Texas Attorney General Issues DEI Advisory Opinion

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Publications

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The Texas Attorney General's Office has issued an advisory opinion and All Bond Counsel Letter that affects the use of bond proceeds to pay some professionals on public financings and some public works contractors. Section 1202.003, Texas Government Code, requires that, before the issuance of a public security, Texas issuers must submit the public security and the related record of proceedings to the Attorney General for approval. Upon the Attorney General's approval, the public security becomes "valid and incontestable" for any reason other than an infirmity under the Texas Constitution. Section 402.044, Texas Government Code, provides that "the attorney general shall advise the proper legal authorities in regard to the issuance of bonds that by law require the attorney general's approval." Citing Section 402.044 as authority, the Attorney General's Office issued an All Bond Counsel Letter on Jan. 20, 2026, implementing Texas Attorney General Opinion No. KP-0505 ("Diversity, Equity, and Inclusion" in Texas), issued Jan. 19, 2026.

According to the All Bond Counsel Letter, the opinion identifies various diversity, equity, and inclusion (DEI) provisions in Texas statutes that, in the Attorney General's opinion, create race-based and gender-based classifications in violation of the U.S. Constitution's Equal Protection Clause and the Texas Constitution's Equal Rights Amendment, including such classifications in various historically underutilized business (HUB) and disadvantaged business enterprise (DBE) programs and bond financing statutes. Accordingly, for all transcripts submitted on or after Monday, Jan. 26, 2026, Texas issuers must certify to the Attorney General that "bond proceeds will not be used for any unconstitutional purposes, including payments made pursuant to unconstitutional DEI programs and including any such DEI programs established by local ordinances or policies."

At this time, the specific scope and application of the All Bond Counsel Letter are unclear. For example, it is unclear whether, and

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for how long, the Attorney General will accept an issuer's certification without undertaking independent fact finding. Some transactions that require Attorney General approval, such as the replacement of a liquidity facility for commercial paper notes or variable rate demand bonds, do not generate bond proceeds but nevertheless seem to fall within the scope of the certification requirement. Further, the required certification does appear to apply to the use of bond proceeds to not only pay transaction participants but also construction contracts and sub-contracts. The certification also appears to be required even in conduit financings in which the borrower's (not the issuer's) DEI policies and hiring decisions are operative. It does appear that the issuer's general certificate is an appropriate document for the certification.

We look forward to additional guidance from the Texas Attorney General's Office on this subject. In the meantime, please reach out to the authors or any attorney with FBT Gibbons' Public Finance Practice if you have concerns or questions about how this DEI advisory opinion might impact financing for any current or planned projects.

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