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State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
70804-9005

October 17, 2013
OPINION 13-0051

3 APPROPRIATIONS
8-1 BONDED - Indebtedness

The Honorable John N. Kennedy
Treasurer
P.O. Box 44154
Baton Rouge, LA 70804

Dear Treasurer Kennedy:

Lines of credit granted by the State Bond Commission under the Capital Outlay Act for capital improvement projects for which bond proceeds are appropriated by a current capital budget, prior to the actual issuance of bonds for such projects, may be funded from any funds in the Comprehensive Capital Outlay Escrow Account. However, the State Bond Commission may only grant lines of credit payable from constitutionally dedicated monies for bonded capital improvement projects that are consistent with the particular constitutionally dedicated fund's purpose. Proceeds from prior general obligation bond sales may not be used to fund non-bond capital outlay projects. The original issue premium received pursuant to the sale of general obligation bonds may be used to fund general obligation bond-funded projects, provided that such use is permissible under the Treasury Regulations and the premium is either not needed or may not be used under the Treasury Regulations to pay obligations that are secured by the full faith and credit of the state and which become due and payable within the current fiscal year.

Your request for an Attorney General's Opinion has been assigned to me for research and reply.

You indicated that, recently, the State Bond Commission Executive Committee working group was assigned with addressing debt capacity and limitation issues affecting the State. As a result of the group's discussions, a number of issues have arisen that require an opinion of our office.

Intra-fund Borrowing

The Comprehensive Capital Outlay Escrow Account (the "Account"), established under Section 5 of Act 24 of the Regular Session of 2013 (the "Capital Outlay Act") and prior annual capital outlay acts, captures all activity related to both non-bond and bond funded projects contained in the annual Capital Outlay Act and other special legislative acts containing capital outlay projects. The Account is currently comprised of three separate "sub-funds" that were originally established to capture three distinct control and administrative entities administering capital outlay projects, namely Department of Transportation (051), Facility Planning and Control (075), and Department of Military (055) (now referred to as "Other" and which has been expanded under Section 8 of the Capital Outlay Act to include not only the Department of Military Affairs but also the Office of Coastal Restoration, Louisiana Stadium and Exposition District, certain Department of Economic Development projects, and certain Department of Natural Resources projects).

All projects and their costs are identified in each fund/sub-fund and are tracked by their associated originating means of financing source [State Direct General Fund, Federal Funds (CMIA), Federal Funds, Self-Generated, Interagency Transfer, Interim Emergency Board-GF, Statutory Dedication (which is comprised of both constitutionally and statutorily dedicated funds) and actual general obligation bond sale proceeds as well as authorized cash lines of credit]. As of February 5, 2013, the fund breakdown was as follows:

DOTD (051)	\$ 37 million
Facility Planning and Control (075)	\$ 69 million
Other (055)	\$179 million
Total	\$285 million

The recent monthly spending for designated projects has been approximately \$50-\$60 million per month. Due to a lack of bond sales coupled with actual disbursement for cash lines of credit of approximately \$615 million and the lack of direct general fund project financing, the ability of the funds to continue to cover project costs has been called into question.

As a part of developing a permanent solution, the following question has been raised:

Given the current constitutional restrictions for constitutionally established funds, statutory provisions for statutory funds, the provisions of the constitution providing for capital outlay funds and project funding, and the Capital Outlay Act provisions regarding administrative and control functions related to projects, is intra-fund borrowing between the sub-funds allowable, and if so, to what extent?

First, we note that we could not locate any provision that specifically allows for intra-fund borrowing within the Comprehensive Capital Outlay Escrow Account. Nevertheless, Section 1 of the Capital Outlay Act provides, in pertinent part, as follows:

Upon approval by the State Bond Commission, and subject to compliance with its policies and procedures and the procedures set forth herein, a line of credit providing for the use of funds in anticipation of the sale of general obligation bonds may be granted to the appropriate administering agency or department from the Comprehensive Capital Outlay Escrow Account...

Consequently, the State Bond Commission may grant the appropriate administering agency or department lines of credit for capital improvement projects for which bond proceeds are appropriated by a current capital budget, prior to the actual issuance of

bonds for such projects, unless the attorney general advises that an impediment exists to the valid issuance of the bonds on the date such line of credit is granted.¹

The Act also provides that such lines of credit are payable from monies available from the Comprehensive Capital Outlay Escrow Account. Significantly, the Legislature has not limited the source of line of credit funding to the appropriate administering agency or department's particular sub-funds within the Comprehensive Capital Outlay Escrow Account. The Capital Outlay Act only requires that the line of credit be granted to the appropriate administering agency or department. It does not limit the source of the funding within the Comprehensive Capital Outlay Escrow Account.²

As for constitutionally and statutorily dedicated non-bond monies within the Comprehensive Capital Outlay Escrow Account, we assume your concern is with using such monies to fund lines of credit for capital improvement projects for purposes other than those authorized by the Constitution of the State of Louisiana of 1974 (the "Constitution"). In our view, there is a clear distinction between statutorily dedicated monies and constitutionally dedicated monies. Constitutionally dedicated funds are established by the Constitution, and the monies contained therein are dedicated for a specific use and purpose. These funds are constitutionally protected, and their enabling articles serve as a constitutional prohibition against the use of the monies contained in these funds for purposes other than those stated in the enabling articles. Therefore, the State Bond Commission may only grant lines of credit payable from constitutionally dedicated monies for bonded capital improvement projects that are consistent with the particular constitutionally dedicated fund's purpose.

Statutorily dedicated funds, on the other hand, do not enjoy the same constitutional protection. These funds are established by statute, and therefore are subject to the Legislature's broad, exclusive, and pervasive power to repeal, amend, or abolish a previously passed statute, as well as the Legislature's broad and exclusive power to appropriate funds. In our view, the Legislature is free to appropriate statutorily dedicated funds for general use, notwithstanding any other statutory reservation to the contrary. Accordingly, under the Capital Outlay Act, the State Bond Commission may

¹ Obviously, lines of credit may only be granted from cash that is not otherwise encumbered (*i.e.*, a line of credit has already been granted from the cash, or the cash has been earmarked to pay a particular contract).

² We also note that, under La. R.S. 39:121, the division of administration has been delegated with, among other things, the authority to administer and enforce the provisions of the capital outlay budget adopted by the legislature. That statute also requires the division of administration to schedule the funding of projects in the event that there are more projects ready for funding than there are funds available at that time from the proceeds of the sale of bonds if such bonds are not sold at one time. Further, under Section 1 of the Capital Outlay Act, as to projects within a priority, the State Bond Commission acting on requests submitted by the Commissioner of Administration shall determine when such project, or phases thereof, shall be funded.

grant lines of credit for bonded capital improvement projects from statutorily dedicated funds that are not consistent with the particular statutorily dedicated fund's purpose.

Therefore, it is the opinion of this office that lines of credit granted by the State Bond Commission under the Capital Outlay Act for capital improvement projects for which bond proceeds are appropriated by a current capital budget, prior to the actual issuance of bonds for such projects, may be funded from any funds in the Comprehensive Capital Outlay Escrow Account. However, the State Bond Commission may only grant lines of credit payable from constitutionally dedicated monies for bonded capital improvement projects that are consistent with the particular constitutionally dedicated fund's purpose.

Finally, we recommend that the State's general obligation bond counsel review any proposed use of available funds other than general obligation bond sale proceeds to ensure compliance with the Internal Revenue Code of 1986 and U.S. Department of Treasury Regulations promulgated pursuant thereto. We also note that the State must consult with bond counsel to ensure that general obligation bonds are sold on a timely basis to replenish funds in the Comprehensive Capital Outlay Escrow Account with tax-exempt general obligation bond proceeds.

Bond Proceeds Utilization

Next, you ask whether the State is correct to prevent the utilization of proceeds from prior general obligation bond sales on non-bond capital outlay projects.

The short answer to this question is yes. Section 1 of the Capital Outlay Act provides, in pertinent part, that:

The amount set forth in this Section opposite each project, or so much thereof as may be necessary, is hereby appropriated and payable from the proceeds available from the sale of general obligation bonds, unless a different source of funding is indicated. Where such a different source of funding is indicated, the corresponding amount set forth, or so much thereof as may be necessary, is hereby appropriated and payable from the source of funding indicated...

As you can see, funds for projects appropriated and payable from sources other than the proceeds available from the sale of general obligation bonds are payable only from the source of funding indicated in the Capital Outlay Act. Thus, it is the opinion of this office that the State may not use bond proceeds from prior bond sales to fund non-bond capital outlay projects.

Premium Utilization

Your next question concerns the use of original issue premium received pursuant to the sale of general obligation bonds. You indicate that, as a result of current economic and

market conditions, the difference between the market yield rate and the coupon rate on new general obligation bond sales has generated, and might continue to generate, premiums that are in excess of the par value of the bonds and consequently above the value of the project authorizations.

In the past, the State has used the premiums to pay interest on general obligation bonds (other than those that created the particular premium) that is payable within one year of realization of the premium. The State would like to have the option to use these premiums to fund projects payable from the proceeds available from the sale of general obligation bonds. Thus, you ask whether the State may use original issue premium received from the sale of general obligation bonds for additional project funding.

Significantly, the only provision of Louisiana law that specifically references the use of premium on State general obligation bonds is in Section 5 of the Capital Outlay Act, which provides, in pertinent part, the following:

Notwithstanding any provisions contained herein or other law to the contrary, any original issue premium or accrued interest proceeds received pursuant to the sale of general obligation bonds shall remain on deposit to the credit of the Bond Security and Redemption Fund until such time as they may be utilized in accordance with U.S. Department of Treasury Regulations promulgated pursuant to the Internal Revenue Code of 1986.

Notably, the Capital Outlay Act only requires that the original issue premium be deposited in the Bond Security and Redemption Fund until such time as it may be used in accordance with U.S. Department of Treasury Regulations promulgated pursuant to the Internal Revenue Code of 1986 (the "Treasury Regulations").

Additionally, under La. Const. art. VII, § 9(B), in each fiscal year an amount is allocated from the bond security and redemption fund sufficient to pay all obligations which are secured by the full faith and credit of the state and which become due and payable within the current fiscal year, including principal, interest, premiums, sinking or reserve fund, and other requirements.

Moreover, in Section 1 of the Capital Outlay Act, the Legislature appropriates funds for certain projects from the "proceeds available from the sale of general obligation bonds." Thus, we must consider whether a premium received from the sale of general obligation bonds are "proceeds."

The term "proceeds" is not defined in the Capital Outlay Act or elsewhere. Therefore, under La. Civ. Code art. 11, which states that "[t]he words of a law must be given their generally prevailing meaning," we turn to a dictionary definition of that term. According to the Random House Unabridged Dictionary, in pertinent part, "proceeds" are "the total

amount derived from a sale or other transaction.”³ As such, we consider original issue premium received pursuant to the sale of general obligation bonds to be a part of the proceeds from the sale of general obligation bonds. As long as such proceeds are not needed to pay obligations that are secured by the full faith and credit of the state and which become due and payable within the current fiscal year, then they may be used to fund bonded capital outlay projects.

Considering the forgoing, it is the opinion of this office that the original issue premium received pursuant to the sale of general obligation bonds may be used to fund general obligation bond-funded projects, provided that such use is permissible under the Treasury Regulations and the premium is either not needed or may not be used under the Treasury Regulations to pay obligations that are secured by the full faith and credit of the state and which become due and payable within the current fiscal year.

Finally, we also note that you ask about the effect of La. R.S. 39:1410.33(C) on the use of original issue premium for additional project funding. Under La. R.S. 39:1410.33(C), “[w]henever a resolution for the issuance of state general obligation bonds is to be heard by the Bond Commission, a list of the allocation of the proceeds of the sale shall be sent to each member of the legislature at least five business days prior to the approval of the resolution.” Specifically, you are concerned with how to allocate the proceeds, since it is uncertain how much premium the sale will generate.

It appears that this issue can be dealt with in one of two ways. First, according to the State’s financial advisor, the State can simply require the bidders at a competitive sale to submit bids for a certain amount of sale proceeds (par amount and original issue premium combined). Second, the list of the allocation of sale proceeds could include a list of projects to be funded from the par amount as well as a supplemental list of projects to be funded from original issue premium, to the extent that such premium is available. The supplemental list would have to include the order in which the premium must be allocated, since premium might not be available to fund all of the projects in full.

Conclusion

In summary, the following is the opinion of this office:

1. Lines of credit granted by the State Bond Commission under the Capital Outlay Act for capital improvement projects for which bond proceeds are appropriated by a current capital budget, prior to the actual issuance of bonds for such projects, may be funded from any funds in the Comprehensive Capital Outlay Escrow Account. However, the State Bond Commission may only grant lines of

³ Dictionary.com, Dictionary.com Unabridged, Random House, Inc.
<http://dictionary.reference.com/browse/proceeds> (last visited: April 9, 2013).

credit payable from constitutionally dedicated monies for bonded capital improvement projects that are consistent with the particular constitutionally dedicated fund's purpose;

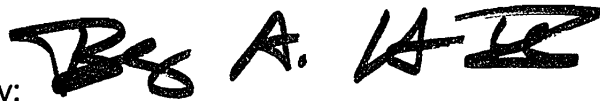
2. The State may not use proceeds from prior general obligation bond sales to fund non-bond capital outlay projects; and
3. The original issue premium received pursuant to the sale of general obligation bonds may be used to fund general obligation bond-funded projects, provided that such use is permissible under the Treasury Regulations and the premium is either not needed or may not be used under the Treasury Regulations to pay obligations that are secured by the full faith and credit of the state and which become due and payable within the current fiscal year.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

JAMES D. "BUDDY" CALDWELL
Attorney General

By:

A handwritten signature in black ink, appearing to read "B. A. Huxen II", written over a horizontal line.

BENJAMIN A. HUXEN II
Assistant Attorney General

JDC/BAH II