

STATE OF INDIANA
DEPARTMENT OF LOCAL GOVERNMENT FINANCE
Room 1058, IGCN – 100 North Senate
Indianapolis, IN 46204

IN THE MATTER OF THE PETITION)
FOR REVIEW ALLEGING ARTIFICIAL)
DIVISION OF A CONTROLLED) **CP20-001**
PROJECT BY GREATER CLARK)
COUNTY SCHOOLS)

FINAL DETERMINATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. Indiana Code 6-1.1-20-3.1 and IC 6-1.1-20-3.6 provide that a political subdivision may not artificially divide a capital project into multiple capital projects in order to avoid the requirements of the petition and remonstrance process or referendum process, respectively.

2. Indiana Code 6-1.1-20-3.1 and IC 6-1.1-20-3.6 also provide that a person that owns property within a political subdivision or a person that is a registered voter residing within a political subdivision may file a petition with the Department of Local Government Finance (“Department”) objecting that the political subdivision has artificially divided a capital project into multiple capital projects in order to avoid the requirements of the petition and remonstrance process or referendum process, respectively. The petition must be filed not more than ten days after the political subdivision gives notice of the preliminary determination to issue the bonds or enter into the lease for the project. If the Department receives such a petition, it must, not later than 30 days after receiving the petition, make a final determination on the issue of whether the capital projects were artificially divided.

3. A controlled project is, with some exceptions, any project financed by bonds or a lease that will cost a political subdivision more than the lesser of \$5,575,690 or an amount equal to 1% of the total gross assessed value of property within the political subdivision on the last assessment date, if that amount is at least \$1,000,000. IC 6-1.1-20-1.1; Department Nonrule Policy Document #2020-1.

4. A school corporation is a political subdivision. IC 6-1.1-1-12.

RELEVANT PROCEDURAL HISTORY

5. On October 29, 2020, Alice Butler, who owns property within the jurisdiction of the Greater Clark County School Corporation (“Corporation”), submitted a petition (“Petition”) to the Department. The following exhibits were included in the Petition and thus part of the Record:

Petitioner Exhibit 1: State Form 55888 – Petition for Review of Proposed Controlled Project, submitted on October 29, 2020.

Petitioner Exhibit 2: Written statement of Alice Butler, dated October 29, 2020.

Petitioner Exhibit 3: Corporation 1028 Resolution, unadopted, dated October 27, 2020.

Petitioner Exhibit 4: Resolution Authorizing Execution of Amendment to Lease Agreement (2020), unadopted, dated October 27, 2020.

Petitioner Exhibit 5: Additional Appropriation Resolution, unadopted, dated October 27, 2020.

Petitioner Exhibit 6: Guaranteed Energy Savings Performance Contract between Corporation and Energy Savings Group (“ESG”), unsigned, as a Microsoft Word Document.

6. The Petition alleged, among other things, that the Corporation approved a preliminary determination (aka a “1028 resolution”) to issue bonds in the amount of \$22,100,000. Ms. Butler claimed the resolution individually named the bonds, which includes 1) \$4,123,398 for a project at Charlestown High School; 2) a project of \$5,124,566 at Jeffersonville High School; 3) a project of \$3,544,696 for Utica Elementary School; and 4) \$9,307,340 which are alleged to support various projects under \$1,000,000 each. Ms. Butler alleged in her petition that the bond issue also includes funds to cover a project with Energy Systems Group, LLC, costing \$9,036,000, for “the installation of energy conservation measures and related upgrades at [Corporation’s] facilities.” Ms. Butler claims this project “appears to be one project covering all facilities within the [Corporation]. Yet, the [Corporation] has divided this project by individual facility in order to avoid the Petition and Remonstrance process.” *Petitioner Exhibit 2*. Ms. Butler provided a Word document represented to be a guaranteed energy savings contract (“GESG”) between the Corporation and Energy Savings Group, LLC (“ESG”). *Petitioner Exhibit 6*.

7. On October 30, 2020, the Department contacted the Corporation, asking it to respond to the contentions made in the Petition no later than November 16, 2020. *E-mail from David Marusz, Deputy General Counsel of Department, to Mark Laughner, Corporation Superintendent, and Janelle Fitzpatrick, Corporation Board President, October 30, 2020, 4:16 P.M. EST.*

8. On November 2, 2020, the Corporation submitted its response (“Response”) to the Petition to the Department. The following exhibits were presented by the Corporation and thus part of the Record:

Corporation Exhibit A: E-mail from Laura Hubinger, Corporation Chief Financial Officer, to David Marusz, November 2, 2020, 2:24 P.M. EST.

Corporation Exhibit B: 1028 Resolution, adopted, dated October 27, 2020.

Corporation Exhibit C: Preliminary Determination Resolution, adopted October 13, 2020.

Corporation Exhibit D: Resolution to Approve Form of Amendment of Lease Agreement, adopted October 13, 2020.

Corporation Exhibit E: Excerpts from Minutes of the October 13, 2020 Meeting of the Corporation Board of Trustees.

Corporation Exhibit F: Resolution Authorizing Execution of Amendment to Lease Agreement (2020), unadopted, dated October 27, 2020.

Corporation Exhibit G: Notice to Taxpayers of Preliminary Approval, as shown in scan of page B3 of October 22, 2020 edition of *News and Tribune*.

Corporation Exhibit H: Order Confirmation of Notice to Taxpayers of Preliminary Approval, printed September 29, 2020.

Corporation Exhibit I: Amendment to Lease Agreement between Corporation and Greater Clark Building Corporation, dated October 27, 2020.

Corporation Exhibit J: Corporation Strategic Plan and Facility Plan.

Corporation Exhibit K: Excel Spreadsheet entitled “2020 Project Budgets.”

Corporation Exhibit L: Powerpoint Presentation entitled “Greater Clark County Schools 2020 Energy Savings Project Final Presentation.”

9. The Corporation responded by confirming that on October 27, 2020, it adopted the 1028 Resolution as well as a resolution authorizing execution of the Amendment. The Corporation also responded by stating that there was no public comment made that the hearing to adopt these resolutions, and also at several points over the last year the Corporation has provided several opportunities at public school board meetings to receive comments and inform the public on the Projects. The Corporation also stated that the Petition was not timely because it was submitted more than ten (10) days after notice of the preliminary determination was published, as required by IC 6-1.1-20-3.1(c). *Corporation Exhibits A, B, & D.*

10. The Corporation provided a scan of the 1028 resolution, dated October 27, 2020. The 1028 resolution states that the Corporation preliminarily approves an amendment to the leases with Greater Clark Building Corporation (the “Building Corporation”) in order to finance various renovation and improvement projects”, listing the following projects (collectively, the “Projects”):

- Renovations, additions, and improvements at all eighteen (18) classroom buildings, including additional classrooms at Utica Elementary School.
- Purchase of buses and technology and general improvements at
 - Corden Porter Education Center;
 - Administration Building;
 - Fetter Center;
 - AUX Services Center;
 - Transportation Center; and
 - Witten Auto Center.

The 1028 resolution states that the Building Corporation will issue approximately \$22,100,000 in bonds payable from lease rentals made by the Corporation. *Corporation Exhibit B.*

11. The Corporation also provided an Excel spreadsheet entitled “2020 Project Budgets” which lists the Corporation’s buildings and the projected costs pursuant to the GESC for 2021. This spreadsheet also provides what is called a “Year 2-Projects-Summary Descriptions,” which states for each Corporation building the projects involved with the GESC. *Corporation Exhibit K.*

12. The Corporation also provided a Powerpoint presentation, entitled “Greater Clark County Schools 2020 Energy Savings Project Final Presentation,” dated September 1, 2020 (“Presentation”). This Presentation describes the scope and costs of the project associated with the GESC. *Corporation Exhibit L.*

13. On November 24, 2020, the Department received an e-mail from Bill Hawkins, a member of the Corporation’s Board of Trustees but who did not claim to speak on behalf of the Board. This e-mail is therefore recognized as Petitioner Exhibit 7.

14. Mr. Hawkins made the following claims with respect to the GESC:

- 1) It is a single contract, for the entire scope of work, at all locations.
- 2) The scope of work cannot be taken in segments without taking all segments as a whole. Splitting the GESC, and only taking part of the total work, will not produce the savings necessary to justify the entirety, or quite possibly, even the sections of work being claimed as an individual project.
- 3) The GESC has no provisions in the published section proving a clear division in design work. or proposed general conditions for each section of the contract. The GESC is also claimed to be a singular project, indicating general conditions and design are shared work scopes (i.e., engineering and design, mobilization, project management, supervision, etc.).
- 4) Sharing of the above listed scopes results in economies of scale, and reduces the overall cost of the project, assuming this is being proposed. Which conversely means subdividing the contract and properly assigning the true values will drive the cost to the point it is unlikely to meet the requirements of the GESC legislation.
- 5) The alternative is internally the contractor and the administration have assigned these costs independently, and feel they meet the criteria for being designated as individual projects, but the public or Mr. Hawkins himself as a boardmember were not provided those details to enable a transparent discussion on the merits each project.

Petitioner Exhibit 7.

FINDINGS OF FACT

13. The Amendment to the Lease states that the Corporation agrees to pay additional annual maximum lease rentals pertaining to the Projects in the annual amount of \$8,000,000 in 2021 and \$2,000,000 for each year thereafter until the completion of the Projects, but no later than June 30, 2040. *Corporation Exhibit I.*

14. There appears to be two types of projects claimed to have been artificially divided in the Petition. The first type, as represented in the 1028 Resolution, includes “the proposed renovation and improvement to educational facilities” but also “the purchase of busses [*sic*] and technology and general improvements” at other Corporation facilities. The Petition also references the project described in the GESC with ESG. Given the broad statements in the 1028 Resolution describing the improvements involved, the Department believes the GESC is included in the scope of the 1028 Resolution. However, the GESC covers improvements specific to energy savings, not just general capital acquisition of buses, technology, etc.

15. The Corporation provided a scan of a page from the *News and Tribune*, a local newspaper, showing a “Notice to Taxpayers of Preliminary Approval” (“Notice”) published by the Corporation on October 22, 2020. The Notice states that the Corporation preliminarily approved on October 13, 2020 entering into an amendment to lease with Greater Clark Building Corporation (the “Building Corporation”).” The Notice states that the Building Corporation will issue approximately \$22,100,000 in bonds payable from lease rentals made by the Corporation. The Notice also states that taxpayers or registered voters may file a petition with the Department within ten (10) days of the publication of the Notice alleging that the projects were artificially divided. *Corporation Exhibit G*. The Corporation also provided the proof of publication for the Notice, which shows that the Notice was published two (2) times, once on October 15, 2020 and again on October 22, 2020. *Corporation Exhibit H*.

16. The GESC contains a “Scope of Work” and includes the following projects to be done by ESG:

- District wide LED lighting improvement.
- District wide indoor air quality improvements.
- District wide building envelope improvements.
- District wide water conservation.
- Transformer replacements for each school.
- Safety and code improvements.
- Solar heating panel installation.

For each category of tasks, the Scope of Work details what is to be replaced or changed and also excludes the following tasks:

- Electrical distribution work related to correcting code violations, grounding issues, etc.
- Repairs to any existing electrical service, service equipment, and/or panel boards.
- Hazardous materials abatement.
- Permits – scopes of work listed above do not require permits.
- Painting or patch work which may be required as a result of fixture replacement.
- As-built CAD drawings.

Petitioner Exhibit 6.

17. The Excel Spreadsheet entitled “2020 Project Budgets” shows the following breakdown of costs for the projects, including Design Build Projects and the GESC Projects:

2021 Projects <i>Air Quality/HVAC/Energy/Lockerrooms</i>	ESG Per Project Estimated Budget	Design Build Per Project Projected Budget	Per Project Total Costs
Administration	163,736.00		163,736.00
AUX Services	72,547.00		72,547.00
Fetter Center	60,837.00		60,837.00
Transportation	0.00		0.00
Witten Auto/Center/Storage	31,841.00		31,841.00
Corden Porter Education Center	20,218.00		20,218.00
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CHS	1,123,398.00	3,000,000.00	4,123,398.00
JHS	2,124,566.00	3,000,000.00	5,124,566.00
NWMHS	862,823.00		862,823.00
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CMS	686,076.00		686,076.00
Parkview Middle School	545,650.00		545,650.00
River Valley Middle School	567,946.00		567,946.00
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Bridgepoint Elementary	183,989.00		183,989.00
Franklin Square Elementary	57,365.00		57,365.00
Jonathan Jennings Elementary	169,565.00		169,565.00
New Washington Elementary	300,827.00		300,827.00
Northhaven Elementary	239,905.00		239,905.00
Parkwood Elementary	364,970.00		364,970.00
Pleasant Ridge Elementary	167,326.00		167,326.00
Riverside Elementary	453,278.00		453,278.00
Thomas Jefferson Elementary	171,930.00		171,930.00
Utica Elementary	344,696.00	3,200,000.00	3,544,696.00
Wilson Elementary	324,529.00		324,529.00
	9,038,018.00	9,200,000.00	18,238,018.00
<i>Reserve</i>	200,000.00	300,000.00	500,000.00
	9,238,018.00	9,500,000.00	18,738,018.00
<i>Technology-Chrome Books, Study Sync, Active Panels (Elementary)</i>			2,219,683.95
<i>Busses</i>			800,000.00
			21,757,701.95
<i>Fees</i>			342,298.05
			22,100,000.00

The spreadsheet also includes a description of the projects by school building:

Year 2-Projects-Summary Descriptions	
CHS Projects	Energy Savings Project Weather Stripping, doors, lighting, air quality, controler updates, gymnasium fixtures & Construct Locker rooms and Restrooms
JHS Projects	Energy Savings-HVAC Gymnasium, Install roof access, Door seals, Water conervation-toilets, new flush valves, transformers, water heating system, lighting, pool & parking lots & gymnasium light fixtures, air quality & Construct Locker rooms, concessions, bathrooms, conference room
Utica Elementary Projects	Energy Savings-Door seals, air balancing & purification and retrofix of existing lights & construct and equip 8 new classrooms, bathroom, alarms, new PA, Flooring, Furniture
10 Elementary Projects	10 Elementary Air Quality & Energy Savings Projects (Excludes Utica)
Bridgepoint Elementary	Doors & Seals, air quality and balancing, retro fit lighting, install roof access-ladders and install ground ladders to roof access, 6 Ft fence around gas meter (safety), switches in for gym lighting, demolish abandoned electrical meter
Franklin Square Elementary	Air purification and air balancing
Jonathan Jennings Elementary	Doors & Seals, air quality and balancing, retro fit lighting, install roof access-ladders and install ground ladders to roof access
New Washington Elementary	Doors & Seals, New Urinals and wall mounted elongated bowls and flush valves, Vandal Proof spray mderator, air quality and balancing, retro fit lighting
Northhaven Elementary	Doors & Seals, New Urinals and wall mounted elongated bowls and flush valves, Vandal Proof spray mderator, air quality and balancing, retro fit lighting
Parkwood Elementary	Water conservation-new valves, toilets, urinals, vandal proof spray, electrical safety, demolish and install new ceiling between cafeteria and gymnasium, lighting
Pleasant Ridge Elementary	Doors & Seals, air quality and balancing, retro fit lighting
Riverside Elementary	Doors & Seals, New Urinals and wall mounted elongated bowls and flush valves, Vandal Proof spray mderator, air quality and balancing, retro fit lighting, Transformers
Thomas Jefferson Elementary	Doors & Seals, air quality and balancing, retro fit lighting, install roof access-ladders and install ground ladders to roof access
Wilson Elementary	Doors & Seals, air quality and balancing, retro fit lighting, install roof access-ladders and install ground ladders to roof access
3 Middle School Project	
CMS	Install roof access to Gym HVAC, install ground to mezzanine access ladder, new doors & seals, new urinals & toilets and flush valves, Transformers Air purification and air balancing, lighting
Parkview Middle School	Install fence around gas meter (safety), New toilets and flush valves, air quality & balancing, lighting, new doors and seals
River Valley Middle School	Install roof access to Gym HVAC, install ground to mezzanine access ladder, new doors & seals, new urinals & toilets and flush valves, Transformers Air purification and air balancing, lighting, solar thermal pool water filtration
1 Middle/High School Project	
NWMHS	Doors & Seals, New Urinals and wall mounted elongated bowls and flush valves, Vandal Proof spray mderator, air quality and balancing, retro fit lighting, Transformers Solar Thermal-pool water heating system and domestic water heating system

Corporation Exhibit K.

18. The Presentation of the Corporation’s energy savings project also included the following description of the improvements and costs:

2020 Energy Savings Project



Facility	LED Lighting	Indoor Air Quality	Building Envelope	Safety & Code Improvements	Water Conservation	Electrical Transformers	Solar Thermal
Administration Building							
Auxiliary Services Building							
Bridgepoint Elementary							
Charlestown High							
Charlestown Middle							
Corden Porter							
Felter Center							
Franklin Square Elementary							
Jeffersonville High							
Jonathan Jennings Elementary							
New Washington Elementary							
New Washington Middle High							
Northaven Elementary							
Parkview Middle							
Parkwood Elementary							
Pleasant Ridge Elementary							
River Valley Middle							
Riverside Elementary							
Thomas Jefferson Elementary							
Ulca Elementary							
Whitten Property							
Wilson Elementary							

2020 Energy Savings Project



Included Scopes of Work	Estimated Financial Investment:	\$ 9,036,000
<ul style="list-style-type: none"> District wide LED lighting District wide indoor air quality (IAQ) District wide building envelope District wide safety & code improvements District wide water conservation Electrical transformer replacements Solar Thermal Heating 	<ul style="list-style-type: none"> Type of Financing: Term of Financing: Rate of Financing: Estimated annual payment: Average annual operational fund savings: Year 1 annual operational fund savings: Year 15 annual operational fund savings: 	<ul style="list-style-type: none"> Bond 15 Years 1.50% \$ 677,177 \$ 701,800 \$ 523,833 \$ 913,146

Facility Pricing

Estimated JHS Facility Pricing	\$2,046,458
Estimated Admin Facility Pricing	\$163,736
Estimated AUX Services Facility Pricing	\$72,547
Estimated Bridgepoint Facility Pricing	\$262,097
Estimated CHS Facility Pricing	\$1,032,622
Estimated CMS Facility Pricing	\$603,595
Estimated Cordon Porter Facility Pricing	\$20,218
Estimated Fetter Center Facility Pricing	\$60,837
Estimated Franklin Square Facility Pricing	\$57,365
Estimated Jonathan Jennings Facility Pricing	\$244,233
Estimated New Washington Elem Facility Pricing	\$300,827
Estimated Northaven Facility Pricing	\$239,905
Estimated NWMHS Facility Pricing	\$862,823
Estimated Parkview Middle Facility Pricing	\$506,647
Estimated Parkwood Facility Pricing	\$364,970
Estimated Pleasant Ridge Facility Pricing	\$249,807
Estimated Riverside Facility Pricing	\$463,278
Estimated RVMS Facility Pricing	\$528,943
Estimated Thomas Jefferson Facility Pricing	\$249,936
Estimated Utica Facility Pricing	\$344,696
Estimated Whitten Property Pricing	\$47,949
Estimated Wilson Facility Pricing	\$324,529
TOTALS	\$9,038,018

Corporation Exhibit L.

19. Based on the Excel spreadsheet and the presentation, the Department finds that the Corporation has included in the scope of its overall facility plan 1) 3 design build projects totaling \$9,200,000; 2) acquisition of technology totaling \$2,219,684; 3) acquisition of buses totaling \$800,000; and 4) a guaranteed energy savings project totaling \$9,238,018. It is not clear what constitutes the design build projects, but they appear to entail the following: construction of locker rooms and restrooms for Charlestown High School; 2) construction of locker rooms, concessions, bathrooms, and a conference room at Jeffersonville High School; and 3) construction and installation of eight (8) new classrooms, a bathroom, alarms, a new P.A. system, flooring, and furniture at Utica Elementary School. In addition, the Department finds that the costs stated in the 1028 Resolution for Charlestown High School, Jeffersonville High School, and Utica Elementary School are a combination of costs attributable to the GESC and the design build projects. The balance of the \$22,100,000 for the Lease comes from the remaining GESC expenses, bus & technology purchases, fees, and reserve costs.

ANALYSIS

20. Indiana Code 6-1.1-20-3.1(c) states that a controlled project is artificially divided when the result of one (1) or more of the subprojects cannot reasonably be considered an independently desirable end in itself without reference to another capital project. This a fact-sensitive inquiry. The Department makes its determinations on a case-by-case basis in reliance on the applicable law and facts. Moreover, the fact that one (1) or more projects are included in a single lease and are represented by the Corporation as distinct projects does not mean that the projects were artificially divided.

21. The Corporation did not raise any argument as to why the Projects were not artificially divided. Rather, the Corporation argued that the Petition is not timely. Indiana Code 6-1.1-20-5(a) requires that notice of a decision to issue bonds or enter into leases exceeding \$5,000 must be published once each week for two (2) weeks in accordance with IC 5-3-1-4, as well as being posted in three (3) public places. The Corporation published the Notice twice in compliance with IC 6-1.1-20-5(a). The first publication was made on October 15 and the second one a week later on October 22. The Petition was submitted on October 29, fourteen (14) days after the first publication of the Notice in the newspaper. The e-mail from Mr. Hawkins is dated November 24, more than five (5) weeks after the first notice was published.

22. The Department agrees with the Corporation that the Petition was not timely submitted. The Corporation gave notice of the preliminary determination pursuant to IC 6-1.1-20-3.1(c) on October 15, 2020 with the first of two publications in the *News and Tribune*. This notice is required by IC 6-1.1-20-5(a), which states that notice must be given by “publication once each week for two (2) weeks.” However, IC 6-1.1-20-3.1(c) states that the petition must be filed within ten (10) days after the political subdivision gives notice of the decision, without reference to IC 6-1.1-20-5(a). While the Corporation published the Notice in compliance with IC 6-1.1-20-5(a), a plain reading of IC 6-1.1-20-3.1(c) is that the ten (10) day window to file a petition began from when the Corporation simply gave notice, which is shown by the *News and Tribune* publications, and not when the Corporation fulfilled the requirements of IC 6-1.1-20-5(a). The Petition was submitted on October 29, 2020, later than ten (10) days as required by statute. Therefore, because a timely petition has not been submitted, the Department is unable to make a determination whether the Projects have been artificially divided. However, the Department recognizes that even an untimely petition does not mean artificial division has not occurred.

23. Indiana Code 36-1-12.5-5.5 states that the controlled project procedures under IC 6-1.1-20 do not apply to a guaranteed energy savings contract. Therefore, any of the projects included in the GESC cannot be considered eligible to be a project for purposes of the controlled project statutes. Therefore, the GESC cannot be added to the cost thresholds contained in IC 6-1.1-20 to determine whether a project or projects are controlled or not. As such, even if the Department was able to review whether the Projects have been artificially divided, it would have to disregard the Corporation’s guaranteed energy savings contract with ESG for purposes of its review.

24. Even though the Department cannot make a determination under IC 6-1.1-20-3.1(c), the Department informally comments that the projects for Charlestown High School, Jeffersonville High School, and Utica Elementary, as well as the busing and technology components of the Lease, are separate projects that have not been artificially divided. The acquisition of buses and technology speak for themselves. The act of purchasing buses or electronics can be done separately from construction or renovation projects. As for the supposed design build projects, the projects done at each school can be done independently whether or not the other school projects were also being done. In other words, the construction of new locker rooms, concessions, bathrooms, and conference room at Jeffersonville High School is its own project, with the subprojects comprising the overall renovation of that school building. Likewise, the new classrooms, bathroom, alarms, etc., at Utica Elementary comprise the overall renovation of that building and do not require a reference to any of the projects at Jeffersonville or Charlestown High School. The Department could find differently, however, had the projects and their costs

been separated within each school building project; for example, at Jeffersonville High School, one project for locker rooms, another for the conference room, etc. The Department reiterates that the projects associated with the GESC are not part of this analysis.

25. In sum, the Department dismisses the Petition. The Department does not have the authority to review the Projects as the Petition was not timely submitted in compliance with IC 6-1.1-20-3.1(c). In addition, the Department finds that the Project involves a guaranteed energy savings project which by law is excluded from the requirements for controlled projects described in IC 6-1.1-20. Even if the Department was to make a determination, its findings would likely be that the non-GESC projects were not artificially divided as their results can be reasonably made without reference to the other projects.

Dated this 30th day of November, 2020.

STATE OF INDIANA
DEPARTMENT OF LOCAL GOVERNMENT FINANCE

Wesley R. Bennett

Wesley R. Bennett, Commissioner