



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 3, 2016

To All Bond Counsel:

RE: Certificates of Obligation, Disclosure Filings for Certain Public Finance Contracts, and Upcoming Proposed General Rules

The main purpose of this letter is to address new requirements for certain issuers with respect to laws enacted during the 84th Regular Session: House Bill 1378 regarding the amendment to the Certificate of Obligation Act and House Bill 1295 regarding the disclosure of interested parties for certain contracts. Additionally, in the near future, we will be proposing new general rules updating our public security review procedures.

1. Failed Bond Proposition and Subsequent Certificates of Obligation – House Bill 1378

Effective January 1, 2016, House Bill 1378 amended the Certificate of Obligation Act by adding subsection (d) to section 271.047 of the Local Government Code. Absent narrow exceptions, the amendment prohibits the governing body of an issuer from authorizing certificates of obligation to finance a purpose previously rejected by the voters in a bond election during the preceding three years. Therefore, the issuer must provide certification in its general certificate confirming that no bond proposition to authorize the issuance of bonds for the same purpose as any of the projects being financed with the proceeds of the certificates was submitted to the voters of the issuer during the preceding three years and failed to be approved. The ordinance authorizing the certificates of obligation should also confirm this fact in the recitals in order to ensure that the governing body has made this determination before it authorizes the certificates. If one of the exceptions in subsection (d) applies, the issuer will need to set forth in the ordinance and the general certificate the applicable exception and the factual basis supporting the exception.

2. Disclosure of Interested Parties for Certain Contracts – House Bill 1295

We have received several questions about the application of House Bill 1295 to public finance contracts. By adding section 2252.908 to the Government Code, the law imposes disclosure requirements for certain contracts entered into on or after January 1, 2016 between a business entity and a governmental entity or state agency. Section 2252.908(b) applies to a contract of a governmental entity or state agency that either requires an action or vote by the governing body of the entity or agency before the contract may be signed, or to a contract having a value of at least \$1 million. *See also* 1 Tex. Admin. Code § 46.1(b). We note that based on the Texas Ethics Commission Rules, section 2252.908 also applies to contracts that are amended, extended, or renewed after December 31, 2015. *See* 1 Tex. Admin. Code §§ 46.1(b), 46.3(a).

A. Certification to Evidence Compliance.

As part of the public security transcript, governmental entities and state agencies must include certification in the general certificate confirming that, with respect to contracts related to the authorization or issuance of the public security, all disclosure filings and acknowledgments required by section 2252.908, Texas Government Code, and the Rules of the Texas Ethics Commission related to said provision, have been made. Implicit in this certification is a determination by the issuer as to whether a particular agreement constitutes a “contract” or falls under an exception provided in the statute and the rules of the Texas Ethics Commission, including the delegation exception set forth in Rule 46.1(c). In those instances in which the thirty-day period under Rule 46.5(c) for the governmental entity or state agency to acknowledge receipt of disclosure does not expire until after the bond closing, the certification may reflect that the acknowledgments “have or will be made” in accordance with the Act and the Commission’s rules.

B. Certification Not Required for Non-Profit Corporations Acting on Behalf of Governmental Entities or State Agencies.

Section 2252.908(a)(2) defines a governmental entity to mean “a municipality, county, public school district, or special-purpose district or authority.” Although “authority” is not expressly defined, based on the preceding entities identified in the definition, we construe “authority” to be limited to a political subdivision, and to not include non-profit corporations created on behalf of a governmental entity. Similarly, we do not view non-profit corporations created on behalf of a state agency to be considered a “state agency” as such term is defined. Please note, however, that most conduit transactions require certifications from the governing unit that created the non-profit corporation to act on its behalf. In situations in which the governmental entity or state agency has authorized the execution of contracts with business entities in connection with the public security authorized by the non-profit corporation, the general certificate of the governmental entity or state agency will need to include certification confirming compliance with section 2252.908.

C. Federal Government Is Not a Business Entity

We have also been asked whether the federal government constitutes a “business entity” under section 2252.908, in cases in which the federal government is the purchaser of the bonds or is otherwise a party to a contract related to the issuance of bonds. Based on the language used in the definition, we do not construe the federal government to be a “business entity”, and therefore will not require certification of compliance with section 2252.908 of the Government Code for contracts between the federal government and a state agency or governmental entity. Section 2252.908(a)(1) defines “business entity” to mean “any entity recognized by law through which business is conducted, including a sole proprietorship, partnership, or corporation.” As a sovereign entity, the federal government does not fall within the description of the last clause, not being a sole proprietorship, partnership, or corporation. The listing describes the nature of a business entity, which is contrary to the nature of a sovereign government. Therefore, under the principle of *ejusdem generis*, the federal government is not a business entity as that term is defined. This construction is supported by the Commission’s definition of “business entity” in Rule 46.3(b) to exclude a “governmental entity or state agency”.

3. Positions Taken Limited to Public Finance Review of Public Securities.

This letter is limited in scope to matters governed by the Public Finance Division. We have endeavored to inform you of positions we have taken regarding House Bills 1295 and 1378, as they relate to our review of public securities. Please note that this letter is not meant to address the application of such bills to matters beyond the scope of our review of public securities.

4. Upcoming Proposed General Rules

In the near future, we will propose in the *Texas Register* a new subchapter A of our rules to better reflect our current review requirements. The proposed rules are substantially similar to the prior proposed rules that were subsequently withdrawn, with most changes made to address some of the comments received from the prior rulemaking proceedings. We will hold a public hearing after we have had an opportunity to review all written comments received during the thirty-day comment period.

Sincerely,



Leslie Brock
Assistant Attorney General
Chief, Public Finance Division