

# Texas Water Development Board

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**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Todd Chenoweth, General Counsel  
Jessica Zuba, Deputy Executive Administrator

**FROM:** Mark Wyatt, Director, Program Administration & Reporting

**DATE:** August 23, 2018

**SUBJECT:** Drinking Water State Revolving Fund Set-Aside Contract

## ACTION REQUESTED

Consider authorizing the Executive Administrator to execute the State Fiscal Year 2019 Drinking Water State Revolving Fund Set-Aside Contract between the Texas Water Development Board and the Texas Commission on Environmental Quality.

## BACKGROUND

Each year, the Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ) execute an inter-agency contract governing the use of certain Drinking Water State Revolving Fund (DWSRF) capitalization grant funds for set-aside activities. The contract reflects the set-aside allocations included in the State Fiscal Year (SFY) 2019 Intended Use Plan (IUP) and set-aside activities described in SFY 2019 Set-Aside Work Plans prepared by the TCEQ and submitted for approval to the U. S. Environmental Protection Agency (EPA).

There are two substantive changes from last year's contract. The first change removes the requirement for TCEQ to provide match for the State Program Management ("10 percent") set-aside. The Water Infrastructure Improvements for the Nation Act of 2017 (Pub. L. 114-322) eliminated the requirement for the state of Texas to provide this match beginning with the Federal Fiscal Year (FFY) 2018 grant funds. The second change is to update the reference to the DWSRF program's disadvantaged business enterprise goals to be consistent with the levels that EPA approved on July 17, 2017.

## KEY ISSUES

The DWSRF set-aside contract will cover the TCEQ's annual utilization of \$12,244,800 from the FFY 2018 capitalization grant funds, plus any eligible Small Systems Technical Assistance and State Program Management set-aside funds remaining from the prior DWSRF grant.

### Our Mission

To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas

### Board Members

Peter M. Lake, Chairman | Kathleen Jackson, Board Member | Brooke T. Paup, Board Member

Jeff Walker, Executive Administrator

A total of \$12,244,800 of FFY 2018 capitalization grant funds will be allocated as follows:

- State Program Management set-aside - \$8,704,000,
- Small Systems Technical Assistance set-aside - \$1,740,800, and
- Local Assistance and Other State Programs set-aside - \$1,800,000.

The maximum allocations of grant funds for these set-asides is established in federal law. The state may use up to 10 percent for the State Program Management set-aside, which equals \$8,704,000. The state may also use up to two percent of the grant for the Small Systems Technical Assistance set-aside, which equals \$1,740,800. Finally, the state may use up to 15 percent of the grant for the Local Assistance and Other State Programs set-aside. The amount of \$1,800,000 allocated for this set-aside was negotiated between TCEQ and TWDB.

The FFY 2018 capitalization grant increased \$27,450,000 over last year's level resulting in an increase in TCEQ's allocation this year of \$3,294,000.

**RECOMMENDATION**

The Executive Administrator recommends that the Board authorize the execution of the attached contract with the TCEQ, with the ability to make minor revisions that do not alter the underlying content.

Attachment: 1. Draft Set-Aside Contract between the TWDB and the TCEQ

DRINKING WATER STATE REVOLVING FUND PROGRAM  
SET-ASIDE ACTIVITIES CONTRACT  
BETWEEN  
THE TEXAS WATER DEVELOPMENT BOARD  
AND  
THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**ARTICLE I. RECITALS.**

The Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ), collectively referred to herein as the Parties, agree that the following representations are true and correct and form the basis and reason for the execution of this Contract for Set-Aside Activities (hereinafter referred to as “Contract”).

**1.1.** Section 130 of the Safe Drinking Water Act Amendment of 1996 (PL 104-182) added 42 U.S.C. 300j-12 to the provisions of the Safe Drinking Water Act (SDWA) (42 U.S.C. 3600f, *et seq.*) and thereby authorized the creation of the Drinking Water State Revolving Fund (DWSRF) program. Under the DWSRF, the U.S. Environmental Protection Agency (EPA) may be appropriated federal funds to provide grants to states to capitalize a state revolving loan fund in each state so that each state may provide financial assistance to public water systems to achieve the purposes of the SDWA. Pursuant to 42 U.S.C. 300j-12(g)(2) and 42 U.S.C. 300j-12(k)(2) of the SDWA, the EPA may also set portions of the capitalization grant aside from the authority to provide financial assistance so that the funds may be used for SDWA State Program Management, Small System Technical Assistance, and Local Assistance activities (collectively referred to as “Set-Aside Activities”).

**1.2.** Pursuant to § 15.6041, Texas Water Code, the TWDB is authorized to establish and administer the Texas DWSRF program in accordance with the SDWA, the SDWA Amendments of 1996, and Chapter 15, Subchapter J, Texas Water Code. Acting pursuant to these provisions, since the enactment of the DWSRF, the TWDB has submitted an application to the EPA for the award of the capitalization grant to the State of Texas (State) for the administration of the DWSRF program. The TWDB is authorized to use the capitalization grant to administer the DWSRF by providing financial assistance to eligible applicants. Additionally, the TWDB administers the portions of the capitalization grant funds for the Set-Aside Activities to be performed by TCEQ.

**1.3.** TCEQ, as the State’s primacy regulatory agency, is responsible for implementing the drinking water regulatory scheme established by the SDWA and for enforcing the national drinking water standards set by the EPA. To effectuate these goals, TCEQ administers the 10% set-aside for the State Program Management (SPM), the 2% set-aside for the Small System Technical Assistance (SSTA) and a portion not to exceed \$1.8 million of the additional 15% set-aside funds for Local Assistance (LA) programs. These activities are eligible under the SDWA for funds set aside from the DWSRF capitalization grant.

**1.4.** Due to the continuing nature of the capitalization grants and TCEQ's regulatory responsibilities, the TWDB and TCEQ are authorized to use capitalization grant funds not expended in a given year for approved activities conducted in subsequent years, except for the LA set-aside funds. These activities are those approved through grant work plans (hereinafter "Set-Aside Work Plans") developed by TCEQ for Set-Aside Activities and submitted to the EPA. The Parties agree that unspent set-aside balances may be reduced either through accelerating set-aside spending or through transferring accumulated set-aside funds to the financial assistance program fund, as provided in 40 CFR 35.3540.

**1.5.** Pursuant to 31 TAC § 354.3 (the Memorandum of Understanding), the Parties shall annually identify the amount and purposes for the disbursement of DWSRF capitalization grant funds from the TWDB to TCEQ for authorized Set-Aside Activities to be performed by the TCEQ. This Contract will govern the duties and responsibilities of the Parties in effectuating the allocation of funds for each State Fiscal Year (SFY) of the Contract Term. The use of the funds by TCEQ has previously been described and documented in the DWSRF Intended Use Plan for each SFY of this Contract, which are incorporated herein by this reference and made a part of this Contract.

**1.6.** Activities funded under this Contract will take place during the applicable Intended Use Plan year, which is effective for activities during the SFY beginning on September 1 and ending on August 31, using the associated federal capitalization grant funds.

## **ARTICLE II. TCEQ RESPONSIBILITIES.**

In consideration of the performance of the responsibilities of the TWDB set forth in this Contract, TCEQ agrees as follows:

**2.1. SET-ASIDE ACTIVITIES.** TCEQ agrees to perform such activities for which the State can use capitalization grant funds pursuant to SDWA 42 U.S.C. 300j-12(g)(2), 300j-12(k)(2) and in accordance with EPA-approved TCEQ Set-Aside Work Plans and budgets. All work plans and the budgets related to the Set-Aside Activities submitted to EPA by TCEQ must also be submitted to the TWDB. The final approved or amended work plans and budgets must be sent to TWDB in electronic format.

**2.1.1. STATE PROGRAM MANAGEMENT SET-ASIDE.** TCEQ shall engage in such activities for which the State can use up to 10% of the capitalization grant pursuant to 42 U.S.C. 300j-12(g)(2)(A) and (B) by performing or subcontracting to perform the tasks identified in the Drinking Water State Revolving Fund State Program Management Ten Percent Set-Aside Activities Work Plan for each SFY of the Contract, including all changes or amendments (hereinafter "SPM Work Plan"). The SPM Work Plan is incorporated into this Contract by reference. In order to perform or subcontract to perform the SPM Work Plan, TCEQ shall:

1. Perform or have performed the tasks identified in the SPM Work Plan to administer the State Public Water System Supervision (PWSS) Program as public water system supervision authorized by 42 U.S.C. 300j-12(g)(2)(A);
2. Perform or have performed the tasks identified in the SPM Work Plan to develop and implement a capacity development strategy as authorized by 42 U.S.C. 300j-12(g)(2)(C); and
3. Make available upon request by the TWDB, records of work performed for each Program Element as identified in the SPM Work Plan and incorporated herein.

**2.1.2. SMALL SYSTEMS TECHNICAL ASSISTANCE SET-ASIDE.**

TCEQ shall engage in such activities for which the State can use up to 2% of the capitalization grant pursuant to 42 U.S.C. 300j-12(g)(2) by performing or subcontracting to perform the tasks identified in the Small Systems Technical Assistance Set-Aside Work Plan for each SFY of the Contract, including all changes and amendments thereto (hereinafter referred to as the "SSTA Work Plan"). The SSTA Work Plan is incorporated into this Contract by reference. Specifically, TCEQ shall perform the tasks identified in the SSTA Work Plan, including all changes and amendments, to provide technical assistance to public water systems serving 10,000 or fewer persons as authorized by 42 U.S.C. 300j-12(g)(2).

**2.1.3. LOCAL ASSISTANCE AND OTHER STATE PROGRAMS SET-ASIDE.**

TCEQ shall engage in such activities for which TCEQ may use up to \$1,800,001 of the additional eligible 15% Set-Aside funds of the capitalization grant pursuant to 42 U.S.C. 300j-12(k)(2) for local assistance and other State programs. TCEQ shall perform or subcontract to perform the tasks identified in the Local Assistance and Other State Programs Set-Aside Work Plan (hereinafter referred to as the "LA Work Plan"), including all changes or amendments thereto, utilizing the most current awarded FFY Set-Aside Funds available. The LA Work Plan for each SFY of the Contract is incorporated into this Contract by reference.

TCEQ shall perform or subcontract to perform the tasks identified in the LA Work Plan, including the following:

- A. Provide financial, managerial, and technical assistance to any public water system as part of a capacity development strategy as authorized by 42 U.S.C. 300j-12(k)(2)(C);
- B. Upon request of the TWDB, provide financial, managerial, and technical assessment, furnishing the TWDB with a report on DWSRF applicants within forty-five (45) to sixty (60) days from receipt of the TWDB request, and expeditiously provide a similar assessment and report on projects designated as emergency by the TWDB;

- C. Complete source water protection activities to assist in the implementation of programs designed to provide source water protection and wellhead protection within the State;
- D. Coordinate with the TWDB to effect sharing of electronic data no less than quarterly, but no more than monthly;
- E. Provide regulatory oversight of water conservation and reclamation districts and promote regional water strategies;
- F. Enhance the Capacity Development Strategy requirement of the SDWA through extended outreach by 1) sharing written materials, as provided by the TWDB, relating to financial assistance and eligibility requirements to potential DWSRF applicants, and 2) providing DWSRF application assistance to potential applicants through third-party entities or contractors;
- G. Increase coordination of information and outreach activities with the TWDB in an effort to reduce compliance violations and ensure safe drinking water for the citizens of the State, including early identification of systems repeatedly non-compliant with SDWA provisions; and
- H. Make available, upon request of the TWDB records of work performed as identified in the LA Work Plan.

**2.2. SUBCONTRACT AUTHORITY.** TCEQ may perform all or any portion of the Set-Aside Activities identified in Sections 2.1.1 and 2.1.2, or 2.1.3 by subcontracting with other entities. If TCEQ subcontracts any such responsibility, TCEQ shall comply with the requirements of this Section.

**2.2.1. SUBCONTRACT PROVISIONS.** TCEQ shall include in all subcontracts any provisions required by federal or state law or regulations.

**2.2.2. SUBCONTRACT COPIES.** Upon written request, TCEQ shall provide copies to the TWDB of all executed contracts, contract amendments, and contract deliverables related to all or any portion of the Set-Aside Activities discussed in this Contract.

**2.2.3. SUBCONTRACT RESPONSIBILITY.** TCEQ shall be solely responsible for the performance of all terms and conditions of any subcontracts executed to perform the terms of this Contract, including, but not limited to, all payments made to all such subcontractors.

**2.3. PROCUREMENT AND DISADVANTAGED BUSINESS ENTERPRISE GOALS.** TCEQ shall select the contractor pursuant to State procurement laws, 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, and 2 CFR Chapter XV- Environmental Protection Agency. Further, in compliance with 42 U.S.C. 4370d and 40 CFR Part 33, TCEQ shall assist the State in reaching its Disadvantaged Business

Enterprise (DBE) “fair share” goals for any funds provided by this Contract and spent in subcontracts for construction, supplies, equipment, and services contracts. The established fair share goals are shown below and are subject to change upon approval by the EPA.

PROCUREMENT TYPE	MBE GOAL (%)	WBE GOAL (%)
Construction	19.44%	9.17%
Supplies	25.34%	8.82%
Equipment	16.28%	11.45%
Services	20.41%	13.66%

**2.3.1. GOOD FAITH EFFORT.** Pursuant to 40 CFR 33.301, TCEQ agrees to make the following good faith effort in offering fair opportunity for participation when procuring contracts for construction, supplies, equipment, and services including engineering, contracting, legal, and fiscal services.

A. A good faith effort by TCEQ would include, but is not limited to, the following actions:

1. Including qualified DBEs on solicitation lists;
2. Assuring that DBEs are solicited whenever they are potential sources;
3. Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of DBEs;
4. Establishing delivery schedules, where requirements of the work permit, that will encourage participation by DBEs;
5. Using services and assistance of the Minority Business Development Agency of the Small Business Administration of the United States Department of Commerce, as appropriate; and
6. If any consultant or contractor awards sub-agreements, requiring them to take affirmative steps required in sub-paragraphs (1-5) herein.

B. TCEQ shall maintain documentation establishing its good faith efforts to meet the State’s DBE goals for inspection by the TWDB, upon request.

**2.3.2. REPORT COORDINATION.** TCEQ shall provide DBE report data for each FFY of the Contract, October 1 through September 30, to the TWDB no later than twenty (20)

calendar days after completion of the FFY ending September 30. If the date for the submission of the DBE report data falls on a Saturday, Sunday, a legal holiday, or a day on which state agencies within the State of Texas are authorized to be closed, then the date for providing the DBE report data will be the prior working day. The TWDB is not responsible for incomplete data provided by TCEQ. Revisions, inquiries, and special requests regarding TCEQ's subcontracting utilization data must be coordinated and resolved by TCEQ.

**2.3.3. CONTRACT ADMINISTRATION PROVISIONS AND BIDDERS LIST.**

TCEQ agrees to comply with the contract administration provisions of 40 CFR 33.302, and also agrees to require subcontractors to comply with provisions of 40 CFR 33.302 and 40 CFR 33.501(b) and (c) if the subcontractor is subject to or follows the competitive bidding requirements.

**2.4. REPORTING REQUIREMENTS.** The TCEQ shall annually provide to the TWDB a SFY Set-Aside Report (hereinafter the "Report") of funds expended during the prior SFY no later than November 15<sup>th</sup> of each year. The Report must include the information as follows:

**2.4.1. ANNUAL SET-ASIDE REPORT.** For each Program Element identified in the SPM Work Plan, the SSTA Work Plan, and the LA Work Plan (in this Section, the "Work Plans"):

- A. The amounts of funds expended for each Program Element identified in each Work Plan for all invoices paid by TCEQ during the SFY. Invoices paid by TCEQ after September 1 in each year, must be included in the next year's Annual Set-Aside Report;
- B. The number of completed project deliverables identified in each Work Plan. For incomplete project deliverables, provide the degree of accomplishment for each project deliverable associated with a task identified in the Work Plans;
- C. A narrative explanation for deviations from either completed or incomplete deliverables identified in the Work Plans; and
- D. A narrative identifying how the goal for the Program Element was achieved.

**2.4.2 FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT.**

Pursuant to the Federal Funding Accountability and Transparency Act (hereinafter "FFATA") of 2006, Pub. L. 109-282, and associated 2008 amendments, Pub. L. 110-252, TCEQ is required to assist the TWDB in capturing and reporting federal sub-award and executive compensation data regarding first-tier sub-awards, including sub-contracts. TCEQ shall submit all required data to the TWDB no later than twenty (20) days following the month the sub-award or sub-contract has been made. The TWDB shall utilize the data submitted by TCEQ to comply with reporting requirements under FFATA.

**2.5. RATES.** All releases, fringe and indirect rates that are applicable to the contract apply to the start of the SFY.

**2.6. WORK PLAN AMENDMENT.** The Parties understand and agree that the Work Plans are subject to change during the course of the fiscal year. At any time should the Work Plans change:

- A. TCEQ shall provide to the TWDB final approved or amended Work Plans and approved or amended budgets in electronic format.
- B. Amended Work Plans will be incorporated into this Contract as though they are documents revised under the terms of Section 4.4.

**ARTICLE III. TWDB RESPONSIBILITIES.**

In consideration of the performance of the responsibilities of TCEQ set forth in this Contract, the TWDB agrees as follows:

**3.1. REIMBURSEMENT OF EXPENSES FOR STATE PROGRAM MANAGEMENT.** For performing the tasks identified in the SPM Work Plan, the TWDB shall provide to TCEQ, according to the terms of this Contract, from capitalization grant funds actually received or any previously approved and available capitalization grant funds from the EPA, an amount not to exceed the SPM Work Plan budget for actual expenses incurred by TCEQ in performing the tasks identified in the SPM Work Plan. These expenses must not exceed the 10% State Program Management Set-Aside of the DWSRF capitalization grant allotted to the State. The TWDB is under no obligation to pay TCEQ until the TWDB has actually received the available capitalization grant funds from the EPA. TCEQ may perform additional projects using the fund balance of prior years, in addition to the 10% state program management, as long as it does not exceed the set-aside balances. TCEQ agrees to provide the TWDB with an updated budget if additional projects are to be added to the SPM Work Plan.

**3.2. REIMBURSEMENT OF EXPENSES FOR SMALL SYSTEMS TECHNICAL ASSISTANCE.** For performing the tasks identified in the SSTA Work Plan, the TWDB shall provide to TCEQ, according to terms of this Contract, from capitalization grant funds actually received or any previously approved and available capitalization grant funds from the EPA, an amount not to exceed the SSTA Work Plan budget for actual expenses incurred by TCEQ in performing the tasks identified in the SSTA Work Plan. These expenses must not exceed the 2% SSTA Set-Aside of the DWSRF capitalization grant allotted to the State. The TWDB is under no obligation to pay TCEQ until the TWDB has actually received the available capitalization grant fund payment from the EPA. TCEQ may perform additional projects using the fund balance of prior years in addition to the 2% SSTA, as long as it does not exceed the set-aside balances. TCEQ agrees to provide the TWDB with an updated budget if additional projects are to be added to the SSTA Work Plan.

**3.3 REIMBURSEMENT OF EXPENSES FOR LOCAL ASSISTANCE AND OTHER STATE PROGRAMS.** For performing the tasks identified in the LA Work Plan, the TWDB shall provide to TCEQ from the most currently awarded FFY capitalization grant funds actually

received from the EPA, FFY, an amount not to exceed the LA Work Plan budget for the actual expenses incurred by TCEQ. These expenses must not exceed \$1.8 million dollars of the 15% Local Assistance and Other State Programs Set-Aside for each SFY of the LA Work Plan from the EPA. The TWDB is under no obligation to pay TCEQ until the TWDB has actually received the most current awarded FFY capitalization grant funds from the EPA. TCEQ agrees to provide the TWDB with an updated budget if additional projects are to be added to the LA Work Plan.

**3.4. CONDITIONS FOR RELEASE OF FUNDS.** The TWDB shall not release any funds for the Set-Aside Activities to TCEQ until the following conditions have been met:

**3.4.1. REQUEST FOR REIMBURSEMENT SUBMISSION.** A request for reimbursement must be submitted to the TWDB for work performed each month of the Contract within forty-five (45) days of the end of such month. If no expenses are incurred for a specific period and/or fiscal year Work Plan, TCEQ will submit a "\$0" report in accordance with the above schedule. The request for reimbursement will be submitted on an Excel spreadsheet in a format agreed upon by both TCEQ and the TWDB.

**3.4.2. TWDB REVIEW OF REQUEST FOR REIMBURSEMENT.** The TWDB shall promptly review each request for reimbursement submitted by TCEQ to ensure compliance with the requirements of this Contract. Upon written request of the TWDB, TCEQ will timely submit, in writing, any additional information that is needed by the TWDB to complete the review of the request for reimbursement. The TWDB shall prepare and deliver a transfer voucher to the Texas Safekeeping Trust Company for deposit with the Texas State Treasury within thirty (30) days of receipt of an administratively complete request for reimbursement.

**3.5. FUNDS AVAILABILITY.** It is expressly understood and agreed by the Parties that performance on the part of TCEQ and the TWDB of their respective responsibilities under this Contract is contingent upon actual availability and receipt of sufficient and adequate funds from the Texas Legislature, the United States Congress, the EPA, and any other sources contemplated by this Contract.

**3.6. COMMUNICATION.** This Contract establishes the understanding between the TWDB and TCEQ to share information necessary for compliance with the EPA programmatic requirements of the DWSRF program in accordance with the Memorandum of Understanding. Programmatic changes in the federal administration of the capitalization grant shall be shared between the Parties through mutual participation in DWSRF coordination meetings, which shall be conducted on a basis mutually agreeable to each Party. The set-aside balances will be provided to TCEQ each month.

#### **ARTICLE IV. GENERAL TERMS AND CONDITIONS.**

**4.1. TERM.** This Contract will be effective September 1, 2018. Performance of this Contract by either Party will be for each applicable Intended Use Plan Year and will expire on August 31, 2019, unless terminated early by the Parties per Section 4.2 of this Contract. At the end of each SFY during the performance of this Contract, or in case of an early termination by either Party,

TCEQ will have ninety (90) days to liquidate its encumbrances for activities from September 1 to August 31 of the previous SFY.

**4.2. TERMINATION.** Should either the TWDB or TCEQ desire to terminate this Contract, the Party requesting termination shall give ninety (90) days written notice of intent to terminate and shall advise the other Party in writing of the reasons.

**4.3. SEVERANCE PROVISION.** Should any one or more provisions of this Contract be held to be null, void, or for any reason without force or effect, such provision(s) will be construed as severable from the remainder of this Contract and will not affect the validity of all other provisions of this Contract, which will remain in full force and effect.

**4.4. AMENDMENT.** As the Parties to this Contract are agencies of the State, the Contract term may be amended as needed and is not subject to competitive procurement regulations. This Contract may be amended in writing at any time by mutual consent of the TWDB and TCEQ through the officials indicated below or their designees. Any renewal amendment will identify the Contract Term and incorporate the subsequent SFY DWSRF Intended Use Plans and Set-Aside Work Plans.

**4.5. CORRESPONDENCE.** All correspondence between the Parties must be made to the following addresses:

**Texas Water Development Board**

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**TEXAS WATER DEVELOPMENT  
BOARD**

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Jeff Walker  
Executive Administrator

Date: \_\_\_\_\_

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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Toby Baker  
Executive Director

Date: \_\_\_\_\_