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## The Certificates of Obligation Act of 1971, as Amended

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# THE CERTIFICATES OF OBLIGATION ACT OF 1971, AS AMENDED

by

*Elbert M. Morrow\**

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THE Certificates of Obligation Act of 1971 (the Act)<sup>1</sup> was originally designed to cure ambiguities and remedy difficulties caused by the Bond and Warrant Law of 1931 (Bond and Warrant Law)<sup>2</sup> and provide an alternate and more flexible means of financing by cities and some counties. The Act is cumulative of other methods of financing and also authorizes an alternate method of financing by providing a new class of securities which may be issued and delivered by an issuer.<sup>3</sup>

## I. CLASSIFICATION OF CERTIFICATES

Certificates issued under the Act are classed as a "security" within the meaning of the chapter governing investment securities of the Uniform

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1. TEX. REV. CIV. STAT. ANN. art. 2368a.1, §§ 1-11 (Vernon Supp. 1976-77).

2. *Id.* art. 2368a (Vernon 1971).

3. *Id.* art. 2368a.1, § 10 (Vernon Supp. 1976-77). For the purposes of the Act, § 2 defines an "issuer" as a county having a population of less than 350,000 according to the last federal census, or an incorporated municipality incorporated under (i) any general or special law which provides the power to levy ad valorem taxes of not less than \$1.50 on each \$100 valuation of taxable property therein, or (ii) TEX. CONST. art. XI, § 5, the home rule amendment. By § 8 of the Bond and Warrant Law, the applicability of the law to counties is similarly restricted. See TEX. REV. CIV. STAT. ANN. art. 2368a (Vernon 1971) which governs the issuance of time warrants by counties having a population in excess of 300,000 according to the preceding federal census. TEX. CONST. art. XI, § 4 provides that general law cities shall have power to levy taxes as permitted by law not exceeding 1 1/2% (*i.e.*, \$1.50 on the \$100 valuation of taxable property). For a discussion of powers of an incorporated general law city see Morrow, *Financing of Capital Improvements by Texas Counties and Cities*, 25 Sw. L.J. 373, 381-83 (1971).

Commercial Code.<sup>4</sup> They may be issued for: (i) the purpose of paying one or more *contractual obligations*<sup>5</sup> to be incurred for the construction of public works or the purchase of materials, supplies, equipment, machinery, the purchase of land, or for the payment of contractual obligations for professional services; or (ii) one of the purposes provided in section 7 of the Act.

The Act originally authorized the issuance of certificates payable only from taxation because section 8 provides that certificates "shall be a debt of the issuer within the meaning of Article XI, sections 5 and 7 of The Constitution of Texas."<sup>6</sup> Section 8a was added to the Act to provide that in lieu of or in combination with existing sources for the payment of certificates, an issuer may provide that certificates will be payable from and secured by other revenues. Thus, certificates of obligation may be classed according to the method utilized by the issuer to provide for their payment: (1) from ad valorem taxes; (2) from revenues, if the issuer is otherwise authorized to secure or pay any kind of general or special obligations by or from such revenues; or (3) from a combination of ad valorem taxes and revenues. Certificates may be further classed according to whether they are: delivered to a party in payment of the contractual obligation under section 3 or 8a(ii) of the Act; or sold for cash, if issued for one or more of the purposes provided in section 7, or if the certificates are payable from revenues or a combination of taxes and revenues, by reason of section 8a(ii) of the Act.

## II. PROCEDURE FOR ISSUANCE

### A. *Notice of Intent to Issue Certificates*

With limited exceptions,<sup>7</sup> the governing body of an issuer institutes pro-

4. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 8 (Vernon Supp. 1976-77). This section is applicable only to obligations payable from taxation since reference is made therein to the constitutional provisions governing the creation of a debt payable from taxation. Certificates payable from other sources would qualify as a "security" by reason of TEX. BUS. & COMM. CODE ANN. § 38.102 (Vernon 1968).

5. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 3 (Vernon Supp. 1976-77). A contractual obligation is defined as a contract pursuant to §§ 6 or 7 of the Act. *Id.* § 2(d). Such a contract must be in writing unless the work is to be done by regularly salaried employees of the issuer, the work is to be paid for as the work progresses, or the contract is for legal services. *Id.*

6. Any obligation payable from taxes to be collected beyond the budget year of its creation is a debt. *McClellan v. Guerra*, 152 Tex. 373, 258 S.W.2d 72 (1953); *Texas & N.O.R.R. v. Galveston County*, 141 Tex. 34, 169 S.W.2d 713 (1943); *Ault v. Hill County*, 102 Tex. 335, 116 S.W. 359 (1909); *Pendleton v. Ferguson*, 99 Tex. 296, 89 S.W. 758 (1905); *City of Tyler v. L.L. Jester & Co.*, 97 Tex. 334, 78 S.W. 1058 (1904); *Howard v. Smith*, 91 Tex. 8, 38 S.W. 15 (1896); *Edwards County v. Jennings*, 89 Tex. 618, 35 S.W. 1053 (1896); *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895); *Biddle v. City of Terrell*, 82 Tex. 335, 18 S.W. 691 (1891); *City of Terrell v. Dissaint*, 71 Tex. 770, 9 S.W. 593 (1888); *City of Corpus Christi v. Woessner*, 58 Tex. 462 (1883); *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 82 S.W. 1066 (Tex. Civ. App. 1904), conforming to answers to certified questions in 98 Tex. 69, 81 S.W. 2 (1904); *Peck-Smead Co. v. City of Sherman*, 63 S.W. 340 (Tex. Civ. App. 1901, no writ); *Mineralized Rubber Co. v. City of Cleburne*, 56 S.W. 220 (Tex. Civ. App. 1900, no writ). A certificate payable only from revenues pledged to its payment is not a debt within the constitution. Rule 003.02.05.009 of the Texas attorney general states: "Certificates payable solely from revenues other than taxes shall not be considered debt within the meaning of Article XI, Sections 5 and 7 of the Constitution of Texas."

7. If the certificates are issued for one of the purposes enumerated in §§ 7(1) through (5) (in case of public calamity where it becomes necessary to act at once to relieve the necessity of the citizens or to preserve the property of the city or county; where it is necessary to preserve or protect the public health of the citizens of the issuer; in the case of unforeseen damage to public property, machinery, or equipment; contracts for personal or professional services; or for work done by employees of the issuer and paid for as such work progresses) publication of notice of intention is not required by reason of § 8(b) of the Act. These purposes closely parallel the "exceptions" to the requirement of advertising for bids as contained in § 2 of the Bond and

ceedings under the Act by causing notice<sup>8</sup> of its intention to issue certificates to be published in a newspaper<sup>9</sup> of general circulation in the area of the issuer once a week for two consecutive weeks. The date of the first publication must be at least fourteen days prior to the date tentatively set in the notice for the passage of the order or ordinance authorizing the issuance of the certificates.<sup>10</sup> The published notice must state the time and place tentatively set for the passage of the order or ordinance authorizing the certificates, the maximum amount of certificates that may be authorized, the purpose of the certificates, and whether the issuer proposes to provide for a payment by taxes, revenues, or both.<sup>11</sup> If a petition signed by five percent of the qualified electors is filed with the city secretary or city clerk, if the issuer is a city, or with the county clerk, if the issuer is a county, protesting the issuance of the certificates, and the petition is filed prior to the passage of the order or ordinance authorizing the issuance of the certificates, then the certificates may not be issued unless such issuance is approved at an election.<sup>12</sup> While the published notice is required to state the time when the governing body tentatively proposes to authorize the certificates, such action clearly may be postponed for a reasonable time, thereby extending the period for filing a petition protesting the issuance of the certificates.

#### B. *Notice of Intent to Receive Competitive Bids*

As in the Bond and Warrant Law, no contract requiring a payment, or creating or imposing an obligation or liability of any nature upon an issuer in excess of \$2,000 may be entered without *advertising* for competitive bids.<sup>13</sup>

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Warrant Law, and the exceptions to the requirement of publishing notice of intention to issue warrants, as contained in § 5 of the Bond and Warrant Law.

8. The requirement that a notice of intention to issue certificates be published pursuant to § 8(b) of the Act should *not* be confused with the requirement in § 6 that notice of an intention to receive competitive bids be published when certificates are to be issued to pay a contractual obligation authorized in § 3(a) of the Act. The matters required by both sections of the law, however, may be included in a single notice.

9. See TEX. REV. CIV. STAT. ANN. art. 28a (Vernon 1969) (The Mandatory Publications Act).

10. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 8(b) (Vernon Supp. 1976-77). The period of publication is the same as that specified in § 2 of the Bond and Warrant Law.

11. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 8(b) (Vernon Supp. 1976-77).

12. *Id.* These provisions parallel those of § 4 of the Bond and Warrant Law except: (1) under the Bond and Warrant Law the petition must be signed by 10% of the qualified voters *who are also property taxpayers according to the last approved tax rolls*, and (2) the time for filing is prior to the time set for the letting of the contract. The "taxpayer qualification" would appear to be suspect in the light of the decision in *Hill v. Stone*, 421 U.S. 289 (1975) (*all* qualified electors must be permitted to vote, not merely voters who are obligated to pay property taxes). When the Texas attorney general has reviewed time warrant authorizations in connection with refunding bonds, he has properly taken the position that when warrants are being issued an officer of the issuer must execute a certificate stating that no petition signed by 10% of the qualified electors was presented prior to the letting of the contract. Policy letter of the attorney general of Texas (Jan. 28, 1970).

13. Certain exceptions to this requirement are listed in § 7 of the Act, and are substantially the same as those contained in § 2 of the Bond and Warrant Law. The Act, however, is broader than the Bond and Warrant Law in allowing the acquisition of an existing utility system without the receipt of competitive bids. Moreover, when additional work is to be done under a construction contract the change order must conform to limitations of § 3(b) of the Act or competitive bids are required. Provision for the payment of any additional amount to become due must be made by the appropriation of cash or the issuance of certificates of obligation as provided by §§ 3(b) and 6(c) of the Act. If certificates of obligation are to be issued for such an increase, the notice of intention required by § 8(b) of the Act must be given.

At the legislative session adopting the Act, § 2 of the Bond and Warrant Law was amended to

If certificates of obligation<sup>14</sup> are to be delivered to a contractor in payment of the contractual obligation to be incurred by the issuer, the notice to bidders must state that the successful bidder will be required to accept certificates of obligation in payment of all or a part of the contract price, or that the issuer has made provision for the contractor to sell and assign the certificates to another.<sup>15</sup> At the time bids are received, each bidder is required to state whether he will accept the certificates in payment of all or part of the contract price or assign the certificates in accordance with the arrangements made by the issuer.<sup>16</sup>

The notice must include the time and place for the letting of the contract<sup>17</sup> and must be published in accordance with the Bond and Warrant Law, the Act, or, if the issuer is a home rule city, the charter.<sup>18</sup> The notice to bidders is also required to state that plans and specifications for the machinery, supplies, equipment, or materials to be purchased are on file with a designated official of the issuer where they may be examined without charge.<sup>19</sup>

### C. *Exceptions to the Requirement for Competitive Bids*

Historically, the requirement of competitive bidding imposed upon cities and counties by sections 2 and 6 of the Bond and Warrant Law is not applicable:

- (a) in the case of a public calamity when necessary to act at once to relieve the necessity of the citizens or to preserve the property of a city or county; or
- (b) when necessary to preserve or protect the public health of the citizens of a city or county; or

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raise the amount of the contract liability which may be incurred without competitive bids from \$2,000 to \$3,000. While § 10 of the Act provides that an issuer need not designate the statute under which it is proceeding, the lower limitation clearly applies when certificates are to be issued. Because of the broad and sweeping language of § 3(a) of the Act, which would require competitive bids on most contractual obligations, § 7(9) was added to the Act to make clear that the sale by the issuer of a public security is not required to be advertised.

14. Section 5 of the Act refers to "certificates of indebtedness" rather than certificates of obligation, and on one occasion the attorney general took the position that when the obligation was payable from taxation, either title could be used to describe the instrument. The attorney general has informally indicated that this precedent will not be followed.

15. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 5 (Vernon Supp. 1976-77).

16. *Id.* The purpose for the provision is apparent; most contractors do not wish to provide interim financing for the issuer but are concerned with construction or delivery of machinery, equipment, or supplies. A bidder should be advised of his responsibilities, if any, in this regard. By the same token, if an issuer makes arrangements for the financing, the financial institution must know, when bids are received, if it is to be obligated to accept the certificates. Moreover, if the issuer makes arrangements with a financial institution for the acceptance of certificates from any successful bidder, all bidders, insofar as such arrangements are concerned, are on an equal footing.

17. *Id.* § 6(b).

18. *Id.* The publication period is once a week for two (2) consecutive weeks in a newspaper of general circulation in the territorial limits of the issuer. Section 2 of the Bond and Warrant Law requires that the newspaper be published within the territorial limits of the issuer; if no newspaper is so published, then notice is to be posted for such period at the courthouse door in the case of a county and at city hall in the case of a city. This is a different requirement from that contained in TEX. REV. CIV. STAT. ANN. art. 29a (Vernon 1969) (Mandatory Publications Act), and has caused a measure of confusion and a trap for the unwary. Section 2 of the Bond and Warrant Law provides that with respect to "notice to bidders, advertisement thereof, requirements as to the taking of sealed bids based upon specifications for public improvements or purchases, the furnishing of surety bonds by contractors and the manner of letting contracts" a city charter provision shall control. The Act permits advertisement pursuant to the Bond and Warrant Law, a charter, or the Act. Section 10(a) of the Act also provides that the Act will prevail over a contrary provision of a city charter where there is a conflict.

19. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 6(b) (Vernon Supp. 1976-77).

- (c) in the case of unforeseen damage to public property, machinery or equipment; or
- (d) for contracts for personal or professional services; or
- (e) for work done by a county or city and paid for by the day as work progresses; or
- (f) for the purchase of land and rights of way for authorized needs and purposes; or
- (g) where the expenditures are for paving, drainage, street widening and other public improvements, the cost of at least 1/3 of which is to be paid by or through special assessments levied against benefited property.<sup>20</sup>

Section 7 of the Act preserves these exceptions and adds the purchase of buildings and existing utility systems to the list.<sup>21</sup> The exception for purchase of buildings makes clear that land acquired may have a building thereon. The exception for purchase of existing utility systems eliminates the receipt of bids which is a meaningless gesture when only one person or entity is capable of bidding. Since section 6(a) contains language to the effect that the creation of an obligation of an issuer in excess of \$2,000 will require competitive bids, section 7(9) was inserted to make clear that the sale of public securities by an issuer is not required to be made pursuant to the advertising requirements of section 6. While the delivery of bonds or certificates, and not their sale, creates the obligation on the part of the issuer to pay the principal of and interest on the issued securities, the statute seeks to foreclose litigation on the point.<sup>22</sup>

The Texas attorney general takes the position that exceptions to the advertising requirement for competitive bids are to be narrowly construed.<sup>23</sup> For example, despite the holding of the court in *Hoffman v. City of Mt. Pleasant*,<sup>24</sup> for a number of years the attorney general took the position that a "calamity" (such as a tornado) must occur before time warrants or certificates could be issued without competitive bids. A failure of a water well was not considered sufficient cause to avoid taking competitive bids under the theory of necessity to preserve the public health, because this would be an event likely to occur and should have been anticipated. While no longer the prevailing view, this position indicates the caution that should be exercised when an issuer seeks to rely upon the exceptions to the competitive bids by reason of a calamity, the preservation of public health, or unforeseen damage to public property, machinery, or equipment.

When bond proceeds or current funds prove insufficient to permit the

20. *Id.* art. 2368a, § 2.

21. *Id.* art. 2368a.1, §§ 7(1)-(8).

22. As to warrants courts have distinguished between the authorization of the obligation and delivery, holding that the latter is the act which places the duty upon the issuer to pay the obligation. *See, e.g., Nacogdoches County v. Marshall*, 469 S.W.2d 633 (Tex. Civ. App.—Tyler 1971, no writ); *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970, no writ).

23. Informal discussion with the office of the Texas attorney general.

24. 126 Tex. 632, 89 S.W.2d 193 (1936) (the public calamity and preservation of public health exceptions contained in § 2 of the Bond and Warrant Law are separate and distinct exceptions to the requirement for competitive bids). Sections 7(1) and 7(2) of the Act clearly separated the exceptions. Rule 003.02.05.007 of the attorney general's office now states: "Certificates of Obligation will be approved under paragraphs (1), (2) and (3) of Section 7 of Article 2368a.1 in cases of true emergency only. An emergency must involve a public calamity, a present danger or unforeseen damage."

execution of a contract or when an advertisement has been made in the manner authorized or permitted by section 6 of the Act, but the bond funds or current funds are not sufficient to permit the awarding of a contract, section 7(8) permits the issuance of certificates to eliminate the deficiency without the receipt of new competitive bids. The attorney general takes the position that the amount of the certificates which may be issued to cure the deficiency of bond funds or current funds may not exceed twenty-five percent of the funds committed to the project at the time of the advertisement for bids.<sup>25</sup>

#### D. Awarding the Contract

Both the Act<sup>26</sup> and the Bond and Warrant Law<sup>27</sup> contemplate that contracts shall be let to the lowest responsible bidder on a lump sum or unit price basis and that both a payment and performance bond will be obtained, each in the full amount of the contract.<sup>28</sup> A performance bond benefits the issuer by insuring the faithful performance of the work under the contract, while the payment bond provides protection to claimants supplying labor and materials in the prosecution of the work.

In financing circles, acceptance of bids and the execution of a contract are generally considered distinct and separate acts.<sup>29</sup> The execution of the contract is viewed as the act which creates the issuer's obligation to provide for its payment.<sup>30</sup> Thus, when the contract is executed, provision should be or should have been made for the authorization of the certificates by an ordinance, if the issuer is a city, or by an order if the issuer is a county.<sup>31</sup>

#### E. Changing the Contract

Both the Act<sup>32</sup> and the Bond and Warrant Law<sup>33</sup> provide that after the

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25. Rule 003.02.05.008 of the Texas attorney general provides: "Certificates will be approved under paragraph (8) of Section 7, Article 2368a.1, where their amount is not in excess of 25% of those current funds or bond funds committed to the project, and such certificates are necessary in order to provide for deficiency to enable contract award to be made." The attorney general supports this restriction by reference to § 6(c) of the Act which is concerned with change orders, not a deficiency in funds. The attorney general may be suggesting that if a greater percentage of a deficiency is to be provided, an issuer should be required to re-examine the project.

26. TEX. REV. CIV. STAT. ANN. art. 2368a.1, §§ 6(b), (d) (Vernon Supp. 1976-77).

27. *Id.* art. 2368a, §§ 2, 2(a) (Vernon 1971).

28. The requirements of art. 5160 governing contractors' payment and performance bonds should be reviewed carefully. Particular attention should be paid to §§ (A) and (C) which (i) provide that the statute applies where the contract is for the "construction, alteration or repair of any public building or the prosecution or completion of any public work" and is in excess of \$15,000 and (ii) define the terms "labor" and "materials." TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon Supp. 1976-77).

29. Section 6(d) of the Act provides that the governing body of an issuer shall have the right to reject any and all bids; § 2 of the Bond and Warrant Law contains the same provision. Until the lowest and best bid has been accepted, normally evidenced by the written contract, and provision made for the payment of the amount due from the city or county issuer to the contractor, the issuer would have the right to reject the bids. Provision may be made for the payment of the amount due under the contract before the contract is executed by reason of § 4 of the Act; if the obligation is to be payable in whole or in part from taxation, however, the execution of the contract may not precede the provision for its payment since TEX. CONST. art. XI, §§ 5, 7 require the tax to be levied at the time the debt is created.

30. Sections 4, 5, 6(b), 8(b), and 9 of the Act implement the constitutional provisions of art. XI, §§ 5 and 7.

31. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 9 (Vernon Supp. 1976-77).

32. *Id.* § 6(c).

33. *Id.* art. 2368a, § 2a.

performance of a contract has commenced and changes in the plans, specifications, quantity of work to be done or materials, equipment, or supplies to be furnished become necessary, either type of contract is subject to amendment by a change order. While contracts may be let on a lump sum or on a unit price basis,<sup>34</sup> experience shows the latter is the more popular procedure because the contractor is required to show the amount bid for each line item of work done or materials supplied. When a contract is let on the unit price basis, the information furnished to the bidders must specify the approximate quantities, estimated on the best available information; payment, however, is based upon the actual quantities constructed or supplied.<sup>35</sup> Traditionally, the estimated quantities have been considered as the maximum quantities permitted unless a change order has been approved and provision made for the increase in the construction cost.<sup>36</sup>

The total amount of the contract may not be increased unless provision is made for payment of the additional amount to become due on the contractual obligation as the result of the change order.<sup>37</sup> Both the Act and the Bond and Warrant Law provide that the increase of the contract price may be not more than twenty-five percent and that the contract price may be decreased no more than twenty-five percent without the consent of the contractor.<sup>38</sup>

Section 3(b) of the Act specifically prohibits the delivery of certificates in excess of the contractual obligation existing after the execution of a change order. Where certificates are being delivered to the contractor, the knowledge that the certificates delivered will not exceed the final contract price prevents an overissue of certificates. If certificates of obligation are to be sold for cash, however, extreme caution must be utilized before certificates are so authorized because of the proposed heavy tax sanctions for the overissue of governmental securities.<sup>39</sup>

34. *Id.* art. 2368a.1, § 6(b); *id.* art. 2368a, § 2a.

35. *Id.* art. 2368a.1, § 6(b).

36. Normally, only the governing body of the issuer has the right to set aside additional money to provide for an increase in the contract price; in some home rule cities, however, an administrative officer is often given limited authority in this respect by charter provision.

37. Section 2a of the Bond and Warrant Law permits the issuance of time warrants and their delivery to the contractor for the amount the contract is increased. Section 6(c) of the Act contains basically the same provision with respect to certificates of obligation. Section 7(8) may also be applicable so as to permit the sale of certificates for cash or their delivery to the contractor. Under both the Bond and Warrant Law and the Act, notice of intention to issue the securities would be required unless § 8(b) provides an exception for certificates.

38. TEX. REV. CIV. STAT. ANN. art. 2368a.1, §§ 3(b), 6(c) (Vernon Supp. 1976-77); *id.* art. 2368a, § 2a. An interesting question is whether the contract price may be increased more than 25% if the contractor and the issuer are both in agreement. At one time the Texas attorney general's office took the view that such an increase is permitted. The current view is embodied in rules 003.02.05.001 and 003.02.05.002 of the Texas attorney general which provide, respectively:

.001 Certificates may not be authorized or issued to provide for change orders in excess of 25% of any original contract price.

.002 No original contract price may be increased by more than 25% (regardless of the intended source of funds to provide for such increase), nor shall any original contract be decreased by more than 25% without the consent of the contractor to such decrease.

39. The proposed regulations of the Internal Revenue Service provide that an "overissue" results if the original proceeds exceed the amount necessary to achieve the governmental purpose by more than 5%. Proposed Treas. Reg. § 1.103-13(b)(5)(ii), 38 Fed. Reg. 10944 (1973). In the event of an "overissue," restrictions are placed upon certain types of investment income or the obligations will be classed as "arbitrage bonds" so that the interest thereon would not be tax exempt under I.R.C. § 103(d).

## III. METHODS OF PAYING CONTRACTORS

The issuance of time warrants under the Bond and Warrant Law has been classed as the exercise of implied authority<sup>40</sup> under a procedural statute.<sup>41</sup> Time warrants must be delivered to a contractor and may not be sold for cash.<sup>42</sup> Pursuant to the Act, certificates are a new class of securities<sup>43</sup> which may be sold for cash or delivered to the contractor under certain circumstances.<sup>44</sup> When certificates are delivered to the contractor, he presents an estimate bearing the appropriate approval of an architect or an engineer, the governing body of the issuer reviews and approves the estimate and authorizes the delivery of certificates to the contractor. Section 4 of the Act provides a variation of this procedure, which is based upon the practice and custom followed under the Bond and Warrant Law, by allowing the issuer to provide for claims and accounts to be incurred for authorized purposes and then providing for the funding or exchange of those claims and accounts<sup>45</sup> for certificates of obligation. Claims and accounts may be used to pay all or a part of the amount due a contractor. An advantage in utilizing claims and accounts is that many smaller contracts may be timely paid, and the claims and accounts accumulated and exchanged in a large group for certificates. Claims and accounts may also be utilized to pay an amount due the contractor which may not be paid through the delivery of certificates because of the denomination of the certificates. The statute specifically permits the authorization of the issuance of certificates and the indebtedness represented thereby prior to the execution of the contractual obligation.<sup>46</sup> Certificates authorized for the purposes specified in subsections 7(1) through 7(4) and 7(6) through 7(8) may, in the discretion of the governing body of the issuer, be delivered to the contractor or be sold for cash.<sup>47</sup>

Section 8(a) of the Act provides that "in lieu of or in combination with the existing sources provided" (*i.e.*, taxation) the governing body of an issuer may provide that certificates will be payable from and secured by other revenues "if the issuer is otherwise authorized by the Constitution or statutes to secure or pay any kind or type of general or special obligation by or from such revenues." Certificates payable wholly or partially from revenues may be delivered in exchange for services and property or may be

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40. *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *San Patricio County v. McClaine*, 58 Tex. 243 (1883); *Grimes County v. Slayton*, 262 S.W. 209 (Tex. Civ. App.—Texarkana 1924, writ ref'd); *Allen v. Abernathy*, 151 S.W. 348 (Tex. Civ. App.—San Antonio 1912, no writ); *Cowan v. Dupree*, 139 S.W. 887 (Tex. Civ. App.—Texarkana 1911, writ ref'd); *Stratton v. Kinney County*, 137 S.W. 1170 (Tex. Civ. App.—San Antonio 1911, writ ref'd).

41. *Adams v. McGil*, 146 S.W.2d 332 (Tex. Civ. App.—El Paso 1940, writ ref'd).

42. *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970, no writ); *Cantu v. Rodriguez*, 376 S.W.2d 70 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

43. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 10 (Vernon Supp. 1976-77).

44. *Id.* §§ 7, 8a(ii).

45. Section 4 of the Act provides that claims and accounts are instruments which represent an undivided interest in the series of certificates which are simultaneously authorized.

46. *But see Cantu v. Rodriguez*, 376 S.W.2d 70 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.) (dicta to the contrary with respect to time warrants). Under TEX. CONST. art. XI, §§ 5, 7 provision for the payment of indebtedness from taxation clearly must precede or be made simultaneously with the entering of the contractual obligation or the contractual obligation is void.

47. At first blush § 7(5) would seem to be included, but the proviso to § 7 excludes the sale of certificates for cash to pay for work done by employees of the issuer and paid for as work progresses.

sold for cash.<sup>48</sup>

When certificates are delivered to the contractor, he may retain them or assign them, depending upon the election he made at the time of submitting his bid on the project. If he elected to assign them, such assignment would be made to a financial institution with whom the issuer made the arrangements contemplated in section 5 of the Act. If certificates are sold for cash, payments would be made in cash when the payments become due under the contract.

#### IV. METHODS OF PAYING CERTIFICATES

Certificates payable solely from ad valorem taxes are a debt of the issuer within the constitutional limitations of article XI, sections 5 and 7 of the Constitution of Texas that require the levy of taxes at the time of their authorization.<sup>49</sup> Section 8a(i) of the Act provides that if the issuer is authorized by some other law to secure the payment of or pay any type of general or special obligation from revenues, such revenues may be pledged to payment of certificates of obligation. This language parallels the language contained in articles 717k and 717k-3, which both relate to refunding bonds. Those statutes have been construed literally, *i.e.*, if some other statute permits the revenues to be pledged to the payment of a general or special obligation, such revenues may be pledged to the payment of refunding bonds. The Texas attorney general heretofore adopted the view that only revenues from the facilities improved or acquired by reason of the issuance of the certificates of obligation could be pledged to the payment of the certificates of obligation, but upon re-examination has determined that the literal construction of the statute is proper.<sup>50</sup>

An issuer is also permitted to issue certificates payable from ad valorem taxes and revenues.<sup>51</sup> Since a certificate of obligation is merely a creature of contract, the ordinance or order authorizing the issuance of the certificates may provide (1) for revenues to be taken into account and a tax levied to provide the deficiency between revenues and the debt service requirements, or (2) for taxes to be levied in an amount initially sufficient to pay the indebtedness and subsequently for deposit of reserves in the interest and sinking fund so as to reduce or eliminate taxes levied in later years, or (3) for some acceptable compromise between the extremes. The market place will normally govern the amount of the tax base which must be pledged to the payment of a particular series of certificates. This method of payment is disadvantageous because the attorney general has taken the position that the entire series of certificates must be included in calculating the issuer's ability to pay its tax obligations and to provide for the payment of revenue obligations payable from the same source.<sup>52</sup>

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48. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 8(a)(ii) (Vernon Supp. 1976-77).

49. *Id.* § 8.

50. Informal discussion with the office of the Texas attorney general.

51. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 8a (Vernon Supp. 1976-77).

52. Rule 003.02.01.007 of the Texas attorney general provides: "Generally, the transcripts of combination tax and revenue public securities issues shall include tax securities transcript requirements provided by these rules and the revenue securities transcript requirements provided by these rules. Combination tax and revenue issues shall be treated as debt."

#### V. APPROVAL OF CERTIFICATES BY THE ATTORNEY GENERAL

If certificates authorized for the purposes specified in section 7 are sold for cash, they must be submitted to the attorney general of Texas under the same procedures as are applicable to bonds of an issuer and they are then registered by the comptroller of public accounts.<sup>53</sup> If the certificates are sold for cash pursuant to section 8a, they should also be submitted to the attorney general.<sup>54</sup>

If certificates of obligation are delivered to a contractor, the attorney general does not review the proceedings relating to the authorization and delivery of the certificates unless the issuer seeks to refund the obligations into bonds. If refunding bonds are to be authorized, all proceedings taken in connection with the authorization and delivery of the certificates must be submitted to the attorney general of Texas in connection with the proceedings which authorize the proposed refunding bonds.<sup>55</sup> This after the fact examination determines whether the underlying indebtedness being refunded is in fact valid, since only valid indebtedness may be refunded.<sup>56</sup>

#### VI. CONCLUSION

The Certificates of Obligation Act of 1971 has served as a useful tool to permit financing of governmental projects by cities and the counties to which it applies. Although closely paralleling the provisions of the Bond and Warrant Law of 1931, the Act seems to accomplish some of its clarification purposes.

As more experience is gained in utilizing the complex procedures of the Act, the present burdensome limitations may be lifted. Most limitations in the Act, however, are both useful and proper.

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53. TEX. REV. CIV. STAT. ANN. art. 2368a.1, § 7 (Vernon Supp. 1976-77).

54. Rule 003.02.05.004 of the Texas attorney general provides: "Only certificates sold for cash will be subject to approval by the Attorney General and registration by the Comptroller of Public Accounts." Rule 003.02.05.011 of the attorney general provides that TEX. REV. CIV. STAT. ANN. arts. 709-716 (Vernon 1964) is fully applicable to certificates reviewed by the attorney general. These articles require that bonds which are to be authorized and issued must be submitted to and approved by the attorney general and registered with the comptroller of public accounts before delivery.

55. Rule 003.02.05.005 of the Texas attorney general provides: "Certificates delivered in exchange for services or property that are being refunded pursuant to any law requiring approval of the Attorney General and registration by the Comptroller of Public Accounts of said refunding obligations shall be documented and submitted for review in the manner set forth herein." Rule 003.02.05.006 of the attorney general provides: "No refunding of certificates delivered in exchange for services or property will be approved unless said certificates are authorized and issued in substantial compliance with statutory authority and full compliance with any applicable constitutional provisions."

56. *City of Laredo v. Looney*, 108 Tex. 119, 185 S.W. 556 (1916); *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 99 Tex. 6, 86 S.W. 750 (1905).