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The State of South Carolina

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The Honorable James L. Solomon, Jr.
Commissioner
South Carolina Department of
Social Services
P. O. Box 1520
Columbia, South Carolina 29202-1520

Dear Commissioner Solomon:

This Office has on numerous occasions issued opinions to the effect that state agencies do not have authority to enter into indemnification agreements in their contractual arrangements.[1] The Department of Social Services, however, occasionally has opportunity to receive funds for various programs for which the funding entity proposes a contract containing an indemnification clause. You, therefore, have requested an opinion from this Office on the acceptability of indemnification agreements when your agency would be contracting with other state government entities, federal government entities, or local government entities.

The relevant powers of the Department of Social Services (DSS) are enumerated in S. C. Code §§ 43-1-80 (1976, as amended), 43-1-110 (1976), and 43-1-120 (1976). Section 43-1-80 authorizes DSS to "cooperate with any federal agency ..., and administer any federal funds granted the State in the furtherance of the duties imposed upon the State Department...." Section 43-1-110 authorizes DSS to "cooperate with the Federal government, its agencies or instrumentalities, in the administration of Child Welfare Services ..." and to "receive and

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1. See for example Op. Atty. Gen. June 25, 1964, February 13, 1968, and October 20, 1971.

expend all funds made available to the Department by the Federal Government, the State or its political subdivisions for such purposes." Section 43-1-120 authorizes DSS to "take such action as it may deem necessary ... to enable the Department to secure for the State and its residents the full benefits available under the Social Security Act ... and under any other Federal legislation...." These sections impliedly authorize DSS to enter into contractual arrangements regarding funding of its programs. However, § 43-1-120 also contains the important limitation that "nothing contained in this section shall be construed to authorize any action by the Department in violation of the law of this State." The query thus turns to whether the law of this State would prohibit DSS from entering into indemnification agreements, even with public agencies, as a part of its contract.

The term "indemnity" pertains to liability for loss shifted from one person, held legally responsible, to another person. In an indemnity contract between two parties, one agrees to indemnify the other against loss or damage arising from some contemplated act of the indemnitor, or for some responsibility assumed by the indemnitee, or from the claim or demand of a third person, that is, to make good to him such pecuniary damage as he may suffer. Black's Law Dictionary (Fifth ed., 1979) "Indemnity." While you have not supplied our Office with any specific contractual provisions, we will presume that the contractual arrangement DSS proposes to enter into would contain a provision to the effect that DSS would assume any liability incurred by the other governmental entity on account of its actions relating to or in furtherance of the contract.

We believe such a clause in a contract violates state law in at least two ways. By virtue of the contingent nature of this assumption of liability, the amount of liability cannot be known at the time of contracting, and also the liability may not arise until after the close of the fiscal year during which the contract is made. Because of these aspects of an indemnity clause, it is impossible to specifically provide funding for it in an annual appropriations act. An indemnity clause in any contract, whether with a private party or with a governmental entity, therefore violates S. C. Code § 11-9-220 (1976), which provides:

> It shall be unlawful for any department, institution, commission or board of the State government or officer or agent of the State government authorized to make contracts or draw appropriations to contract

> indebtedness in excess of the amount specifically provided in the annual appropriation act.[2]

A second way in which an indemnity clause conflicts with state law relates to the State's immunity from suit in tort. The sovereign immunity of a state may only be waived by the State Legislature by legislative action. See, Art. X, Section 10, Constitution of South Carolina, 1895, as amended. In the absence of express statutory authorization, neither counsel for the state nor any of its agencies may waive the defense of sovereign immunity. Op. S. C. Atty. Gen. June 25, 1964, 81 A C.J.S. States § 299 (1977). By adoption of the S. C. Tort Claims Act, S. C. Code §§ 15-78-10, et seq. (1976, as amended), the state has partially waived its immunity from liability in tort so as to allow suits against it for limited monetary damages only in certain circumstances. Section 15-78-20 (b) specifically provides:

> The General Assembly ... intends to grant the State, its political subdivisions, and employees, while acting in the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability ... only to the extent provided herein [emphasis supplied].

See also § 15-78-40. Moreover, the Tort Claims Act provides that the Budget and Control Board shall provide insurance to cover the liability risks to the State created by the Tort Claims Act. Thus, the waiver of immunity contained in the Tort Claims Act is partial and limited and the State has provided that the risks created by the act are to be covered by insurance purchased by the Budget and Control Board. Accordingly, any proposed indemnity clause of the contract would place DSS in the potential position of assuming liability for an act not covered by the State's liability insurance and not contemplated by the Tort Claims Act.

For these reasons, this Office continues to hold to its opinion that state agencies, as a general rule, lack authority to enter into indemnification agreements. Of course, a particu-

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2. In this regard, the State Constitution provides that annual expenditures of state government may not exceed annual state revenues. See, Art. X, Section 7, Constitution of South Carolina, 1895, as amended.

lar indemnity agreement might meet the guidelines suggested in this opinion if the agreement were limited to a sum certain within a particular fiscal year where adequate appropriations have been made to cover the liability and then only as circumscribed by the Tort Claims Act, but no such a proposed agreement has been presented to this Office.

We are not unfamiliar with the problem faced by DSS, since indemnification agreements are common in contracts proposed to be entered into with federal agencies. We suggest that contract negotiations include elimination of indemnification clauses altogether or else insertion of language such as "so far as the laws of the State permit." Another approach would be for the DSS to agree to purchase liability insurance to cover the exposure of the contracting agency. Barring this, an agency might seek legislative authorization "to give such assurances on behalf of the State as may be required under the provisions of Federal laws."

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

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