



House of Representatives

State of South Carolina

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Committee:

Education and Public Works

December 2, 2013

The Honorable Alan Wilson
Attorney General of South Carolina
P.O. Box 11549
Columbia, S.C. 29211-1549

Re: I-526 Extension, the State Infrastructure Bank and the commitment of future funds

Dear Attorney General Wilson:

Thank you for your thorough and concise June 25, 2013 opinion related to my series of questions on the State Infrastructure Bank (SIB) and the I-526 extension project.

As we approach significant milestones related to this project, several of the points made in your Office's previous opinion (enclosed) raise numerous questions. Most importantly, it is my concern that the SIB is moving to enter into a binding contract (the amended I-526 Intergovernmental Agreement) to provide state funds beyond the current fiscal year when said state funds are not available and have not been appropriated by the Legislature. It is my hope that your response to the below questions will lead to preventative actions taken by our state's leaders which will negate the need for costly corrective actions at a later date.

Background:

As you will recall, the SIB Board passed a motion on August 17th, 2012 to promise future funding capacity in the amount of \$130 to \$150 million to the I-526 project, to cover the difference between the \$420 million previously pledged to the project and the project's current \$556 million cost estimate. The SIB does not expect that these additional funds will be available to the project until 2020 or later, and neither the Joint Bond Revue Committee (JBRC) nor the Budget & Control Board have reviewed or approved the commitment of these additional funds to this project.

However, it is my understanding that within a few months, the SIB intends to sign an amended Intergovernmental Agreement (IGA) with SCDOT and Charleston County, which would commit this additional \$130 to \$150 million in state funds to the I-526 contract. If

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fully executed, this amended IGA will be a legally enforceable contract that will bind the SIB to the commitment of these additional funds prior to the appropriation of said funds.

On page 8 of your Office's June 25, 2013 opinion, it is noted that "state agencies are generally prohibited by law from entering into contracts which obligate state funds beyond the fiscal year." It is further noted that several statutory provisions prohibit state agencies from entering into a contract in an amount beyond that appropriated for a certain purpose for that fiscal year. The opinion goes on to state that the only way to validly enter into such a contract is for the Legislature to authorize or ratify the contract in the form of an appropriation.

To my knowledge, no such authorization or ratification from the Legislature has occurred, which brings into question the validity of the forthcoming amended IGA.

Questions:

In consideration of the aforementioned concerns, my questions for your Office are:

1. If the SIB does sign the amended IGA (which is said to include a commitment for the additional \$136 million) prior to a formal appropriation from the Legislature and without the inclusion of a non-appropriation clause, does this make the amended IGA invalid? If SCDOT also signs the amended IGA, does this make the State a party to this contract, and consequently make the State liable for the SIB's financial commitment?
2. What steps are required to ensure that the fully executed amended IGA (containing a commitment of the \$136 million) will be valid? For example, it is assumed that the JBRC must first approve the additional funding commitment before the amended IGA is executed; does the Budget & Control Board also need to review and approve the \$136 million commitment, and does the Legislature need to formally appropriate these funds prior to execution? Does a non-appropriation clause need to be inserted into the amended IGA?

Conclusion:

As I previously mentioned, my objective in this instance is to ensure that we take whatever preventative actions are needed to avoid costly corrections in the future. In this case, the SIB should ensure that all applicable laws and procedures are followed prior to entering into a binding contract such as this amended IGA for the I-526 extension project. I believe that your answers to my questions will provide essential guidance to our state leaders as we navigate this complex situation.

Best Regards,



Representative Robert L. Brown

RLB/vhr/2013dec2-16,17
Enclosures: (1)