

Draft Regulatory Guidance

Leased Facilities

1. Applicable statutes or rules

30 TAC §293.63 – Contract Documents for Water District Projects

30 TAC §293.46 – Construction Prior to Commission Approval

30 TAC §293.47 – Thirty Percent of District Construction Costs to be Paid by Developer

Occupations Code §1001.407 – Engineers: Construction of Certain Public Works

TWC §49.273. Contract Award

2. Background

If a district has a ratio of debt to certified assessed valuation of 10% or less, a district may obtain a waiver of developer cost participation requirements under 30 Texas Administrative Code § 293.47 provided that the bond issue includes funds to provide sufficient capacity in specified types of facilities to serve all connections upon which the feasibility is based or to be financed by the bond issue. A district may lease water/wastewater treatment plants prior to building permanent facilities to provide sufficient capacity under these provisions. While some of these leases already include purchase option provisions, all leases should include a purchase option in every lease to ensure the permanency of the available capacity.

3. Draft Regulatory Guidance

Sealing Procedures

Plans for a leased facility must be signed and sealed by a professional engineer licensed by the State of Texas in accordance with the Texas Engineering Practice Act (TEPA), Texas Occupations Code, Subtitle A, Chapter 1001, unless the facility is exempt from the TEPA. Plans and specifications for a leased facility must be approved by all entities with jurisdiction in accordance with §293.46(3).

Option to Purchase and Competitive Bidding Requirements

A lease of a facility must include an option to purchase. In addition, the district must follow the competitive bidding requirements set forth in Texas Water Code § 49.273 in connection with (i) the facility lease and (ii) a contract for site preparation work that must be performed in conjunction with the leased facilities. A standard form of the facility lease and the contract for site preparation work shall be included in the bidding documents, and the facility lease and site preparation work can be bid as one or more contracts. The standard form of the facility lease cannot contain terms and conditions which have the effect of preventing expansions to the facility by a different party than the lessor. For purposes of determining the value of the contract under Texas Water Code §49.273, the facility lease and the contract for site preparation work shall each be considered separate contracts, and the value of the lease shall be equal to the sum of all lease payments due under the lease for the duration of the lease term plus any additional payment(s) that must be paid to the lessor to acquire the facility pursuant to the purchase option at the expiration of the lease term. The provisions of this paragraph shall not apply to a facility lease that expands a wastewater treatment plant that is being leased pursuant to a facility lease executed prior to the publication date of this regulatory guidance.

Permanent Capacity

A bond applicant seeking a waiver under 30 Texas Administrative Code § 293.47 on the basis of a ratio of debt to certified assessed valuation of 10% or less must include funds to provide sufficient capacity in the wastewater treatment plants serving the district. If one or more of these plants is leased, the district can satisfy this criterion by demonstrating that the operation and maintenance tax rates generate revenues that are sufficient to make the lease payments on the plant(s). If the tax rates do not generate revenues that are sufficient to make the lease payments, the district must either (i) include funds in the bond application to purchase the plant(s), or the portion of the plant(s) required to serve the connections upon which the feasibility is based or which are being funded by the issue, under the lease purchase option(s); (ii) include funds in the bond application to construct capacity in a permanent plant; or (iii) provide a copy of a contract with another political subdivision to provide sufficient capacity to the district in a plant or plants owned by the political subdivision.