EXHIBIT B

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA

Opinion 74-115


August 23, 1974

TYPE: OFFICIAL OPINION

SYLLABUS:

A state agency may not incur a fiscal obligation beyond that authorized by currently effective appropriations; contracts incurring an obligation dependent upon future appropriations or the continuation of any other source of state funds are invalid.

REQUESTBY:

State Auditor

OPINIONBY:

Arthur K. Bolton, Attorney General

OPINION:

This is in reply to your request for my opinion as to whether, and under what circumstances, a state agency may lawfully execute a contract with a private party to purchase goods or services where the term of the contract extends beyond the current fiscal year. Your request is drawn in terms of an inquiry as to a proposed contract by the Department of Administrative Services for computer goods and an inquiry as to the extent the Board of Regents of the University System of Georgia is bound by the principles applicable to other state agencies in this area.

Because prior opinions on this question may not adequately explain their reasoning sufficiently to govern the specific inquiries made, I have undertaken to set forth herein a restatement of the underlying rationale and specific conclusions for the purpose of future guidance. nt

nt This opinion deals exclusively with contracts between state agencies and private parties. Contracts between state agencies or between a state agency and another instrumentality of the state involve different considerations. Ga. Const., Art. VII, Sec. VI, Par. I (Ga. Code Ann. § 2-5901).

The resolution of the issue presented requires consideration of several constitutionally embodied concepts, each of which is related to the underlying purpose of foreclosing the state from incurring "debt" except in specified instances.

The first of these is Art. VII, Sec. III, Par. IV. With certain exceptions authorizing certain types of debt, none of which is here pertinent, it provides that

"... the credit of the state shall not be pledged or loaned to any individual, company, corporation or association..." Ga. Const., Art. VII, Sec. III, Par. IV (Ga. Code Ann. § 2-5604).
This limitation, which gathers meaning from its own terms and from the exceptions authorizing the state to incur debt for certain purposes, forecloses the execution of any contract which pledges the faith and credit of the state. *State Ports Authority v. Arnall*, 201 Ga. 713 (1947). The purposes and meaning of this prohibition, contained also in the Constitution of 1877, were exhaustively treated by the Supreme Court in *City Counsel of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696 (1899), where, although dealing specifically with similar prohibitions applicable to political subdivisions of the state, the court delineated the pertinent limitations with reference to the state itself. The court noted that

"Taking into review, as the framers of the Constitution did, the condition of the public debt of the state . . . nothing can be plainer than that the power to create debts, incur liabilities and impose burdens to be discharged in the future, was liable to be grossly abused, if the same existed without restrictions . . . in the hands of the General Assembly. . . . In light of all those facts, what is meant by the various provisions of the Constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose except those few above mentioned. . . . The various departments of government must be supported from year to year by taxation, and only in [certain] instances is the state authorized to incur a debt. . . ." *Id.* at 705-706.

The Supreme Court's definition of "debt" was also drawn in reference to the state itself. "Almost without exception," the court noted, "not only in regard to the subordinate public corporations of the state, but in regard to the state itself" the general rule had been that " . . . salaries and all expenses of government are paid by the year out of taxes raised during the year in which the service to be compensated was rendered. . . . Debt, therefore, as used in the Constitution is to be understood as a liability which is undertaken and which must be discharged at some time in the future but which is not to be discharged by a tax levied within the year in which the liability is undertaken." *Id.* at 711-712.

Specifically, the court held that

"The policy of the Constitution is not only against the incurring of liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performances of some service to be rendered in the future." *Id.* at 712.

This delineation of the debt limitation was incorporated in the present constitutional provisions. *Thompson v. Talmadge*, 201 Ga. 867, 885-86 (1947).

Much of the court's discussion in *Dawson*, supra, is, of course, directed to municipalities of the state where there is a union of legislative and executive powers. When the issue is drawn to the state level, however, the required correspondence of the obligation and taxation as stated in *Dawson*, supra, is not entirely dispositive. That principle, established in Art. VII, Sec. III, must be considered with related provisions of the Constitution also bearing on the issue presented.

Article III, Sec. VII, Par. XI, provides:

"No money shall be drawn from the Treasury except by appropriation made by law." (Ga. Code Ann. § 2-1941).
Article VII, Sec. IX, Par. I, requires the General Assembly to

"... annually appropriate the funds necessary to operate all the various departments ... and meet the current expenses of the state for the next fiscal year." (Ga. Code Ann. § 2-6201).

On the other hand, Art. VII, Sec. IX, Par. II, of the Constitution provides that the General Assembly

"...shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus ... together with an amount not greater than the total Treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds..." (Ga. Code Ann. § 2-6202).


Both under the Constitution and by statute, therefore, the General Assembly has, for purposes of the present issue, complete and absolute control over appropriations and other sources of state funds which may be made available to the department and has neither authorized any state agency to oblige the continued availability of appropriations or of any other sources of state funds, nor could it constitutionally do so, beyond the authorization contained in a presently effective General Appropriations Act.

Footnotes

n2 In certain instances, the Constitution mandates a continued availability of funds and we do not deal with those instances here. See, e.g., Ga. Const., Art. VII, Sec. IX, Par. IV (b) (Ga. Code Ann. § 2-6204).

End Footnotes

The import of these concepts on the question you presented may be succinctly stated: No agency of the state may execute a contract with a private party for the purchase of goods or services which purports to oblige appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the state agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds.

As a matter of general application, this principle forecloses a state agency from executing a contract the term of which extends beyond the current fiscal year. n3 In such a case, the required correspondence of the incurring of an obligation and the availability of funds to satisfy the obligation is provided.

Footnotes

n3 The implication in prior opinions that the frame of reference is any twelve month period is, of course, not correct. See, e.g., Op's Atty Gen. 70-8, 67-345.

End Footnotes

However, this is not necessarily the case. For example, a state agency may execute a contract for the purchase of goods and services even though the term of that contract extends to the next fiscal year if the state agency has on hand at the time of the execution of the contract available appropriated funds necessary to meet its entire obligation under the contract. Such a contract does not oblige an appropriation not then made. Moreover, the Constitution itself specifically provides that appropriations which would otherwise lapse at the close of the fiscal year do not so lapse if the appropriated funds are "contractually obligated." Art. VII, Sec. IX, Par. II (Ga. Code
Ann. § 2-6202). The Constitution itself, therefore, specifically contemplates contracts of the type discussed above.

On the other hand, a state agency generally may not contract for the present purchase of goods or services in one fiscal year which is to be paid for out of appropriations, or funds to be derived from other sources, in a subsequent fiscal year.

A state agency may, however, under certain circumstances, execute a contract the term of which extends to the next fiscal year where the state's fiscal obligation is for services rendered or goods to be received in the subsequent fiscal year and is payable from an appropriation for that subsequent year as long as the General Appropriations Act for that fiscal year making the appropriation has become effective. While the appropriation constitutionally does not become available for expenditure until the fiscal year for which it is made begins, such a contract does not anticipate future appropriations or obligate other sources of funds, and thus does not create a present, unfunded obligation.

II.

In prior informal reviews of state agency contracts by this office, we have encountered multi-year contracts which contained several types of provisions designed to obviate the conflict with the Constitution which would otherwise be posed.

The first of these is a contract, otherwise within the limitations stated above, which grants to the state agency, but not to the private party with whom the contract is made, an option to extend the term of the contract for an additional fiscal year. Generally, the option may be exercised by the state agency within 60 days prior to the beginning of the next fiscal year and thus at a time when appropriations for that fiscal year under a General Appropriations Act have become effective. Such a provision does not in any way obligate future appropriations and is thus within the constitutional limitations set forth above. n4

n4 Prior opinions make clear, however, that penalties imposed on the state agency incident to the failure to exercise the options are invalid. See, e.g., Ops. Atty Gen. 1963-65, p. 221; Op. Atty Gen. 70-8.

A second alternative employed in otherwise invalid multi-year contracts is an attempt to deal directly with the problem inherent in them. Under this approach, a multi-year contract is subject to automatic termination at the end of any fiscal year included in its term if there is a failure on the part of the General Assembly to appropriate sufficient funds for its continuation. Several factors make it apparent that such a clause is insufficient to avoid the constitutional deficiency otherwise inherent in the contract. The General Assembly does not, in fact, and serious doubts exist as to whether constitutionally it may, appropriate with reference to specific contracts executed or to be executed by state agencies. Op. Atty Gen. 73-132 (and constitutional provisions cited); Ga. Const., Art. I, Sec. I, Par. XXIII (Ga. Code Ann. § 2-120); Fuller v. State, 232 Ga. 581 (1974) (concurring opinion of Hall, J.); Boston & Gunby v. Cumnins, 16 Ga. 102, 107 (1854). Absent such a scheme for the appropriations process, the continuing fiscal obligation inherent in such contracts would purport to govern expenditure of appropriations in fact made to the state agency. See, Ivins v. Harrison, 185 Ga. 244, 253-54 (1937); Harrison v. State Highway Dept., 183 Ga. 350 (1936). For these reasons, it is my opinion that a "failure of appropriations" clause does not save an otherwise invalid multi-year contract.

The third device is a provision granting to the state agency, or to both parties, under a contract which otherwise violates the Constitution, an option to terminate the contract. Generally, such an option is subject to exercise within a period of time immediately preceding the beginning of a new fiscal year. In my opinion, such a contract does not comply with the Constitution and is beyond the authority of a state agency. A state agency is not authorized to pledge the credit of the
state. A multi-year contract obligating future appropriations, even with an option to terminate, is a pledge of the state's credit thus beyond the authority of the state agency in the first instance and therefore void. *Barwick v. Roberts*, 188 Ga. 655 (1938); *Ops. Att’y Gen.* 1963-65, p. 221. The option to terminate the contract does not modify the pledge of credit and purports to vest in the state agency a power to determine whether the pledge shall be terminated. No state agency has such a power and this becomes especially apparent in view of the fact that, under such a contract, the state agency's neglect will suffice to continue the pledge as sufficiently as a conscious determination not to exercise the power. *Ops. Att’y Gen.* 1963-65, p. 221.

III.

As you noted in your request, the Board of Regents of the University System of Georgia is not subject to the same limitations imposed on agencies of the state. See, e.g., *State of Georgia v. Regents of the University System of Georgia*, 179 Ga. 210, 222 (1934); Ga. Const., Art. VIII, Sec. IV, Par. I (Ga. Code Ann. § 2-6701). On the other hand, the Board of Regents is not authorized to obligate future appropriations which are made to it in its departmental capacity. *State of Georgia v. Regents*, supra; *State Ports Authority v. Arnall*, 201 Ga. 723 (1947). With respect to appropriations to it, the Board of Regents is subject to the same limitations which apply to other agencies of the state.

In your request, you make reference to a specific multi-year contract executed by the Board of Regents for computer equipment which it now desires to replace. In the bid documents issued incident to securing replacement equipment, prospective vendors are advised that the successful vendor must make the necessary arrangements to liquidate the existing contractual obligation to the vendor of the equipment to be replaced. Without reference to the existing contract, of course, I cannot reach an opinion as to the validity of that document.

The limitations applicable to other state agencies are also applicable to the Board of Regents of the University System of Georgia to the extent its contractual obligations are dependent upon appropriations made to it in its capacity as a department of State Government.

IV.

Your specific request with respect to the Department of Administrative Services seeks my opinion as to whether, as presently drawn, a proposed contract for the rental by that department of computer equipment and related goods is consistent with the limitations stated above.

Under that contract, the department agrees to rent the equipment for an initial six-year period for a rental payable in monthly increments of $125,000. Anticipating the issue presented here, the contract provides:

"[DOAS] may terminate items of equipment . . . upon . . . written notice of thirty (30) days or the remainder of the . . . fiscal year, whichever is less, certifying that the availability of budgetary funding from those sources currently supporting these items of equipment can no longer support the affected items . . . so that termination of those items will have resulted from the loss of funding. It is not the intent of this provision to permit (the Department) to then make, request or allocate budgetary funding for the acquisition of new or use of existing [non-vendor] equipment . . ."

The Department of Administrative Services, in its provision of computer services, is in a unique position. Under the present statutory framework, the department does not receive for the provision of those services a direct appropriation to it. Instead, DOAS invoices the state agency users of that equipment and by this method funds the costs of providing those services.
That the fiscal obligations of DOAS under contracts with vendors are not payable from direct appropriations to it but depend instead on user fees in turn supported by direct appropriations does not render any less applicable the debt limitations stated above. See, State Ports Authority v. Arnall, 201 Ga. 713 (1947); Op. Att'y Gen. 72-59. Unless the "escape" clause noted above is sufficient to negate a future obligation, it is my opinion that the contract is invalid.

In my opinion, moreover, the "escape" clause is not sufficient to avoid the conclusion that the contract creates a debt. In the first instance, the initial obligation of the Department of Administrative Services is stated as a continuing, general obligation. Even if the quoted language were otherwise sufficient to modify this conclusion as to the nature of the obligation, however, the contract imposes an obligation not to "make, request or allocate budgetary funding for the acquisition or use of [non-vendor] equipment...". In my opinion, such a limitation retains the original character of the department's obligation and thus not only is insufficient to avoid the debt impediment but is further invalid because the nature of the obligation incurred and the period of time which that obligation encompasses is also beyond the contractual authority of the department conferred, or which might be conferred, by statute. 25

--- Footnotes ---


--- Footnotes ---

However, because of the unique position occupied by the Department of Administrative Services, it is my conclusion that different considerations are applicable to its powers in connection with multiyear contracts. In my opinion, the department may remedy the deficiencies inherent in the existing language of the proposed contract if in lieu of the language quoted above the following is substituted:

"(a) The total monthly charge established hereunder is payable by the customer solely from fees received by the customer from other agencies of the State of Georgia for their use of the products, which, to the extent authorized by law, are established in the sole discretion of the customer. In no event shall the sum of the total monthly charges made in any fiscal year of the customer exceed the sum of the fees so received by the customer during such fiscal year.

"(b) In the event that the source of payment for the total monthly charge no longer exists or is insufficient with respect to the products or to any of them, then this contract as to all products, or, as the case may be, as to any products included under this contract, shall terminate without further obligation of the customer as of that moment. The certification by the customer of the event stated above shall be conclusive."

Under such a clause, the department does not obligate the continuation of any source as state funds and thus neither pledges the credit of the state nor obligates the state in a manner beyond the authority conferred by statute. See, e.g., City Council of Dawson v. Dawson Waterworks Co., 106 Ga. 666, 710 (1899); Miller v. Head, 186 Ga. 694 (1938).

It is my opinion, therefore, that if the Department of Administrative Services amends the proposed contract in the manner stated above, then the fact that the term of the contract extends beyond the current fiscal year does not invalidate the contract.