1996 WL 599418 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 12, 1996

Re: Informal Opinion

*1 The Honorable Holly Cork
Senator, District No. 46
3 Rowboat Row
Hilton Head Island, South Carolina 29928

Dear Senator Cork:
You request an opinion concerning the following situation:
[u]nder the provisions of Act 52 of 1995, Beaufort County Council is pursuing a referendum, to be held during the November general election, on whether to establish a local-option sales tax to fund a highway construction project.

As I understand it, DOT is to directly reimburse the County the funds it would have dedicated to the project had DOT proceeded without County intervention. Repayment of 100 million would begin in 2001, at the rate of $7 million annually ... .

You enclose a copy of this contract, which is styled an "Intergovernmental Agreement Between Beaufort County and the South Carolina Department of Transportation Regarding the Widening of S.C. Route 170". Your question is whether "DOT [can] guarantee repayment to the County by the State?"

LAW / ANALYSIS

S.C. Code Ann. 4-37-10 et seq. provides an optional method for financing transportation facilities. This Act (No. 52 of 1995) authorizes the governing body of a county by ordinance to establish a transportation authority and to enter into a partnership, consortium, or other contractual arrangement with one or more governmental entities. However, if such consortium or partnership is entered into, "a referendum on the action must be held by each county and the referendum must be approved by each and every separate county and together."

Section 4-37-30 empowers counties either to impose a sale and use tax, or to authorize an authority established by the county council to "use and impose tolls" in order to provide revenue for the transportation facility. If the sales tax method is chosen, pursuant to Section 4-37-30(A), council may, by ordinance, impose a one percent sales and use tax within its jurisdiction "for a single project and for a specific period of time to collect a limited amount of money." Such projects may include "jointly-operated projects of the county and South Carolina Department of Transportation ...".

Pursuant to Section 4-37-30(A)(2), once such project and sales and use tax is authorized by county council pursuant to ordinance, "the county election commission shall conduct a referendum on the question of imposing the optional special sales and use tax in the jurisdiction." Specific requirements for conducting the referendum and terminating the sales and use tax are entailed in the statute and need not be repeated here. Suffice it to say that a sales and use tax imposition has been authorized by ordinance of Beaufort County Council with the necessary referendum to be held in the November general election.

Your question, however, focuses upon the contract entered into by Beaufort County and the South Carolina Department of Transportation to reimburse the County for its expenditures pursuant to the revenue raised 100 million dollars, beginning in the year 2001, at the rate of 7 million dollars annually. As I understand it, the contract period is to endure for approximately 20 years, although the contract contains an express termination clause authorizing the parties to terminate "by mutual agreement any time after this agreement has been entered."

*2 In an opinion of this Office, dated February 22, 1982, we commented upon the various constitutional and statutory provisions governing multi-year contracts executed by state agencies. We stated therein:
[p]ursuant to Art. 10, Sec. 10, South Carolina Constitution (1895), the fiscal year is set as commencing on the first day of July of each year. More definitively, Section 11-9-80 restates inter alia this constitutional provision. This section further provides that all acts to be performed shall be within the fiscal year and that all officers are required to keep their accounts and records in conformity with the fiscal year.

More specifically, Art. 10, Sec. 9 of the Constitution states that "money shall be drawn from the Treasury only in pursuance of appropriations made by law." This provision governs contracts made by public officers or officials. Beacham v. Greenville County, 218 S.C. 181, 185, 62 S.E.2d 92. It was intended to "prohibit expenditures of the public funds at the mere will and caprice of those having funds in custody without legislative sanction therefor." ... Grimball v. Beattie, 174 S.C. 422, 431, 177 S.E. 668. Contracts made by officers without a "regular appropriation" of the monies expended by contract contravene Art. 10, Sec. 9. State of South Carolina v. Corbin and Stone, 16 S.C. 533, 538.

We referenced State ex rel. Edwards v. Osborne, 193 S.C. 158, 173, 7 S.E.2d 526, where our Supreme Court stated that "it may be conceded that the legislature has plenary power ... to change its mind from year to year as to the purpose to which in each year it will apply the proceeds of particular sources of revenue ... ." Further, we noted that the case of Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 concluded that Section 11-1-40 "represents a limitation or constraint upon an agency's general authority to contract." Section 11-1-40 makes it unlawful for any public officer "to enter into a contract for any purposes whatsoever in a sum in excess of the tax levied or the amount appropriated for such purposes ... ." Our reading of the Long case, holding that so long as an agency possesses appropriated funds in its hands, the agency may contract and obligate those funds pursuant to its general power, was that "it would not represent an unfair extension of Long" to conclude that a contract beyond the life of the agency's appropriation "would be invalid pursuant to Sec. 11-1-40."

Also referenced in the 1982 opinion was the case of Beacham v. Greenville County, supra. In Beacham, an appropriation was made to pay an architect $400,000 for work done concerning repair of a courthouse. The architect proceeded with the work which ultimately totalled $863,000. The Court noted that the architect was "charged with knowledge of the limited power and authority of the Board, had actual knowledge of their intentions that the project should cost $400,000 and, finally, he had actual and constructive notice of the amount of the legislative appropriation for the project ... ." 218 S.C. at 188.

*3 Further observing that "assurances by state officials of continuation of the program beyond the life of the appropriation for that program", are not binding upon the General Assembly, the 1982 opinion concluded:
[b]oth the Beacham and Long cases, together with the wording of Sec. 11-1-40 itself, strongly indicate that a contract made by a public officer, which seeks to obligate state funds beyond the fiscal year, where there is no existing appropriation providing for the expenditure of such funds is invalid. Unless the Legislature subsequently authorizes or ratifies the contract in the form of an appropriation, as the General Assembly did in Beacham, the contract may not be enforced.

The 1982 opinion recognized, however, that inclusion of the so-called "non-appropriations" clause in any contract rendered it valid for purposes of agency authority. As was stated in the opinion,

[t]he only basis on which the State or an agency thereof could validly enter into a contract obligating public funds for a period beyond the fiscal year as determined by the constitution and statutes of this State, would be the inclusion of a proviso which would make continuation of the contract term contingent upon the fact that the General Assembly appropriated sufficient funds, from year to year, to pay the consideration under the contract as to be solely determined by the State or its agency.

Since the 1982 opinion was written, both this Office, as well as our Supreme Court, have reaffirmed the fact that a "non-appropriations" clause is necessary for multi-year contracts entered into by a governmental agency. In Op. Atty. Gen., Op. No. 83-89 (November 15, 1983), we reaffirmed the 1982 opinion and applied it to counties. There, we noted that
... contracts executed for terms in excess of one year will be binding; however, the contract should contain a proviso to the effect that the contract is subject to cancellation if funds are not appropriated or otherwise made available for the contract after the first year.

And in Caddell v. Lexington Co. Sch. Dist. No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988), our Supreme Court observed that "critical to" a lease-purchase arrangement for thirty years between a school district and a private corporation was "a provision known as the 'non-appropriation clause,' under which the District may decline, without penalty, to renew the annual lease by failing or refusing to appropriate the necessary funds." 373 S.E.2d at 599. The Court, in rejecting the contention that the lease-purchase agreement constituted general obligation debt, pointed to the "non-appropriations clause" in concluding that it was not:
... a leaseback arrangement containing an explicit non-appropriation clause places no such requirement on the political entity. Under the plan here, rental payments are to be included in the District's annual budget. Liability under the leaseback agreement is, at most, contingent: The District has the option of terminating simply by refusing to appropriate money for rent.

*4 See also, Whiteside v. Cherokee County Sch. Dist. No. 1, 428 S.E.2d 884, 888-89; Op. Atty. Gen., Op. No. 93-61 (Sept. 23, 1993); Op No. 91-6 (Jan. 18, 1991) ["Such a contract should contain a non-appropriation clause and be terminable with each fiscal year ..."]; Op. Atty. Gen., Op. No. 85-140 (December 9, 1985).

Thus, any long-term contract entered into by a state agency and which commits public funds over the course of a number of years is, by definition, subject to the General Assembly's future appropriation of those funds. Even if the funds committed over the long-term are in whole or in part federal funds, we have concluded that
[a]s a practical matter, when federal funds are received by the State or an agency or institution thereof, such funds are generally required to be deposited in the State Treasury ... [Section 72.6 of the 1996-97 Appropriations Act], provides in part:
[a]ll Federal Funds received shall be deposited in the State Treasury, if not in conflict with Federal regulations, and withdrawn therefrom as needed, in the same manner as that provided for the disbursement of state funds ... .

Similarly, Section 11-13-125, Code of Laws of South Carolina (1983 Cum.Supp.), requires that '[a]ll funds received by any department or institution of the State Government shall be deposited ... in the State Treasury ... .' See also Harris v. Fulp, 178 S.C. 332, 183 S.E. 158 (1935); Ops. Atty. Gen. dated December 12, 1979 and April 5, 1978. Just as for any state-generated funds, federal funds in the State Treasury must be appropriated by the General Assembly before expenditure is permissible. Article X, Section 8 of the State Constitution provides that '[m]oney shall be drawn from the treasury of the State ... only in pursuance of appropriations made by law.' See also State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982); Anderson v. Regan, 53 N.Y.2d 356, 425 N.E.2d 792 (1981); Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978). Thus, for at least some purposes, federal funds assume the characteristics of state funds upon their receipt by the State Treasurer and appropriation by the General Assembly.

Op. Atty. Gen., Op. No. 85-26 (March 25, 1985).

Accordingly, all long-term state contracts are subject to the contingency that funds appropriated by the General Assembly will be available. See, also Op. Atty. Gen., January 8, 1963 ("the Educational Television Commission operates on funds appropriated by the General Assembly from year to year and no action by the Commission could bind a subsequent General Assembly to appropriate funds to be used by the Commission."). In that sense, therefore, no payments by the State can ever be absolutely "guaranteed". Even continuing appropriations authorized by the Legislature itself may be changed by a subsequent General Assembly. Clearly, one Legislature is not bound by another. Op. Atty. Gen., February 25, 1987.

*5 In addition, a recent decision by our Court of Appeals addresses the issue of long-term government contracts. In Piedmont Public Service District v. Cowart, 459 S.E.2d 876 (S.C. Ct. App. 1995), the Court held that a 20-year employment contract made by a public service district may not necessarily be binding on the successor boards of the district. In reaching this conclusion, the Court referenced the general law in this area as follows:

[i]f the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract. The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils. [citations omitted] ... . This rule was adopted by our Supreme Court in Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948).

The Court further noted that even if the public service district was deemed a body of continuing existence a twenty-year employment contract was considered of unreasonable duration. Only recently, in Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992), our Supreme Court recognized that

[t]he planning, construction, and financing of State roads is a governmental service which requires statewide uniformity.

307 S.C. at 456. (emphasis added).

Of course, as we have repeatedly stressed, this Office is not able to comment in an opinion upon the validity of a particular contract previously entered between a state agency and others. Op. Atty. Gen., Op. No. 85-132 (November 15, 1985). Such involves factual determinations which this Office has no authority to make in a legal opinion. Op. Atty. Gen., December 12, 1983. The agreement in question specifies that "[r]eimbursement ... will be made to SCDOT with funds allocated in future STIPS." [emphasis added]. Such agreement does not, however, specify where these revenues would originate, or whether the are to be paid pursuant to some continuing appropriation of the General Assembly, constitutional mandate or simply out of the general fund as any other disbursement. Thus, we are unable to make any comment about the particular contract you have referenced.

As a general matter, however, as the authorities referenced above indicate, long-term contracts by the State are always subject to the contingency that the General Assembly will continue to provide the funding and to appropriate funds for the payment thereof. The General Assembly, as the supreme legislative authority, has the absolute discretion whether or not to appropriate monies or whether or not to continue a state agency's existence. Any long-term state contract will contain a "non-appropriations" clause to the effect that the contract is contingent upon the continuing availability of appropriated funds. I would add, however, that while it is a legal requirement that no state agency can commit state funds beyond the life of an appropriation, and while persons who contract with the State are always cognizant of such

contingency, as a practical matter, I am aware of no circumstance where a default of such a major long-term state contract has ever occurred. As we stated in Op. Atty. Gen., Op. No. 85-140 (December 9, 1985),

*6 ... while technically speaking, the State is not legally obligated to appropriate funds ... the importance of the governmental function involved in your question would make [such] non-appropriations very unlikely.

The inclusion of such contingency through a "non-appropriations" clause is simply a recognition that when it comes to the allocation of public funds, the General Assembly's authority is supreme.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am
Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

1996 WL 599418 (S.C.A.G.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.