



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 11, 1995

To All Bond Counsel:

Re: Update of Public Finance Division Positions and Procedures

1. **Contract Revenue Bonds for Water Supply and Wastewater Treatment Facilities.** As many of you know, there has not yet been a decision in *Lavaca-Navidad River Authority and City of Corpus Christi v. Texas Water Development Board, et. al.*, No. 3-94-306-CV, Court of Appeals, Third District.¹ The pendency of this case affects our ability to approve certain contract revenue bonds where the Interlocal Cooperation Act, Chapter 791 of the Local Government Code, is the authority for the contracts. During this time, if the home rule charter of the city or cities or the special act of the district requires that the cities hold an election prior to entering into a contract with the district, we will not be able to approve the bonds without an election being held. Approvals after the resolution of this case will depend on the decision reached by the court. The above does not necessarily apply to refunding bonds or to bonds being issued pursuant to a contract previously approved by this office, if the contract does not have to be amended in order for additional or refunding bonds to be issued. Please contact any of the division lawyers if you have questions regarding this position.

2. **Hospital District Refunding.** It appears to us that hospital districts are in the same category as school districts as far as issuing refunding (tax) bonds in an amount in excess of the principal amount of the bonds being refunded. That is,

¹ To briefly summarize the case, certain citizens of the City of Corpus Christi (the "City") sued the City and the Lavaca-Navidad River Authority ("LNRA") to prevent the issuance of bonds by the LNRA for a water project secured by a contract between the City and the LNRA. One of the arguments made by the citizens was that section 791.005 of Chapter 791 of the Texas Government Code (the Interlocal Cooperation Act) preserved certain rights in effect at the time the Act was adopted, which rights included a right of the City's residents to vote on contracts as allegedly provided in the City's home rule charter. The district court decided in favor of the citizens, without providing a basis for its decision, and the decision was appealed by LNRA and the City. The Court of Appeals could find that the pre-existing "rights" in the charter do limit the statutory authorization in the Interlocal Cooperation Act. If the Court so holds, then it seems probable that such a holding would apply to a special act creating a district, as well as to home rule charters, should the special act have a provision requiring an election to enter into the type of contract apparently contemplated by the Interlocal Cooperation Act.

because of the constitutional requirement to vote the tax, it cannot be done, except through the mechanism of capital appreciation bonds.

3. Election Inspections. We have revised the current policies of this office regarding the on-site election inspections of utility and other special districts now covered by the existing requirements. This office will no longer conduct "on the ground" election inspections within a district. Instead, we will require an affidavit (substantially in the form attached hereto) by each resident, qualified voter voting in the election, for those elections that previously would have been inspected. Such executed affidavits along with the customary election proceedings should be submitted to this office with the first bond transcript. Naturally, if for any reason it is anticipated that there may be a problem with respect to any or all of the affidavits or the election proceedings, we encourage bond counsel to submit the affidavits and documents pertaining to the election along with an explanation of the concern to this office as soon as practical so that we can resolve the matter before the bond transcript is submitted.

4. Requirement for Approval by the Texas Natural Resource Conservation Commission. As most of you know, we now take the position that the 30 day appeal period runs from the date the Commission's order is actually signed and dated, not from the date of the Commission meeting at which approval was given. Therefore, we will not approve bonds requiring Commission approval until 30 days have elapsed from the date the order is signed, which is also the date of the order.

5. Federal Election Preclearance Requirement. As you know, and as a reminder, we require that election documents in transcripts include a certification that the election was held in compliance with applicable provisions of the Texas Election Code, including particularly the bilingual requirements therein, and in compliance with the Federal Voting Rights Act, as amended. In addition, we now require a certification that a preclearance letter was obtained from the United States Justice Department or, alternatively, that a copy of such letter is included in the transcript.

6. Article 717q. As a reminder, Tex. Rev. Civ. Stat. Ann. art. 717q (Vernon Supp. 1995) does not authorize advance refundings, including those where the bonds being refunded are redeemed within 90 days.² (Under state law, we consider any refunding where the refunded bonds are not redeemed on the same day that the refunding bonds are delivered to be an advance refunding.) Thus, for

² Article 717q can be used for an advance refunding if the defeasance is a gross defeasance and the common law requirements of firm financial arrangements are complied with. There are also a few advance refunding statutes that can be used by certain entities in place of using 717k, but their requirements are generally very similar.

advance refundings, Tex. Rev. Civ. Stat. Ann. art. 717k (Vernon Supp. 1995) must also be cited, and its requirements for firm financial arrangements met. Please note that article 717q can only be used to refund "obligations" which meet the requirements for that definition in the statute.

7. **Refundings - Reserve Fund, Debt Service Fund.** It has been our position for some time that any bond proceeds or tax moneys remaining in a reserve fund at the time of a refunding must be either placed in the reserve fund of the refunding bonds, in the interest and sinking (or debt service) fund for the refunding bonds or in the escrow to pay the bonds being refunded. Similarly, tax moneys or bond proceeds in an interest and sinking fund must be transferred to the interest and sinking fund of the refunding bonds or to the escrow (not to the new reserve fund, however). Revenues in reserve funds which are freed up by the refunding may be used for the purposes for which such revenues could otherwise be used. For cities and counties, it appears that Tex. Rev. Civ. Stat. Ann. art. 839 (Vernon 1964) would prevent revenues in the interest and sinking fund from being removed from that fund except to be transferred to the new interest and sinking fund or be used for the escrow. *City of Waco v. Mann*, 127 SW2d 879, 885 (Tex. 1939), which appears to be applicable to all issuers, would seem to have a similar effect. We would suggest that the Public Finance Division be contacted if an issuer or its counsel is considering the possibility of using those funds other than as provided above.

8. **School District Financings Under SB 826.** Following are some of the major requirements, in addition to the usual substantive and procedural items, for SB 826 financings submitted to this office. This is not intended to be, nor should it be viewed as, an exhaustive list of all issues or requirements pertaining to such transactions:

a. Only lease-purchase or similar contracts are authorized by SB 826. Payments relating to the acquisition or improvement of real property under these contracts must be subject to annual appropriation from legally available funds of the district.³ The only "legally available" funds appear to be "Tier Two" funds or unintended surplus maintenance tax moneys remaining after payment of all maintenance and operation expenses for the year.

b. Term of any contract cannot exceed 25 years.

³ No funds, including Tier Two moneys, may be pledged. Tex. Local Gov't Code § 271.005 by its terms does not apply to Section 271.004 contracts.

- c. If the lessor under the contract is a non-profit corporation created under Tex. Rev. Civ. Stat. Ann. art. 717s and is responsible for acquiring and constructing the project, we will require a representation that it will comply with all procurement statutes applicable to a school district.
- d. Notice of intent to enter into a contract must (i) be published in a newspaper within the meaning of Tex. Gov't Code §2051.044 and of general circulation in the school district and (ii) in addition to summarizing the major provisions of the contract, include a more specific description of the project than merely "public facilities" or "school buildings"; such notice should give members of the public a fair idea of the actual project to be undertaken pursuant to the contract and the cost thereof.
- e. Sale of land by the school district pursuant to Tex. Educ. Code §45.082 to a non-profit corporation created under article 717s must be for the fair market value of the land. Proceeds of any such sale may only be used for construction or acquisition of real property or improvements to real property, except that they may also be used for equipping the facility financed under SB 826.
- f. We will require a showing of sufficient available funds to make the annual payments under the contract either through historical data or projections. To the extent the available funds are Tier Two moneys, the school district must demonstrate that such moneys have not been previously encumbered or used to pass the test required under former Tex. Educ. Code §20.09, now §45.003, for previously issued bonds or contractual obligations.

Very truly yours,



Jim Thomassen
Assistant Attorney General
Chief, Public Finance Division

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Attachment: Form of Affidavit

AFFIDAVIT

THE STATE OF TEXAS

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COUNTY OF _____

BEFORE ME, the undersigned authority, on this day personally appeared _____, whom, being first duly sworn by me, upon his/her oath stated:

1. My name is _____.
2. I am not and never have been found to be mentally incompetent by a final court judgment, and I have never been convicted of any felony.
3. On _____ [date of election], my domicile was within the boundaries of _____ (the District), and my address was _____.
4. I am a duly registered voter in _____ County, Texas. My voter registration was effective as of _____, 19___. My voter registration number is set forth beneath my name on this Affidavit. A true and correct copy of my registration certificate and my driver's license is attached to this Affidavit.
5. I was more than eighteen (18) years of age on the date of the election and was a citizen of the United States of America.
6. I moved into the District on approximately _____, 19___, and lived within the District for at least the thirty(30) days prior to _____ [date of election].
7. I voted in a _____ [type of election] election held by the District on _____, 199__.
8. I held the following office (i.e. Presiding Judge, Alternate Presiding Judge or no office held) with respect to the election: _____.

WITNESS MY HAND this _____ day of _____, 199__.

Certificate No. _____

SUBSCRIBED AND SWORN BY _____ before me, the undersigned authority, on this _____ day of _____, 199__, to certify which witness my hand and seal of office.

Notary Public, State of Texas

[NOTARY SEAL]