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ATTORNEY GENERAL OF TEXAS

December 27, 2019

To All Bond Counsel:

RE: Various Legislative Changes Affecting Public Securities

This letter addresses recent legislative changes to bond ballot requirements for school districts and other political subdivisions, provides a revised maintenance tax test for school districts, and requires certain language to be included in contracts excepted from the anti-boycott statute based on value.

1. School District Bond Ballot Requirements

A. Senate Bill 30 authorizes one proposition for general purposes and requires separate propositions for special purposes.

We first provide a general overview of the new requirements made by Senate Bill 30 for school district bond ballots. On the ballot submitted to voters, Senate Bill 30 requires school districts to submit separate bond propositions to voters for certain school purposes by adding subsections (g) and (h) to section 45.003 of the Education Code. Subsection (g) identifies the general category of purposes that school districts may include in one general-purpose proposition, and enumerates six excepted purposes, each requiring a separate special-purpose proposition. The portion of subsection (g) identifying the general-purpose category provides:

(g) Notwithstanding Section 1251.052, Government Code, the question of whether to approve the issuance of bonds for the construction, acquisition, and equipment of school buildings in the district, the purchase of new school buses, and the purchase of necessary sites for school buildings may be submitted to the voters in a single ballot proposition . . .

In describing the general category of what school districts may include in one bond proposition, the Legislature collectively references the purposes stated in section 45.001(a)(1)(A), (C), and (D) for which school districts may issue bonds. This establishes the general rule that school districts may use one general-purpose proposition for the construction, acquisition and equipment of school buildings, including necessary sites, and the purchase of new school buses, unless all or a portion of the bonds include certain special purposes. The remainder of subsection (g) enumerates these special purposes:

. . . except that bonds for each of the following purposes must be stated in a separate proposition:

- (1) the construction, acquisition, or equipment of a stadium with seating capacity for more than 1,000 spectators;
- (2) the construction, acquisition, or equipment of a natatorium;
- (3) the construction, acquisition, or equipment of another recreational facility other than a gymnasium, playground, or play area;
- (4) the construction, acquisition, or equipment of a performing arts facility;
- (5) the construction, acquisition, or equipment of housing for teachers as determined by the district to be necessary to have a sufficient number of teachers for the district; and
- (6) an acquisition or update of technology equipment, other than equipment used for school security purposes or technology infrastructure integral to the construction of a facility.

If the purposes for the bonds include one or more of the special purposes identified above, the school district must place each excepted purpose into a separate special-purpose proposition. Moreover, subparagraphs (1), (3), and (6) of subsection (g) include exceptions to the separate proposition requirement for the respective special purposes, thereby allowing school districts to also include the following purposes in the general-purpose proposition: stadia with seating capacities of 1,000 or less, gymnasias, playgrounds, play areas, equipment used for school security purposes, and technology infrastructure integral to the construction of a facility.

Subsection (h) addresses how a school district must draft ballot propositions when it intends for one building or complex to be used for both general and special purposes. In such case, the school district must apportion the cost between the general and special purpose in the language of each bond proposition:

- (h) The question of whether to approve the issuance of bonds for a building described by Subsection (g)(1), (2), (3), (4), or (5) must be printed on the ballot as a separate ballot proposition regardless of whether that building is proposed as part of the same complex or building that contains traditional classroom facilities. Each separate ballot proposition required by this subsection must state the principal amount of the bonds to be issued that constitutes the cost for construction of that portion of the building or complex attributable to the building described by Subsection (g)(1), (2), (3), (4), or (5) or to the traditional classroom facilities, as applicable.

In requiring the allocation, subsection (h) expressly distinguishes a traditional classroom purpose from a special purpose enumerated in subsection (g)(1)-(5).

Having summarized the specific ballot requirements of section 45.003(g) and (h), we next address various bond ballot questions as school districts seek to comply with Senate Bill 30 and other recently enacted legislation for the upcoming bond elections in May of 2020.

B. Facilities predominantly used for classroom instruction and core administrative operation are not performing arts facilities.

We have received several questions about what constitutes a performing arts facility under section 45.003(g)(4) requiring a special-purpose bond proposition. Although a “performing arts facility” is not defined in Senate Bill 30, performing arts generally mean “arts, such as dance, drama, and music, that are performed before an audience.” *American Heritage Dictionary of the English Language* (Online 5th ed. 2019). Based on this generally understood meaning, if the facility’s predominant purpose is for staging performances to an audience, subsection (g)(4) requires the school district to submit a special-purpose proposition.

In contrast, a facility to be predominantly used for required classroom instruction and essential administrative operations for faculty and staff would not require a separate proposition simply because it includes a stage. Subsection (h) distinguishes between traditional classroom facilities and special-purpose facilities, supporting the premise that the general-purpose proposition is intended to cover basic facilities necessary to provide required curriculum. Although Senate Bill 30 does not define “traditional classroom facilities”, elsewhere in the Education Code the Legislature defines an “instructional facility” to mean real property used predominately for teaching required curriculum, which includes the fine arts as an enrichment curriculum. *See* §§ 46.001, 28.002(a)(2)(D). Moreover, the special purposes enumerated in subsection (g)(1)-(6) do not include core administrative facilities required for a school district to properly function, such as a general assembly room or cafeteria. Consequently, we do not believe that subsection (g)(4) requires a separate proposition for such facilities as, for example, a traditional band practice hall required for music instruction, a meeting hall used primarily for general assemblies of faculty and staff, or a cafeteria or gym that also functions as an auditorium.

Conversely, a facility that a school district intends to use predominantly for concerts and other performances to an audience requires a special-purpose proposition under section 45.003(g)(4). Incorporating classrooms into the facility or incorporating the facility into a larger educational building will not change this characterization. In such case, subsection (h) requires the school district to allocate the costs between the traditional classrooms as part of the general-purpose proposition and the performing arts component in a separate special-purpose proposition.

If a school district has questions about whether a specific proposed facility constitutes a performing arts facility requiring a separate proposition on the ballot under subsection (g)(4), bond counsel may submit their questions for our consideration. School districts should also consider discussing the matter with the Elections Division of the Secretary of State.

C. Special-purpose categories include improvements and renovations.

The special-purpose categories enumerated in subsection (g)(1)-(5) include improvements and renovations¹ to existing facilities falling within those special purposes. The

¹ Any school building renovations a school district undertakes with tax bonds must be of a capital nature in contrast to ordinary maintenance and repair covered by the school district’s voted maintenance tax. *See Madeley v. Trustees of Conroe Indep. Sch. Dist.*, 130 S.W.2d 929, 933 (Tex. Civ. App. – Beaumont 1939, writ dismissed, judgment corrected) (distinguishing between tax levy for maintenance of schools and tax levy for the purchase, construction, repair, or

use of “construction” in section 45.001(a)(1)(A) has traditionally been construed to cover improvements and capital renovations to existing facilities.² The use of “construction” in subsection (g)(1)-(5) should be construed in the same way. For example, a school district submitting bonds for purposes including improvements or renovations to an existing athletic stadium with a seating capacity exceeding 1,000 would be required to use a separate special-purpose proposition under subsection (g)(1) for the athletic stadium improvements.

D. Special-purpose propositions may include multiple facilities serving the same special purpose.

Subsection (g) requires separate propositions on the ballot for each enumerated special purpose, rather than for each separate facility serving that purpose. Although subparagraphs (1)-(4) use the singular to describe the type of facility requiring a separate proposition, the use of the singular generally includes the plural, and the controlling language in the introductory clause of subsection (g) expressly categorizes propositions by purpose. *See* Gov’t Code § 311.012(b). For example, if a school district wants to submit bonds to voters for purposes that include improvements to three existing athletic stadia, each with a seating capacity exceeding 1,000, the school district may submit to voters the improvements to all three stadia in one special-purpose proposition on the ballot under subsection (g)(1).

E. School districts may include the bond purposes added by Senate Bill 11 in the general-purpose proposition.

The general category portion of section 45.003(g) does not specifically recite the purposes added by Senate Bill 11 for which tax bonds may be issued – the retrofitting of school buses with emergency, safety, or security equipment in section 45.001(a)(1)(E) and the purchase or retrofitting of vehicles to be used for the emergency, safety, or security purposes in section 45.001(a)(1)(F). As a result, we have been asked whether school districts must submit these purposes in a separate bond proposition. We believe school districts may include these purposes in the general-purpose proposition because they either constitute equipment or serve a core administrative function of ensuring school safety. To the extent the equipment constitutes technology, subsection (g)(6) of section 45.003 expressly permits technology equipment used for security purposes to be included in the general-purpose proposition.

F. School districts must submit the bond purpose described in section 45.001(a)(1)(B) in a separate proposition.

In contrast to the bond purposes added by Senate Bill 11, school districts must submit the bond purpose provided in section 45.001(a)(1)(B) – the acquisition or refinancing of property financed under Subchapter A, Chapter 271, Local Government Code – in a separate bond proposition. This category is sufficiently distinct from the general-purpose category because the

equipment of public schools); *see also* Tex. Att’y Gen. Op. DM-178 at 5 (distinguishing between maintenance and construction).

² The statute providing school facility allotments to pay debt service reflects this traditional view that school districts may issue tax bonds for renovation and improvement of school buildings. *See* § 46.003(a) (providing the formula for calculating the school facility allotment to pay debt service on “eligible bonds issued to construct, acquire, renovate, or improve an instructional facility.” (emphasis added)).

school district has previously financed the property under a separate financing statute and is now asking voters whether the school district may acquire or refinance the property with ad valorem tax bonds.

G. Mandatory Ballot Statement Required by House Bill 3.

House Bill 3 amended section 45.003 to require school districts to include the following statement in bond propositions on the ballot: “THIS IS A PROPERTY TAX INCREASE.”³ Subsection (b-1) provides that the ballot “must include” this statement, making its inclusion mandatory. *See* Gov’t Code § 311.016(3) (“Must” creates or recognizes a condition precedent). Subsection (b-1) provides no exceptions; therefore, a school district does not have the discretion to omit the language from a proposition for bonds issued under section 45.001.

H. Certain school district tax refunding bonds require compliance with certain new money bond election requirements.

When submitting bonds to voters to refund limited maintenance tax obligations with its unlimited ad valorem tax under chapter 1207 of the Government Code, a school district must still comply with the debt election order requirements of section 3.009 of the Election Code and, if it has at least 250 registered voters, must also prepare the voter information document now required by section 1251.052(b) of the Government Code. This is required because by refunding the maintenance tax obligations with unlimited tax bonds, a school district shifts the burden of the debt from its limited maintenance tax to its unlimited debt tax, effectively creating new debt subject to the test set forth in section 45.0031 of the Education Code.

I. For tax bonds issued under chapter 45 of the Education Code, section 45.003(g) determines how many bond propositions a school district submits, but section 1251.052 of the Government Code otherwise applies.

Section 45.003(g) dictates how many bond propositions a school district must submit to voters “[n]otwithstanding Section 1251.052,” for purposes of tax bonds issued under chapter 45 of the Education Code. This means that section 45.003(g) controls over section 1251.052(a)(1) and (a-1) of the Government Code for the bond purpose description. However, the remaining portions of section 1251.052 still apply to school districts, as enacted collectively by Senate Bill 30 and House Bill 477.

We next address issues raised by the enactment of section 1251.052 as it applies to bond ballot propositions of political subdivisions generally, with the caveat that section 45.003(g) and (h) uniquely govern school districts in determining what constitutes a single specific purpose permitted to be included in one bond proposition.

³ See section 1.008 of House Bill 3, adding subsection (b-1) to section 45.003, Education Code.

2. The Single Specific Purposes Requirement for each Bond Proposition of a Political Subdivision Appearing on the Ballot

Collectively, House Bill 477 and Senate Bill 30 moved specific bond ballot requirements from section 52.072(e) of the Election Code to a new subchapter B of chapter 1251 of the Government Code governing debt obligations⁴ of a municipality, county, school district, or special taxing district. § 1251.051(3). Section 1251.052 requires issuers to include language in the bond ballot describing the purposes, stating the total principal amount, and indicating that taxes sufficient to pay the debt service will be imposed, all as set forth in subsections (a)(1), (a)(2), and (a)(3). The bills contain identical language for subsections (a)(2) and (a)(3); however, they differ in the language used for the purpose requirement in subsection (a)(1), with House Bill 477 requiring “a general description of the purposes” and Senate Bill 30 requiring a “plain language description of the single specific purposes[.]” As a result, we have been asked how to give effect to two different versions of section 1251.052(a)(1).

A. The issuer can comply with both versions of section 1251.052(a)(1) by describing in plain language the single specific purposes for the bonds.

If the same session of the legislature amends the same statute multiple times, each amendment without reference to the other, the amendments should be harmonized, if possible. *See* Gov’t Code § 311.025(b). Only irreconcilable amendments—those involving a direct conflict preventing simultaneous compliance with both provisions—require the later enactment to prevail. *See* § 311.025(a)-(b); Tex. Att’y Gen. Op. GA-0411 (2006) at 2. In this case, an issuer can comply with both versions of section 1251.052(a)(1) because a plain language description of the single specific purposes will inform voters of the general purpose of the bonds. Therefore, when phrasing ballot language, the issuer should focus on crafting its plain language description of the single specific purpose, thereby ensuring compliance with both versions of subsection (a)(1).

B. Section 1251.052(a-1) permits multiple facilities or improvements serving the substantially same purpose and necessarily related improvements and equipment.

The next issue we address involves whether particular purposes are sufficiently related to one another to constitute a single specific purpose under subsection (a)(1) for a bond proposition on the ballot of a political subdivision other than a school district.⁵ Section (a-1) to section 1251.052 elaborates on the meaning of single specific purpose:

(a-1) Each single specific purpose for which debt obligations requiring voter approval are to be issued must be printed on the ballot as a separate proposition. *A proposition may include as a specific purpose one or more structures or improvements serving the substantially same purpose and may include related improvements and equipment necessary to accomplish the specific purpose.*

⁴ “Debt obligation” means a public security secured by and payable from ad valorem taxes and excludes public securities designated by the issuer as self-supporting. Tex. Gov’t Code § 1251.051(1).

⁵ *See* § 45.003(g), Educ. Code, which governs purpose descriptions for school district ballots “[n]otwithstanding section 1251.052[.]”

(emphasis added). Thus, a single specific purpose is not limited to one structure or improvement so long as each structure or improvement serves the substantially same purpose; moreover, related improvements and equipment necessary to accomplish the specific purpose may be included in the same proposition.

C. The particular financing statute may inform issuers as to whether particular improvements serve the substantially same purpose.

Issuers should look to the statute authorizing the public security financing to determine whether particular improvements or structures serve the substantially same purpose under subsection (a-1) of section 1251.052. For example, upon voter approval, the state constitution permits counties to issue bonds for the construction of “macadamized, graveled, or paved roads, and turnpikes, or in aid thereof[.]” TEX. CONST. art. III, § 52(c). As such, all these purposes could be included in one proposition as one single purpose. *See Adams v. Mullen*, 244 S.W. 1083-1084 (Tex. Civ. App. – San Antonio 1922, writ ref’d) (putting roads and turnpikes in same proposition did not impermissibly submit to voters two or more separate and distinct propositions in one question, particularly when language submitted was identical to that used in the constitutional and legislative provision authorizing such election).

D. Water districts may include water, sewer, and drainage improvements in one bond proposition, with park improvements and road improvements each in separate propositions.

We have been asked whether water districts may continue to place in one proposition bonds issued for water, wastewater, and drainage purposes. In considering the principles noted above, we believe water, sewer, and drainage purposes are sufficiently interconnected such that they may continue to be included in one proposition, as evidenced by their treatment in chapter 49 of the Water Code. *See* § 49.466(b)(1) (requiring commission rules to emphasize the primary goal of financing water, sewer, and drainage facilities to serve the district). In contrast, chapter 49 generally distinguishes recreational facilities from water, sewer, and drainage, requiring a separate park plan to be filed and limiting the amount of tax debt that may be issued for park purposes. *See* § 49.4645; *see also* §49.466(b)(2) (requiring commission rules to emphasize and encourage the secondary goal of financing recreational facilities). Moreover, districts rely on a separate constitutional provision to levy an ad valorem tax for authorized road improvements, thus requiring road improvements to be in its own separate bond proposition on the ballot. *See* TEX. CONST. art. III, § 52(b).

E. Issuers must submit refunding bond authorization in a separate proposition from new money improvements.

Certain types of issuers, such as water districts and school districts, are constitutionally required⁶ to submit refunding bonds to voters when they seek to issue refunding tax bonds in a principal amount greater than what voters approved for the underlying new money tax bonds

⁶ *See, e.g.*, TEX. CONST. art. VII, § 3(e) (constitutional taxing authority for school districts), art. XVI, § 59(c) (constitutional taxing authority for water districts).

being refunded.⁷ In such case, the issuer relies upon chapter 1207 of the Government Code to hold the refunding bond election. *See* Gov't Code, § 1207.003(b). Given the separate nature between refunding voted authorization and new money voted authorization in this context, issuers must submit refunding bond authorization in a separate bond proposition.

F. Section 1251.052 of the Government Code does not prevent an issuer from submitting one bond proposition to construct a building serving multiple functions.

Except for school districts, which are governed by section 45.003(g) and (h), political subdivisions are not required to use separate bond propositions when seeking to construct one facility that serves multiple functions. Generally, construction of one facility serving multiple functions may constitute a single specific purpose. *See Alley v. Mayfield*, 131 S.W. 295, 296-97 (Tex. Civ. App. – Fort Worth 1910, no writ) (bonds may be submitted to voters on the single issue of the construction of one building to house a county courthouse and jail).

3. Revised School District Maintenance Tax Test

In light of amendments to various school district maintenance tax provisions made by House Bill 3, attached is a revised maintenance tax test. We recognize that bond counsel for school districts may wish to provide legal analysis for additional considerations should the attached test not adequately reflect a school district's ability to service the proposed maintenance tax obligation. If additional legal analysis warrants a revised maintenance tax debt, we will submit the revised test in a subsequent All Bond Counsel letter.

4. Anti-Boycott Contract Value Exception

House Bill 793 added an exception to section 2271.002(a)(2)⁸ of the Government Code relating to the anti-boycott verification. If a contract for goods or services between an issuer and a company⁹ has a value of less than \$100,000, the anti-boycott verification is not required. As such, if an issuer is relying upon this value exception for a contract contained in the bond transcript, please ensure the contract contains an express provision stating that the contract value is less than the amount stated in section 2271.002(a)(2).¹⁰

⁷ For example, if voters approved and a water district issued new money tax bonds in the principal amount of \$10,000,000 to construct water, sewer, and drainage improvements, the district could not issue refunding tax bonds in the principal amount of \$11,000,000 to refund the new money bonds without voters separately approving at least \$1,000,000 in refunding bond authorization pursuant to section 1207.003(b) of the Government Code.

⁸ Section 21.001(35) of House Bill 4170 redesignated chapter 2270 to chapter 2271, effective September 1, 2019. As such, contracts containing a reference to chapter 2270 should be updated accordingly.

⁹ House Bill 793 also excepts from section 2270.002 companies with less than ten full-time employees.

¹⁰ To the extent a company has less than ten full-time employees, this exception would also need to be specified in the contract.

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 in regard to 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 an election contest or other legal proceeding.

Sincerely,



Leslie Brock
Assistant Attorney General
Chief, Public Finance Division

Revised School District Maintenance Tax Test

$$[(.20) * (CMT) * (CF) * (TAV/100)] \geq \text{KMDS}$$

- CMT = Authorized maximum compressed maintenance tax rate of the District.
- CF = Collection factor (presumed to be 90%, unless demonstrated to be higher).
- TAV = District's certified taxable assessed valuation.
- KMDS = Maximum debt service on all outstanding maintenance tax indebtedness, including proposed maintenance tax obligations.