ALAN WILSON
ATTORNEY GENERAL

March 18, 2011

John J. Fantry, Jr., Esquire
175 Langford Road
Blythewood, South Carolina 29016

Dear Mr. Fantry:

We understand you desire an opinion of this Office on behalf of the Gilbert-Summit Rural Water District (the "District") concerning language contained in a proposed Engineer-On-Call Service Agreement (the "Contract"). In particular, we understand the District is concerned about two provisions contained in the Contract. These two provisions read as follows:

> 11. Ownership of Documents. All documents prepared or furnished by CONSULTANT, pursuant to this Agreement, are instruments of CONSULTANT'S Professional Service and CONSULTANT shall retain an ownership and property interest therein, including all copyrights. CONSULTANT grants OWNER a license to use instruments of CONSULTANTS'S Professional Service for the purpose of constructing, occupying or maintaining the project. Reuse or modification of any such documents by OWNER, without CONSULTANT's written permission, shall be at OWNER'S sole risk; and, OWNER agrees to indemnify and hold CONSULTANT harmless from all claims, damages and expenses, including Attorney's Fees arising out of such reuse by OWNER or by others acting through OWNER. Documents are defined as reports, drawings, specifications, record drawings, plats and other deliverables defined in the scope of work whether in print or electronic format.
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> 17. Indemnification. CONSULTANT and OWNER each agree to indemnify and hold harmless the other, and their respective

> Officers, Employees, Agents and Representatives from and against liability for all claims, losses, damages, and expenses, including reasonable Attorneys' Fees, to the extent such claims, losses, damages, or expenses are caused or alleged to have been caused by the indemnifying party's negligent acts, errors or omissions. In the event claims, losses, damages or expenses are caused by the joint or concurrent negligence of CONSULTANT and OWNER, they shall be borne by each party in proportion to its negligence.

With regard to these provisions, you ask the following three questions:

> First, if the language proposed by the Engineers is unchanged, could the Gilbert-Summit Rural Water District Board of Directors sign the Contract without acting in a manner which conflicts with the advice given in AGO-040132? Second, if the Parties find an Insurance carrier who will sell a Policy covering the risks described by the Consultant Engineers in Paragraphs 11 and 17, may the District agree to pay the costs associated with purchasing coverage? Third, if the District cannot sign a Contract containing Paragraphs 11 and 17, as Proposed by the Consultant Engineers, can the District Board sign a Contract with Paragraphs 11 and 17 written as suggested by John Fantry, Proposal 2?

Law/Analysis

First, as you mentioned in your letter, several opinions of this Office conclude that governmental agencies, in the absence of specific authority, do not have the authority to execute "hold harmless" or indemnity agreements. In a 1966 opinion, we concluded that the State Educational Finance Commission could not agree to indemnify a railroad company. Op. S.C. Atty. Gen., February 21, 1966. In 1972, we determined that the Town of Sullivan's Island may not enter into an indemnification agreement with the United States government. Op. S.C. Atty. Gen., August 15, 1972. We stated:

> It has been the consistent opinion of this Office that governmental agencies, in the absence of specific authority therefor, do not have the authority to execute such 'hold harmless' clauses. The basis for this conclusion is that this State possesses sovereign immunity, with certain deviations there from in limited circumstances. These relate primarily to subjection of the State for claims for damages resulting from the operation of State-owned motor vehicles. The

> execution of a 'hold harmless' cause is nothing more nor less than subjection of the State or one of its political subdivisions to tort liability and, in the opinion of this Office, can only be done by the State itself through legislative enactment.

Id.

In a 1980 opinion, we further explained our position that governmental agencies cannot agree to an indemnity or hold harmless provision. Op. S.C. Atty. Gen., October 6, 1980. In that opinion, we were asked to review a contract between the State Treasurer's Office and a bank. Id. Included in that agreement, we found a hold harmless clause. Id. In regard to this clause, we stated:

> [W]e have been taking the position that the State cannot agree to come in and defend or hold harmless third parties. (For example, we have offered the opinion that the State cannot give general warranties in real estate deeds, because this would require the State to defend title on behalf of subsequent property owners.) Paragraph eight (8) would require the State to come in and defend and hold harmless C & S from any claims. Furthermore, I think it is arguable that this indemnity and hold harmless provision might run afoul of Article X, Section 6 of the South Carolina Constitution as pledging the credit of the State for the benefit of third parties.

Id. Thus, we recommended that the hold harmless clause be deleted from the contract. Id.

In your letter, you mentioned a 2004 opinion issued by this Office addressing the ability of the State to enter into an indemnity agreement with a county concerning an encroachment on a county right-of-way. Op. S.C. Atty. Gen., September 29, 2004. While the county involved acknowledged this Office's longstanding position that the State does not have the authority to enter into indemnification agreements, the county pointed to a 1989 opinion in which we indicated that a indemnity clause can be included in a contract as long as it limits the State's liability by stating "so far as the laws of the State permit." Id. The Budget and Control Board requested an opinion clarifying whether or not indemnification clauses are allowed. We again noted our longstanding position that "a state agency possesses no authority to enter into indemnification agreements." Id. Furthermore, we determined no language can change this lack of authority. Id. Citing many of the opinions referenced above, we concluded that

> "or else insertion of language such as 'so far as the laws of the State permit'" in the 1989 opinion was inadvertent on the part of its author. In any event, we do not deem this language as in any

> way controlling or dispositive and we caution that phraseology should not be relied upon in an effort to validate an indemnification agreement. Thus, to the extent inconsistent with the many other opinions referenced herein, we overrule that portion of Op. No. 89-43 which employs such language. We continue to adhere to our longstanding opinion that indemnification agreements are without legal authority.

Id.

We are not aware of any provision under the law of this State that allows the District to enter into a hold harmless or indemnity agreement. Thus, based on our prior opinions, we are of the opinion that the District may not enter into such agreements. Furthermore, in keeping with our 2004 opinion, we do not believe the addition of language explaining the extent of the District's liability under State law changes the District's ability to consent to such agreements. As some of our opinions indicate, we question whether the inclusion of such a provision can bind the District. Therefore, we advise the District not to consent to any hold harmless or indemnification clauses.

You also inquired about the District's ability to obtain insurance to cover any losses alluded to under the indemnity and hold harmless provisions. In a 1983 opinion, we addressed a proposed agreement between the State Development Board and a private entity. Op. S.C. Atty. Gen., April 22, 1983. Initially, we determined the Development Board is precluded from entering into a hold harmless agreement with a private corporation. However, we stated:

> "Instead, the parties may enter into an agreement which requires the State Development Board to provide, or pay the cost of the insurance necessary to cover claims and losses which might be suffered by FSI in performing the contract. This can be accomplished by eliminating the first sentence of paragraph (4) and substituting the following sentence:
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> > 'The operator agrees to provide and maintain during the term of this agreement, or to pay the cost of such insurance as may be required by FSI to protect it, its officers, directors and employees from losses involving any and all claims, losses, liability, damage and expense arising out of or in any way connected with the use of any operator-furnished aircraft, including but not limited to loss of or damage to the aircraft itself.'

Id. In addition, the purchase of liability insurance generally does not constitute a waiver of sovereign immunity. See McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959), overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741(1985) (finding a city's purchase of a surety bond did not cause a waiver of sovereign immunity); 20 C.J.S Counties § 273. Therefore, we believe the District can purchase an insurance policy to cover the risks described in the Contract. Nonetheless, we do not advise the District to purchase insurance in excess of its liability under State law. Purchasing an insurance policy in excess of what the District would be responsible for under the Tort Claims Act could be viewed by a court as using public funds for private purposes in violation of article X section 11 of the South Carolina Constitution (2009).

Conclusion

Based on our prior opinions, we believe the District is prohibited from entering into a hold harmless or indemnity agreement. Furthermore, we do not believe that by including language limiting the District's liability to the liability allowed under State law validates such agreements. Therefore, we advise the District not to include any hold harmless or indemnity provisions in the Contract. However, we believe the District may obtain an insurance policy to cover risk associated with the Contract. But, we caution the District to limit the policy's coverage to cover only the District's liability under State law.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General