

1983 WL 182019 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 6, 1983

*1 Honorable Patrick B. Harris
Chairman
Joint Appropriations Review Committee
Suite 327
Blatt Building
Columbia, South Carolina

Dear Representative Harris:

You have requested the advisory opinion of this Office on two questions related to the recovery by State agencies of indirect costs on Federally-funded programs. Pursuant to Act 651 of 1978, as amended by Subsection (B) of Section 18 of Part II of Act 178 of 1981, and as further amended by Section 10 of Part II of Act 151 of 1983 (hereinafter 'the 'Act'), agencies must ordinarily recover 'indirect costs' as defined in the Act from the granting authority as a part of the grant contract. There are certain waivers and exemptions.

The letter from your Committee staff advises that a State agency has submitted a bid for a three-year Federal contract which bid does not provide for indirect cost recovery in the first year but would include such recovery in the second and third years. We are further informed that the project is an 'unanticipated Federal project' within the meaning of the Act, in that it was not previously considered and authorized by the General Assembly in the current appropriations act.

The questions on which an advisory opinion is sought are:

- 1) Can the Committee authorize a first year Federal project that does not include the maximum level of indirect costs?
- 2) Can the Committee authorize such a project subject to a condition that indirect costs received during year 2 of the contract will be used to retroactively remit year 1 indirect costs to the General Fund?

Section 12 exempts from the requirements of the Act certain funds and grants, none of which exemptions are here applicable.

We turn, therefore, to the general provisions as to indirect costs, their recovery, and waivers thereof.

Section 2 of the Act provides:

(d) 'Indirect costs' means those costs of supportive services within an agency or provided by another agency which benefit more than one program and which may be charged to federal programs in accordance with Office Management and Budget Circular A-87 or A-21.

Section 9 of the Act provides, in pertinent part:

(a) All agencies receiving federal grants or contracts must recover the maximum allowable indirect costs on those projects, subject to applicable federal laws and regulations. All indirect cost recoveries shall be credited to the General Fund, with the exception of recoveries from research and student aid grants and contracts. * * *

(b) If it is determined to be in the best interest of the State and the agency receiving the federal funds, the requirements of this section may be waived; except that indirect costs waivers may not be granted for unanticipated federal projects authorized pursuant to Section 5 of this act. Requests for indirect cost waivers for continuing federal projects must be made by the applicant agency as a part of their budget request and must be reviewed in accordance with the provisions of Section 4 of this act. [Emphasis added.]

*2 Section 5 provides the procedure to be followed to obtain approval to receive and expend funds or grants which have not been previously approved by the General Assembly. Neither that section nor Section 9 allows waivers for an ‘unanticipated Federal project’ such as that in question here. It therefore appears that indirect costs must be recovered on the contract in question.

The Act does not, however, require that these costs be recovered at any particular time in the duration of the project; although the clear intent is that each year's costs be recovered. Because of the difference in State and Federal fiscal years, it is probable that first-year indirect costs are often not received and transferred by the agency to the General Fund until sometime in the second year; but these indirect costs must be recovered for the entire term of the project, unless all or part is waived by the General Assembly pursuant to Section 9(b) of the Act.

In summary, the legislative intent is clear that indirect costs must be recovered when authorized by OMB Circulars A-87 or A-21, and applicable statutes and regulations. Legislative waiver may not be presumed, even though the Act permits such waiver. Therefore, we advise the project should not be authorized at this time, absent certification by the applicant State agency that funds are available within its existing resources to remit first year indirect costs. See, e.g., Section 5(a)(4) of the Act, referring to matching funds.

It is, therefore, the advisory opinion of this Office that:

1. The Committee may authorize a first-year Federal project that does not include recovery of indirect costs, as defined by the Act, only upon condition that indirect costs be eventually remitted to the General Fund for the entire term of the project, unless all or part thereof are subsequently waived by the General Assembly.
2. It would appear that the Committee may authorize the project conditioned upon the requirement that indirect costs received during the second year be remitted to the General Fund in satisfaction of the first year's obligation; but we do not so recommend, as we find no provision (other than legislative waiver) that would relieve the agency of its ultimate obligation to remit to the General Fund the total of all indirect costs properly chargeable for each year of the project.

Sincerely,

Frank K. Sloan
Chief Deputy Attorney General

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