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AGENDA ITEM MEMO

BOARD MEETING DATE: January 16, 2025

TO: Board Members

THROUGH: Bryan McMath, Executive Administrator
Ashley Harden, General Counsel
Jessica Peña, Deputy Executive Administrator

FROM: Marvin Cole-Chaney, Director, Program Administration & Reporting

SUBJECT: Clean Water State Revolving Fund Set-Aside Contract

ACTION REQUESTED

Consider authorizing the Executive Administrator to execute the State Fiscal Year 2025 Clean Water State Revolving Fund Set-Aside Contract between the Texas Water Development Board and the Texas Commission on Environmental Quality covering regular annual appropriations.

BACKGROUND

The Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ) annually execute an inter-agency contract governing the use of certain Clean Water State Revolving Fund (CWSRF) capitalization grant funds for set-aside activities. The contract covers the grant in the amount of \$746,260 from regular annual appropriations under the Consolidated Appropriations Act, 2024, Public Law 118-42. The agreement reflects the set-aside allocation included in the State Fiscal Year (SFY) 2025 Intended Use Plan (IUP) for CWSRF General Activities and set-aside activities that will be described in SFY 2025 Set-Aside Work Plan prepared by the TCEQ and submitted for approval to the United States Environmental Protection Agency (EPA).

KEY ISSUES

The contract will cover the use of CWSRF set-aside funds by TCEQ in SFY 2025 from the Federal Fiscal Year (FFY) 2024 capitalization grant provided under the regular

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annual appropriations in an amount not to exceed \$746,260 for small system technical assistance.

The maximum allocation of grant funds for this set-aside is established in federal law. The state may use up to 2 percent of the grant for the Small Systems Technical Assistance.

RECOMMENDATION

The Executive Administrator recommends authorizing the execution of the attached contract with the TCEQ to administer the set-aside funds with the ability to make minor revisions that do not alter the underlying content.

Attachment(s):

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

DRAFT

CLEAN 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 Set-Aside Activities Contract (hereinafter referred to as "Contract").

1.1. The Water Quality Act of 1987, Pub. L. No. 100-4, amended the Clean Water Act (CWA) 33 U.S.C. § 1251 *et seq.*, to add Subchapter VI, 33 U.S.C. §§ 1381-1388, which authorizes the U.S. Environmental Protection Agency (EPA) to provide federal funds to states to create and capitalize state revolving loan funds. These funds enable each state to create a Clean Water State Revolving Fund (Base CWSRF) program to provide loans and other various types of assistance to wastewater treatment facilities (WWTF) to achieve the purposes of the CWA. The Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL), Pub. L. No. 117-58, amended the Clean Water Act to add § 603(k), which authorized states to set aside 2% of the annual Base CWSRF funds to provide technical assistance to rural, small, and tribal publicly owned treatment works (hereinafter referred to as "Base CWSRF Set-Aside Activities"). Clean Water Act § 603(k), 33 U.S.C. § 1383(k).

1.1.1 This agreement pertains only to the Base CWSRF 2% set aside, \$746,260.00, to provide technical assistance to rural, small, and tribal publicly owned treatment works.

1.2. Pursuant to Texas Water Code § 15.604, TWDB is authorized to establish and administer the Texas CWSRF program in accordance with the CWA, as amended, and Texas Water Code Chapter 15, Subchapter J. Acting pursuant to these provisions, since the enactment of the CWSRF, TWDB has applied to EPA for the award of the capitalization grant to the State of Texas (State) for the administration of the CWSRF program. TWDB is authorized to use the capitalization grant to administer the Base CWSRF by providing financial assistance to eligible applicants. Additionally, TWDB administers the portions of the capitalization grant funds for the Base CWSRF Set-Aside Activities to be performed by TCEQ.

1.3. TCEQ, as the State's primacy regulatory agency, is responsible for implementing the clean water regulatory scheme established by the CWA and for enforcing the national clean water standards set by EPA. To effectuate these goals, TCEQ will administer the 2% set-aside for the Base CWSRF Small System Technical Assistance (Base CWSRF SSTA). These activities are eligible under the CWA for funds set aside from the Base CWSRF capitalization grant.

1.4. Due to the continuing nature of the capitalization grants and TCEQ's regulatory responsibilities, TWDB and TCEQ are authorized to use capitalization grant funds approved for use but not expended in a given year for approved activities conducted in subsequent years. These activities are those approved through a grant work plan developed by TCEQ for Base CWSRF Set-Aside Activities and submitted to EPA. The Parties agree that unspent set-aside balances may be reduced either through accelerating set-aside spending or through transferring unspent set-aside balances to the financial assistance program fund. Any future unspent set-aside balances will be expended on a First In First Out (FIFO) basis.

1.5. 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 Intended Use Plan for each funding source (Base CWSRF) for each SFY of this Contract, which is 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 TWDB set forth in this Contract, TCEQ agrees as follows:

2.1. SET-ASIDE ACTIVITIES. TCEQ agrees to perform activities for which the State can use capitalization grant funds pursuant to the CWA, 33 U.S.C. § 1383, and in accordance with EPA-approved TCEQ Base CWSRF Set-Aside Work Plans and budgets. Any work plans and the budgets related to the Base CWSRF Set-Aside Activities submitted to EPA by TCEQ must also be submitted to TWDB. The final approved or amended work plans and budgets must be sent to TWDB in electronic format.

2.1.1. SMALL SYSTEMS TECHNICAL ASSISTANCE SET-ASIDE.

TCEQ agrees to engage in such activities for which the State can use up to 2% of the capitalization grant from the Base CWSRF by performing or subcontracting to perform the tasks identified in the Base CWSRF 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 "Base CWSRF SSTA Work Plan"). The Base CWSRF SSTA Work Plan is incorporated into this Contract by reference. Specifically, TCEQ agrees to perform the tasks identified in the Base CWSRF SSTA Work Plan, including all changes and amendments, to provide technical assistance to small wastewater treatment facilities that treat up to one million gallons per day of wastewater and serve a population fewer than 10,000 persons.

2.2. SUBCONTRACT AUTHORITY. TCEQ may perform all, or any portion of the Base CWSRF Set-Aside Activities identified in Section 2.1.1 by subcontracting with other entities. If TCEQ subcontracts any such responsibility, TCEQ agrees to comply with the requirements of this Section.

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

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

2.2.3. SUBCONTRACT RESPONSIBILITY. TCEQ is 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 subcontractors.

2.3. PROCUREMENT AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS. TCEQ will 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 rules. Further, in compliance with 42 U.S.C.

§ 4370d and 40 CFR Part 33, TCEQ will assist the State in administering Disadvantaged Business Enterprise (DBE) requirements.

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 includes, 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 agrees to maintain documentation establishing its good faith efforts to meet the State's DBE requirements for inspection by TWDB upon request.

2.3.2. DBE REPORT COORDINATION. TCEQ agrees to provide DBE report data to TWDB for each FFY of the Contract, October 1 through September 30, no later than twenty (20) calendar days after completion of the FFY ending September 30. If the date for submission of the DBE report data falls on a Saturday, Sunday, 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 next working day. 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 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. TCEQ agrees to provide TWDB an annual SFY Set-Aside Report (hereinafter the "CW Set-Aside Report") of funds expended during the prior SFY no later than November 15th 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 Base CWSRF SSTA Work Plan (in this Section, the "Work Plan"):

A. The amounts of funds expended for each Program Element identified in each Work Plan for all invoices paid by TCEQ during the SFY.

- B. A description of the completed projects identified within each Work Plan. For incomplete project deliverables, the report will provide the degree of accomplishment for each project deliverable associated with a task identified in the Work Plan;
- C. A narrative explanation for deviations from either completed or incomplete deliverables identified in the Work Plan; 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 TWDB in capturing and reporting federal sub-award and executive compensation data regarding first-tier sub-awards, including sub-contracts. TCEQ agrees to submit all required data to TWDB no later than twenty (20) calendar days following the month the sub-award or sub-contract has been made. TWDB will 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 Plan is subject to change during the course of the fiscal year. At any time should the Work Plan change:

- A. TCEQ will provide the final approved or amended Work Plan and approved or amended budget to TWDB in electronic format.
- B. Amended Work Plan will be incorporated into this Contract as though it is a document 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, TWDB agrees as follows:

3.1 REIMBURSEMENT OF EXPENSES GENERALLY

The TWDB will provide to TCEQ an amount not to exceed the amount listed below, plus any remaining funds designated as unliquidated obligations. TWDB is under no obligation to pay TCEQ until it has received the available capitalization grant funds from the EPA. TCEQ may perform additional projects using the fund balance of prior years, including the Base CWSRF 2% SSTA Set-Aside amounts, provided these expenses do not exceed the set-aside balances. If additional projects are to be added to Base CWSRF SSTA Work Plan, TCEQ agrees to provide TWDB with an updated budget.

3.2. REIMBURSEMENT OF EXPENSES FOR SMALL SYSTEMS TECHNICAL ASSISTANCE. For performing the tasks identified in the Base CWSRF SSTA Work Plan, TWDB agrees to provide to TCEQ an amount not to exceed \$746,260.00 for actual expenses incurred by TCEQ in performing the tasks identified in the Base CWSRF SSTA Work Plan, according to the terms of this Contract. These expenses must not exceed the Base CWSRF 2% SSTA Set-Aside of the Base CWSRF annual appropriations.

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

3.2.1. REQUEST FOR REIMBURSEMENT SUBMISSION. A request for reimbursement must be submitted to TWDB for work performed each month of the Contract within forty-five (45) calendar 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 must be submitted on an Excel spreadsheet in a format agreed upon by both TCEQ and TWDB.

3.2.2. TWDB REVIEW OF REQUEST FOR REIMBURSEMENT. TWDB agrees to promptly review each request for reimbursement submitted by TCEQ to ensure compliance with the requirements of this Contract. Upon written request of TWDB, TCEQ will timely submit, in writing, any additional information needed by TWDB to complete the review of the request for reimbursement. TWDB will prepare and deliver a transfer voucher to the Texas Safekeeping Trust Company for deposit with the Texas State Treasury within thirty (30) calendar 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 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 TWDB and TCEQ to share information necessary for compliance with the EPA programmatic requirements of the CWSRF program in accordance with the Contract requirements. The parties agree to share programmatic changes in the federal administration of the capitalization grant through mutual participation in CWSRF coordination meetings conducted monthly at a mutually agreed time. 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, 2024. Performance of this Contract by either Party will be for each applicable Intended Use Plan Year and will expire on August 31, 2025, unless terminated early by the Parties per Section 4.2 of this Contract. This Contract may be renewed for two one-year periods upon written amendment executed by TCEQ and TWDB. 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) calendar days to liquidate its encumbrances for activities from September 1 to August 31 of the previous SFY.

4.2. TERMINATION. Should either TWDB or TCEQ desire to terminate this Contract, the Party requesting termination will give ninety (90) calendar days written notice of intent to terminate and 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 TWDB and TCEQ through the officials indicated below or their designees. Any renewal amendment will identify the Contract Term, the agreed upon fund value and incorporate the subsequent the Base CWSRF SSTA Work Plan.

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

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TEXAS WATER DEVELOPMENT BOARD

Bryan McMath
Executive Administrator

Date: -----

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Kelly Keel
Executive Director

Date: -----