
Rebecca Dow

The Author is a Partner at Holland & Hart in Denver

Alphabet Soup?

Understanding Current Financing Tools for Commercial and Retail Construction Projects (PIFs, TIFs, PICs, URAs, BIDs, GIDs, SIDs)

Developers are using more complex types of financing to fund commercial and retail projects to obtain better economic terms. A contractor should understand the financing vehicle being used by the owner to understand possible ramifications to the contract and contractor.

I. Metropolitan Districts.

Metropolitan districts are a type of special district often used to finance public improvements. This type of district allows the developer to create a quasi-governmental entity that can provide a broad range of infrastructure and services, and that may impose taxes, tolls, charges, and fees and issue tax-exempt bonds to finance construction projects.

Metropolitan districts are the most common form of special district used to finance public improvements, and if the district is the contracting party the construction contract will need to comply with Colorado statutes related to public improvements, such as payment and performance bonds for 100% of the work (C.R.S. § 38-26-106); retainage of 5% until 100% of the work is done (C.R.S. § 24-91-103); publishing a "notice of final payment" under C.R.S. § 38-26-107; change orders subject to appropriation (C.R.S. § 24-91-103.6(4); compliance with all federal, state, and local laws, and rules and regulations related to employment/contracting with illegal aliens and use of "E-Verify Program" or Colorado Department of Labor program (C.R.S. § 8-17.5-101); full appropriation is required before signing the contract (C.R.S. § 24-91-103.6); compliance with 80% Colorado labor requirement (C.R.S. § 8-17-102); among other special conditions applicable to contracts with a governmental entity.

Contractors should make sure that the district has been furnished information necessary for the contractor to enforce rights and assert claims under the Colorado Public Works Act (C.R.S. § 38-26-101 et. seq.).

II. BIDs, GIDs, SIDs.

Special districts also include Business Improvement Districts ("BIDs"), General Improvement Districts ("GIDs"), and Special Improvement Districts ("SIDs"). SIDs are districts formed by a municipality and are limited to a specific geographic area within which public improvements are constructed and paid through assessments levied in such area. BIDs, GIDs, and SIDs are statutory districts that have a localized benefit and funding mechanism.

BIDs are used for economic development activities and infrastructure financing. SIDs and GIDs are used for installing, operating, and maintaining public infrastructure. GIDs may raise revenue by taxation and SIDs raise revenue by assessments imposed against the benefitted property. SIDs and BIDs are not separate governmental entities and are typically governed by the governing body of the municipality under which it was formed. GIDs are separate governmental entities and are allowed to construct a wider range of improvements than SIDs. The special conditions in contracting with a governmental entity described in I. above would also apply.

III. TIFs.

Tax Increment Financing ("TIF") is a financing tool used to capture incremental taxes that are created when an underutilized or vacant property is redeveloped to a higher value and better use.

The increase in value resulting from the redevelopment generates an incremental amount of revenue that can be used to fund commercial and retail projects. TIFs have been used to finance transit-oriented development in Colorado. Currently, TIFs may only be used through an Urban Renewal Authority ("URA") for a project that meets the statutory definition of "blight". TIFs are not a new or additional tax but create tax revenue from the new project that would not have been available but for the redevelopment.

Last May, the Colorado legislature passed a law (HB15-1348) that many authorities believe will limit and even curtail the use of TIF financing to finance public infrastructure needed for private development projects. Currently, there are discussions to amend the law; however, at this time, it is anticipated that there will be fewer urban renewal projects in the future, which will impact private developers who rely on TIFs to finance public improvements needed for development projects in urban renewal areas.

IV. PIFs and PICs.

Public Improvement Fees ("PIFs") are privately imposed fees that are collected like a sales tax, but are imposed by the private property owner through a covenant recorded against the real property owned by such property owner. The covenant is often called a declaration, and it requires retailers or providers of services, such as hotels and lodging, to collect a PIF on each sales transaction subject to the PIF.

A PIF is not a tax because it is imposed by a private entity and is not subject to statutory and constitutional limits regarding increases in taxes. PIFs may be imposed without governmental approval or an election. PIF revenues may be used to finance public and private development and are imposed in the same manner as covenants and reciprocal easements - it must "touch and concern" the real property under Colorado law. The PIF revenue must be used to provide a benefit to the encumbered property. PIFs are typically imposed as a percentage of the sales price for subject goods or services as described in the declaration usually as to goods and services subject to state and/or local sales taxes.

A PIF may be imposed on construction materials used in the development, and contractors should determine if this is the case in a project with PIF financing. Contractors should request that the owner pay any PIFs applicable to construction materials or that there be an exemption granted for the construction project.

The PIFs may be collected by a district or may be collected by a Public Improvement Corporation ("PIC"). A PIC is a non-governmental, private nonprofit corporation that is controlled by the developer for an extended period of time to ensure reimbursement of costs incurred to improve the property. A PIC may use the PIF revenue to obtain financing from a bank or may be pledged to a district as collateral in order to issue bonds. A PIC is not subject to the same limitations as a district and may use PIF revenue for more than public improvements so long as it benefits the property.

Understanding the "alphabet soup" of financing tools used by developers to pay for commercial and retail construction projects will benefit contractors and allow them to make sure their contracts comply with applicable statutory requirements.