for a term of years the exclusive use of the improved facility for the provision of Office certified services.
- (h) “Voluntary agency” means a corporation organized or existing pursuant to the not-for-profit corporation law for the purpose of providing local services including substance use disorder treatment, compulsive gambling treatment, prevention or other authorized addiction disorder services.

§813.5 Requirements for a State Aid Grant or Letter of Understanding and Intent

(a) *Site control.* (1) Prior to receiving funds an applicant must have, or be under contract to have, a fee simple or such other estate or interest in the site, including necessary easements and rights of way, sufficient to assure for a period of years, as such period may be determined by the Office, undisturbed use and possession of the facility. The nature and extent of an applicant's present or anticipated property rights in the site must be established, based upon the type of interest, by:

(i) a survey of the site; the surveyor's metes and bounds property description; and

(ii) a policy of title insurance; or

(iii) a lease sufficient to secure the property for use as a treatment facility for a term approved by the Office.

(2) Property rights must be demonstrated to the satisfaction of the Office which may require a provider's counsel opinion letter certifying that the property interest is of sufficient quality and for the requisite duration and containing citations to supporting documentation upon which the legal opinion was based.

(3) At the discretion of the commissioner, limited state aid may be granted to an applicant who has not secured a property interest in the site, provided the applicant can demonstrate the required title characteristics pursuant to this subdivision.

(b) *Application.* (1) A certificate of need application must be submitted as appropriate and determined by the Office.

(2) A completed application must be submitted in the format and on forms prescribed by the commissioner, such application to include at a minimum:

(i) copies of existing contracts and any other materials requested by the Office relating to the acquisition, construction, renovation and operation of the proposed facility;

(ii) assurance that sufficient funds will be available to the applicant to enable the applicant to meet any non-state-aid share of capital costs;

(iii) assurance that sufficient funds will be available when the capital portion of the project is completed for effective use of the facility for the purposes for which the state aid grant has been provided;

(iv) if the applicant is a certified provider or proposed incorporator of a provider, there must be an agreement between the applicant and the local governmental unit pursuant to section article 41 of the Mental Hygiene Law, including LGU certification that the project is consistent with its plan for the provision of services to those suffering from addictive disorders and their families and/or significant others;

(c) *Repayment.* State aid grants received by an applicant must be repaid if and when the applicant receives a DASNY loan pursuant to section 813.6 of this Part. Such repayment shall be intended only for that portion of a grant represented by underlying costs for which the DASNY loan is made.

(d) *Accountability.* (1) Discrete records and accounts shall be maintained to show receipt and disbursement of federal, local or other funds, costs incurred and expenditures paid with regard to said project. OASAS, or its agent, shall have the right to inspect and audit the project records at any time during the project or after its completion.

(2) The Office or its designee shall have the right to inspect the physical site of any facility benefitting from a state aid grant.

(3) The applicant must agree to execute and record any lien on a security interest with respect to real and/or personal property as may be required by the commissioner.

(4) Upon completion of a capital project, if requested, the provider shall submit to the Office, in a form prescribed by the Office, a certified cost statement reconciling all costs incurred, revenues received and expenses paid with regard to the project.

§813.6 Requirements for a DASNY loan

(a) *Eligibility.* (1) Cities, counties and voluntary agencies as applicants for projects estimated to exceed \$100,000.00 must apply for a state aid grant or a LOUI with the intent to refinance the state aid grant or private financing by means of a DASNY loan at the conclusion of the project.

(2) Applicants with an Office approved LOUI authorizing private financing of a project approved by the Division of Budget may apply for a DASNY loan for purposes of refinancing at the conclusion of the project. Use of construction management or design/build contracts must receive the prior written approval of the

Office and shall contain such terms and conditions as the commissioner shall deem reasonable and necessary.

(3) Upon receipt of an approved project proposal cost (Proposed Project Approval, “PPA”) by the Division of Budget, project approval by applicant’s board of directors or authorized principal, approval of the state Attorney General and state Comptroller, an OASAS capital contract shall be executed including provisions for long term use of the facility and participation in the DASNY financing program for mental hygiene facilities.

(b) *Application.* In addition to requirements for a state aid grant pursuant to section 813.5 of this Part, applicants for a DASNY loan shall provide the following:

(1) applicant must be able to demonstrate that at the time of receiving a DASNY loan, it will possess a fee interest or such other estate or interest in the property sufficient to assure undisturbed use of the property for a minimum of thirty (30) years or the term of the DASNY loan, whichever is greater.

(2) The applicant may not transfer, sell, assign, lease or encumber, in whole or in part, real property acquired through a state aid grant, or transfer, sell or assign in whole or in part, the shares of stock of the cooperative corporation, the proprietary lease, leasehold or contractual agreement acquired with a state aid grant without the prior written approval of the Office.

(3) The applicant shall obtain a resolution of its board of directors authorizing the corporation to enter into such agreements as shall be required by DASNY and the Office pursuant to Mental Hygiene Law and the facilities development corporation act.

(c) *Recertification.* Applicants should initiate a certification process pursuant to Part 810 of this Title if the program is a new facility, is relocating to a new site, or is changing capacity consistent with the approved project plan.

(d) *Accountability.* (1) Review and written approval of plans, specifications and cost estimates by the Office is required at each phase of design. Final working drawings and specifications shall conform with all applicable laws, codes, rules and regulations.

(2) Written approval of the Office is required before the recipient of financial support enters into a contract with an architect, engineer, design consultant or any other provider of services related to the capital project as may be required by the Office.

(3) Bid documents must be reviewed by the Office and approved in writing prior to solicitation of bids. Construction contracts shall be bid competitively upon solicitation of no less than three (3) potential bidders. Contracts shall be awarded to the lowest responsible bidder, upon review and approval by the Office.

(4) The recipient of financial support must provide supervision and inspection at the construction site adequate to ensure that the work is completed on time and in accordance with Office approved plans and specifications. Changes to approved plans or documents shall require the Office's written approval.

(e) *Allowable costs.* (1) Project costs expended prior to execution of a capital contract or LOUI are not eligible for reimbursement from proceeds of a DASNY loan.

(2) Consistent with an approved capital contract or LOUI, a state aid grant or private financing to be refinanced with a DASNY loan may be used for the following costs:

(i) design, construction, acquisition, reconstruction, rehabilitation or improvement of developed or undeveloped real property for use as an addiction services treatment facility;

(ii) feasibility studies, designs, surveys, plans and specifications;

(iii) engineering and architectural services;

(iv) insurance premiums;

(v) original equipment and furnishings required for the operation of the facility;

(vi) costs and expenses in connection with the issuance of the bonds and notes by DASNY to finance the facility, including interest from the date of such issuance to the loan termination.

(vii) refinancing of the outstanding balance of a taxable interest rate loan, the proceeds of which were used for the purposes described in this paragraph;

(viii) legal fees related to the project and capped at a regional rate determined by the commissioner, excluding fees incurred by the applicant related to litigation between applicant and any service provider, contractor or subcontractor hired by applicant during the course of the project.

(ix) such other costs as the commissioner may determine to be reasonable and necessary.

(f) *Agreements.* (1) Upon completion of the project, the facility shall be operated for the purposes for which it was acquired, constructed or improved, for a term of 30 years secured by a State Aid Grant Lien or other agreement between the Office and the recipient of financial support.

(2) The recipient must enter into a mortgage, loan, security and other such agreement and provide such legal opinions and assurances as required by the commissioner and DASNY with respect to the financing and securing of the property.

(3) The recipient must execute an agreement with the Office whereby the Office will recover on a periodic basis a portion of the provider's annual OASAS reimbursement, which may include interest, fees, costs and charges, until the loan is satisfied.

(4) Recipients may pre-pay loans pursuant to terms of the DASNY loan agreement.

§813.7 Liens of the Office

(a) *Recorded liens.* Upon request of the Office, the recipient must file proof of any State Aid Grant Lien, mortgage or other security with the clerk of the county wherein such facility is located and provide OASAS proof of such filing.

(b) *Remedial actions.* In the event the facility is not utilized for the operation of an addiction services treatment program pursuant to all applications, contracts and agreements required for state aid grants and DASNY loans, in addition to any other legal remedies:

(1) OASAS shall have the right to possession and occupancy, without any charge or fee therefore, during the unexpired period of time during which the facility was to have been operated pursuant to this Part. The possession and occupancy shall be under the following terms and conditions:

(i) If OASAS is obligated to make any payment on any mortgage, lien, judgment or other encumbrance on the facility, then the amount of such payment or payments shall be an obligation of the recipient due and owing to OASAS;

(ii) If OASAS is obliged to make such structural repairs then the amounts so expended shall become and be an obligation of the recipient due and owing to OASAS;

(iii) Notwithstanding any of the provisions contained herein, OASAS shall be entitled to recover an amount equal to five percent (5%) of any state aid granted for capital costs of the facility for each year of the unexpired first twenty (20) years of the term during which the applicant has agreed to operate said facility. The total amount shall become an obligation of the recipient due and owing to OASAS; or

(2) Receipt of fee title to the improved real property or transfer of fee title to another Office approved provider of addiction treatment services.

(c) *Subordinate liens.* A State Aid Grant Lien shall be junior only to:

(1) liens to which OASAS has consented to subordination; and

(2) liens pre-existing the grant of state aid.

§321.8 Conflict of interest

No full time officer or employee of the applicant or of the State, or of any firm, organization, corporation, or partnership which such officer or employee owns, controls or directs shall receive funds reimbursed for capital costs directly or indirectly for payment for services provided in connection with planning, design, construction, or equipping of the project, or in connection with site acquisition.

§321.9 Waiver of provision

Upon written request by the applicant, the commissioner may waive any provisions of this Part not otherwise required by law, by giving prior written approval, after full disclosure of all relevant facts and circumstances and a determination by the commissioner that the subject provision imposes an unreasonable burden on the applicant, and that the proposed alternative transaction is necessary for project advancement.

§813.10 Severability

If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part that can be given effect without the invalid provisions or applications, and to this end the provisions of this Part are declared to be severable