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ATTORNEY GENERAL OF TEXAS

December 29, 2023

To All Bond Counsel:

RE: Deadline Extension and Other Public Finance Matters

1. Deadline Extension for Contract Value Provisions, Acceptable Revision to Form of Standing Letter, and Liquidated Damage Provisions

We are still considering how the value of a contract should be properly determined for paying agent agreements, escrow agreements, and similar agreements, including indentures, as initially discussed in the All Bond Counsel Letter dated November 1, 2023. Therefore, we are extending the deadline originally set forth in section 1(d) of that letter from January 1, 2024, to February 1, 2024. However, for any contract that would be validated by our opinion, such as an escrow agreement,[1] we will not validate the contract without the required state law verifications unless we can determine with absolute certainty that value under state law would be less than $100,000.

In response to questions from bond counsel coordinating with the Municipal Advisory Council (MAC), please note that standing letters may contain a statement providing that, "Nothing in the forgoing verifications is intended or shall be construed to create a contractual undertaking. Contractual verifications will be made in the covered contracts."

Covered contracts such as bond purchase agreements and notices of sale and accepted bids may contain a general liquidated damages provision regarding the good faith check should the purchaser fail to accept delivery of and pay for the bonds at closing provided that the reason for failing to do so is not related to violations of the statutory representation and covenants required by chapters 2252, 2271, 2274, and 2276 of the Government Code. The section of the covered contract regarding the statutory representations and covenants must make clear that the liability for breach of any such verification during the term of the contract shall survive until barred by the statute of limitations, and shall not be liquidated or otherwise limited by any provision of the contract, notwithstanding anything in the contract to the contrary.

[1] *See* Tex. Gov't Code § 1207.064 (regarding the validity of the escrow agreement upon registration and delivery of the refunding bonds).

2. Presumption of Forty Years When Long-Term Financing Statute is Silent as to Maximum Maturity

Neither chapter 394 of the Local Government Code nor chapter 431 of the Transportation Code provides a maximum maturity for bonds issued pursuant to those chapters. When the statute is silent as to the maximum maturity, this is generally construed to mean within a reasonable time. *See* Tex. Att'y Gen. Op. No. PD-1394 (1952) at 2. Forty years is traditionally the benchmark maximum maturity for long-term bonds.[2] Therefore, we will presume a maximum maturity of forty years unless the issuer provides factual analysis establishing why a final maturity beyond 40 years is objectively reasonable under the particular facts of that transaction. Absent a sufficient showing, the final maturity must stay within the forty-year benchmark.

3. Certification Requested Pursuant to House Bill 1766 for Qualified Residential Rental Project Bonds

Please be advised that when section 1372.037(b) of the Government Code applies, we are requesting verification to be provided by the issuer of qualified residential rental project bonds. House Bill 1766 limits the amount of bonds issued to each project for qualified residential project bonds for which reservation is sought under certain conditions. This limitation applies if for a program year the total amount of qualified residential rental project bonds for which reservations are sought exceeds, as of October 20 of the preceding year, 55.75 percent of the state ceiling. Tex. Gov't Code § 1372.037(b). If triggered, the amount of bonds issued to each project may not exceed 55 percent of the reasonably expected aggregate basis of the project and the land on which the project is or will be located. Moreover, House Bill 1766 further requires the attorney general to certify the issuer's compliance as follows:

> "(b-1) Notwithstanding subsection (b), if section 1372.037(b) applies with respect to the issuance of qualified residential rental project bonds in a program year, the attorney general must certify the *issuer's* compliance with that subsection before approving the issuance of those bonds. *A certification made under this subsection may be based solely on a written verification provided by the issuer on request of the attorney general*."

Tex. Gov't Code § 1202.003(b-1) (emphasis added). Therefore, we are hereby requesting such verification when section 1372.037(b) applies. We are currently considering input of bond counsel representing issuers of qualified residential rental project bonds with respect to the form of certification. Please note that section 1202.003(b-1) requires the written verification to be provided by the issuer. As such, any certified public accountant calculating and establishing compliance with the bond limitation must be the certified public accountant of the issuer, not the borrower.

[2] *See*, *e.g.,* Tex. Gov't Code § 1201.022(b) (limiting county and city bonds paid from ad valorem taxes to forty years).

4. Rebuttable Presumption When Refunding Ordinary Tax Notes

a. Refunding Ordinary Chapter 1431 Tax Notes – Three-Year Rebuttable Presumption

Recent litigation has required our further review of chapter 1431 of the Government Code in its entirety, ensuring that we give effect to all provisions contained therein, including particularly sections 1431.008(a) and 1431.009(d). For the reasons stated below, if an issuer submits long-term ad valorem tax refunding bonds to refund short-term tax notes within three years of our approval of the tax notes, we will impose a rebuttable presumption that the issuer intended at the outset to pay the tax notes from bonds secured by an ad valorem tax, in violation of section 1431.008(a). Unless the issuer can rebut such presumption with a legitimate public purpose for the refunding, including a demonstration of the conditions that have changed since the original issuance, we will refuse to approve the refunding bonds. Even for bonds refunding tax notes after three years, we require certification confirming that the tax notes were not issued with the intent to refund. Additionally, when tax notes are submitted for our review, we require certification confirming that there is no current intent to refund.

Section 1431.008(a) prohibits a governing body from issuing anticipation notes that "are payable from bonds secured by an ad valorem tax unless the proposition" authorizing the issuance of the bonds "(1) is approved by a majority of the votes cast in an election held by the issuer; and (2) states that anticipation notes may be issued." This section recognizes the short-term nature of tax notes, which ordinarily for the construction of a public work must mature within seven years from the date of our approval under section 1431.009(a).

In contrast, section 1431.009(d) provides that a bond issued under chapter 1207 to refund an anticipation note for a public purpose is subject to the forty-year limitation provided by section 1207.006 and not the seven-year limitation provided by section 1431.009(a). [3] Refunding a short-term tax note with long-term refunding bonds increases total debt service payments by incurring interest over a longer period. Chapter 1207 prohibits a refunding that increases total debt service payments unless the governing body finds that the issuance is in the best interests of the issuer and the gross loss amount is specified in the proceedings. Tex. Gov't Code § 1207.008(a).

Although there may be many reasons why it is in the issuer's best interest to refund for a loss, issuing tax notes with the intent at the outset to refund long in order to disregard or avoid a bond election rejected by its citizens is not one of them. Moreover, the use of synthetic long-term notes, *e.g., issuing tax notes while* intending to refund long at the time of authorizing the tax notes, runs afoul of section 1431.008(a) because in such case the true source of payment of the tax notes comes from the proceeds of general obligation tax bonds.

[3] Please note that section 1431.009(d) does not apply to notes issued for operating expenses or cumulative cash flow deficits, which must mature before the first anniversary of the date that the attorney general approves the notes. *See* Tex. Gov't Code §1431.009(c).

b. Application to Existing Commercial Paper Programs Established Pursuant to Chapters 1431 and 1371.

We will not apply this same presumption to unvoted commercial paper tax notes issued under *existing* commercial paper programs established pursuant to chapter 1431 and 1371 pursuant to proceedings that this office has previously approved; neither will we apply this to refunding bonds taking out commercial paper issued under previously approved programs in which the intent to refund was reflected in the commercial paper program proceedings. However, in light of a recent judicial construction of section 1431.008(a), we have concerns with approving any new programs under this structure or any amendments to existing commercial paper programs to increase, expand, or extend unvoted chapter 1431 tax note programs without further analysis and consideration. Part of this analysis involves not only the interplay between section 1431.003 and 1431.008(a), but also the definition of "obligation" under chapter 1371, which provides in part:

> The term does not include an obligation payable wholly or partly from ad valorem taxes unless:
>
> (A) issuance of the obligation or an obligation refunded by the obligation has been approved by the voters of the issuer in an election held for that purpose; *or*
>
> (B) the issuer:
>
> (i) is authorized by law to issue public securities payable wholly or partly from ad valorem taxes for the purpose for which the obligation is to be issued; *and*
>
> *(ii) has complied with any conditions imposed by law before its pledge of ad valorem taxes to pay the principal of or interest on the obligation.*

Tex. Gov't Code § 1371.001(5)(A)(B) (emphasis added). The legislative enactment of section 1371.001(5)(B) is later in time to section 1431.003;[4] therefore, we must consider whether section 1371.001(5)(B) requires compliance with section 1431.008(a) when establishing, amending, expanding, or increasing the unvoted tax commercial paper program under chapter 1431, with chapter 1371 controlling over any conflict between 1431 and 1371. *See* Tex. Gov't Code § 1371.003(b).

5. Bond Election Matters

a. Required Ballot Language

Please ensure that the bond ballot language references both principal and interest pursuant to section 1251.052(a)(3) of the Government Code, which requires that the ballot specifically state that taxes sufficient to pay the principal of and interest on the debt obligations will be imposed. Additionally, as school districts must expressly include in the ballot the fully capitalized statement

[4] Subsection (5) of section 1371.001 was amended by Section 1 of Senate Bill 968 of the 80th Legislature in the Regular Session to add subparagraphs (A) and (B), effective June 15, 2007. Section 1431.003 was codified in 1999 by the 76th Legislature, and last amended by Acts 2001, 77th Leg., Ch. 1183, section 3, effective September 1, 2001.

"THIS IS A PROPERTY TAX INCREASE",[5] there is no basis for the voter information document or other election materials to include language contradicting the statement statutorily required to be in the ballot.

b. School District General Purpose and Special Purpose Bond Propositions

In determining whether a school bond has been lawfully authorized to be issued, we must determine whether the bond was lawfully approved by voters and whether the purpose is authorized under state law. Part of this review includes determining whether the particular purpose may be included in the general-purpose proposition or whether the purpose must be separately stated in a special-purpose proposition.[6] To enable us to make this determination, issuers must indicate the specific type of facilities being financed, how they will be used, and provide, in addition to the election order and voter information document, any other information posted on its website about how the bond proceeds will be expended. Moreover, if the issuer has relied upon an exception to one of the special-purpose propositions to allow it to be included under the general-purpose proposition, we need to know the basis for this determination, which must be reflected in the election order or the general certificate.

For example, if a school district is financing a small stadium[7] under its general-purpose proposition, the school district must confirm in the general certificate that the seating capacity will be 1,000 or less.[8] If a school district is financing a gymnasium[9] under its general-purpose proposition we may require additional information, particularly if the seating capacity is greater than 1,000 or if the school already has a gymnasium on its campus. Factors to consider include, but are not limited to, how the facility will function as a gymnasium as opposed to another recreational facility, whether it will be an integral part of the school campus or a stand-alone facility, and the degree of athletic or physical education instruction to be provided at the facility. Similarly, in considering whether a particular facility rises to the level of a performing arts facility that would require a special-purpose proposition, we must consider whether the facility will be predominately used for classroom instruction and core administrative operation or whether the facility's predominant purpose is for staging performances, all as set forth in section 1(B) of the All Bond Counsel Letter dated December 27, 2019.

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[5] Tex. Educ. Code § 45.003(b-1).

[6] *See* All Bond Counsel Letter dated December 27, 2019, for a general overview of the school district bond ballot requirements imposed by section 45.003(g) and (h) of the Education Code.

[7] Though not defined in section 45.003(g), under subchapter F governing athletic stadium authorities, "stadium" is defined to mean "the structural and associated facilities designed for staging and holding athletic contests and other events." Tex. Educ. Code § 45.151(2).

[8] Section 45.003(g)(1) requires the construction, acquisition, or equipment of a stadium with a seating capacity for more than 1,000 spectators to be in a separate proposition, meaning that stadia with a seating capacity of 1,000 or less can be included in the general-purpose proposition.

[9] Section 45.003(g)(3) requires the construction, acquisition, or equipment of another recreational facility to be in a special-purpose proposition "other than a gymnasium, playground, or play area." Although gymnasium is not defined in section 45.003(g), it considered a school building necessary to the proper teaching of physical education. *See Jones v. Sharyland Indep. Schl. Dist.*, 239 S.W.2d 216, 218 (Tex. Civ. App. – San Antonio 1951, no writ).

Certain separate purposes, including but not limited to construction of athletic and recreational facilities, raise legitimate lending of credit concerns.[10] We will apply a higher level of scrutiny to these types of facilities, and may require additional factual showings if a proposed separate purpose does not have an obvious, predominantly educational function. We will balance several factors to determine whether the facility can reasonably be considered a school building under article 7, section 3(e) of the Texas Constitution. These factors include, but are not limited to, the educational purpose of the facility, the size of the facility relative to the student population, and whether and to what extent the facility will be accessible exclusively to students. In short, a school building must serve a predominantly educational purpose and is not merely a building owned by a school district that serves an educational purpose incidentally. Please note the factors listed above are a general guideline. If there is any confusion as to whether to include a project in a separate proposition, feel free to contact our office or submit a draft of the issuer's election proposition.

6. School District Maintenance Tax Obligations

a. *Submission of Maintenance Tax Election Proceedings*

When submitting maintenance tax obligations, we require school districts to submit the maintenance tax election proceedings or other sufficient evidence of the maintenance tax proposition approved by voters.[11] This applies not only to obligations in which the maintenance tax levy is pledged, such as maintenance tax notes[12] and contractual obligations,[13] but also to obligations in which delinquent maintenance taxes are pledged, such as time warrants,[14] negotiable notes secured by delinquent taxes,[15] and certificates of indebtedness.[16]

b. *Timing of Time Warrants and Certificates of Indebtedness*

As a reminder, school districts must structure time warrants and certificates of indebtedness so that principal payments occur at or near (within three months of) the end of the school fiscal year, unless the proceeds are used for maintenance expenditures for which the maintenance tax

[10] Article III, section 52(a) of the Texas Constitution generally prohibits a political subdivision from lending its credit or granting public money or thing of value in aid of, or to any individual, association, or corporation. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) (section 52(a) prohibits the Legislature from requiring gratuitous payments to individuals, associations, or corporations); *see also* Tex. Att'y Gen. Op. No. GA-0664 (2008) at pages 2-3 (discussing the application of article 3, section 52(a) to gratuitous transfers from one political subdivision to another).
[11] *See* All Bond Counsel Letter dated February 11, 1999, para 12.
[12] Tex. Educ. Code § 45.108
[13] Tex. Loc. Gov't Code § 271.005
[14] Tex. Educ. Code § 45.103; although subsection (a) of section 45.103 provides that time warrants may be payable out of any available funds, subsection (d) effectively creates a first lien on delinquent taxes by requiring them to be deposited into a special fund for payment of the time warrants. *See also Allen v. Channelview Ind. Sch. Dist.*, 347 S.W.2d 27, 28 (Tex. Civ. App. – Waco 1961, writ ref'd) (providing that predecessor to section 45.103 "in effect, pledges delinquent taxes (except bond taxes), penalties and interest to payment of outstanding warrants").
[15] Tex. Educ. Code § 45.104.
[16] Tex. Educ. Code § 45.111.

was voted.[17] Maintenance tax funds cannot be used to pay non-maintenance expenditures unless and until they have truly become surplus, which does not occur until after payment of current fiscal year maintenance tax expenditures.[18]

c. *Time Warrants for Teacher Housing*

Time warrants issued for the purpose of teacher housing[19] should reflect the housing as part of the purpose language in the authorizing order and initial time warrant. Additionally, either the order authorizing the time warrant or the general certificate must reflect the determination that the housing is necessary to have a sufficient number of teachers for the district.[20]

7. Road Debt Test under article 3, section 52 of the State Constitution

For purposes of demonstrating compliance with the constitutional road debt test under article 3, section 52(b) and (c), we require the issuer to submit certificates of taxable assessed value of real property from the appraisal district for the issuer and any applicable overlapping entities.[21] Please contact us if you have any questions about how to calculate the real property value or apply the test to contract revenue road bonds.

We have provided this letter pursuant to our authority under section 402.044 of the Government Code, which requires that we advise the proper legal authorities regarding the issuance of bonds that by law require the Attorney General's approval. However, please note that this letter does not dictate how a court may rule in a legal proceeding.

Sincerely,

Leslie Brock

Leslie Brock
Assistant Attorney General
Chief, Public Finance Division

[17] *See* All Bond Counsel Letter dated February 11, 1999, para 10.
[18] *See Madeley v. Trustees of Conroe Indep. Sch. Dist.*, 130 S.W.2d 929, 934 (Tex. Civ. App. – Beaumont 1939, writ dism'd judgm't cor.) (the maintenance tax fund for the support and maintenance of public free schools, to the extent that it is needed for that purpose, cannot be diverted to any other purpose; once that purpose has been effectuated, the funds may be used for any constitutional purpose, including for the erection and equipment of school buildings); *see also* Tex. Att'y Gen. Op. No. JH-339 (1974) at 6 (stating that *Madeley* case seems to teach that where the statute authorized the collection of the tax for current year maintenance purposes only, the money cannot be used for anything else until all maintenance requirements for the year have been met).
[19] Teachers' residences are expressly referenced in section 45.103(f).
[20] *See* Tex. Educ. Code § 45.003(g)(5) regarding tax bonds for "housing for teachers as determined by the district to be necessary to have a sufficient number of teachers for the district."
[21] For the overlapping test, *see generally* Tex. Att'y Gen. Op. No. JM-568 (1986).