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FILE NO. S-1015

**STATE MATTERS:
Source of Funds to Pay
Unanticipated Litigation
Costs of IBA**

**Honorable Alan J. Dixon
Treasurer
105 State House
Springfield, Illinois 62706**

Dear Mr. Dixon:

This responds to your request for an opinion concerning the manner in which costs of litigation in which the Illinois Building Authority has been involved in the last several years can be funded. You state that moneys available to the IBA are derived only from the sale of bonds pursuant to specific declaration of public interest by the General Assembly and from rental payments under leases and that the legislative authorization and the lease between the IBA and the

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using agency provide a maximum amount of cost to be incurred by the IBA for a given facility. You also state that "AN ACT to create the Illinois Building Authority and to define its powers and duties" (Ill. Rev. Stat. 1973, ch. 127, pars. 213.1 et seq.) makes no apparent provision for funding of unanticipated, involuntary additional costs after the bond proceeds for a given project are exhausted. Your question is how the costs involved in litigation, including both legal costs (counsel fees, special consultants, expert technical witnesses, testing services, court costs, etc.) and possible judgments which would exceed the authorized cost, should be funded.

Preliminarily I must consider whether the Illinois Building Authority can expend funds for costs which would cause the total cost of the project to exceed the maximum cost authorized by the legislature for the project. Section 5 of the Act (Ill. Rev. Stat. 1973, ch. 127, par. 213.5) provides, in part, that the Authority shall have the power to:

"(a) Acquire by purchase or otherwise * * * construct, complete, remodel and install fixed equipment in any and all buildings and other facilities as the General Assembly by law declares to be in the public interest." (emphasis added.)

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From time to time, the General Assembly has declared certain projects to be in the public interest and placed limitations on how much could be expended on each project. For instance, see "AN ACT to declare certain building projects and facilities to be in the public interest". (Laws of 1967, p. 1875.) (H.B. 2221.) Thus, the IBA has no authority to expend funds on a particular project in excess of the amount found by the General Assembly to be in the public interest. Section 3 of H.B. 2221 and similar sections in other authorizing Acts do provide that the cost limit for a facility may be exceeded as long as the total cost limit for facilities to be provided for that particular agency is not exceeded. To the extent, however, that such provisions do not authorize additional costs in excess of the authorized limit for a particular facility, the General Assembly would have to pass a bill declaring it to be in the public interest that the cost ceiling for that particular project be raised to cover those additional costs.

I note further that your question assumes that the IBA

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is authorized to expend funds to pay these legal costs and judgments. I shall not address myself to that question but will assume for the purposes of this opinion, as you have, that the IBA has the power to make expenditures for such purposes.

Assuming then that original legislative authorization was sufficient or that an additional authorization is granted and that the IBA is authorized to spend funds for litigation costs, I will consider the possible mechanisms to fund the additional costs. The Act authorizes the IBA to sell bonds to raise funds to construct or remodel buildings for use by the State. (Ill. Rev. Stat. 1973, ch. 127, par. 213.5(d).) The principal and interest on the bonds and a portion of the administrative expenses of the Authority are to be paid from the services, fees, or rentals from the use of the facilities. (Ill. Rev. Stat. 1973, ch. 127, par. 213.7.) Under the lease, rentals were computed to cover principal and interest payments on bonds plus a portion of the administrative expenses calculated at the beginning of the lease. This, however, did not include a contingency for unanticipated legal costs and judgments incurred after the lease has been executed.

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You inquired about two possible means of funding these unanticipated costs and ask whether these or some other available means should be used. You first inquire whether the litigation costs might be borne by the using agency (lessee). The using agency could conceivably transfer funds to the IBA either as increased payments under the lease or as a direct grant to the IBA. Both present problems.

The standard lease between the IBA and a using agency sets rentals at an amount sufficient to cover the cost of the project, interest to bond holders and administrative expenses, but makes no provision allowing the Authority to raise the rent to defray the costs of contingencies such as those which have arisen. It appears at first that paragraph 8 of the lease might allow the IBA to exact additional charges above rentals before the title to the property is transferred to the lessee. This paragraph provides as follows:

"8. It is expressly understood and agreed that upon the payment of the total sum of _____ (less the sum of _____, which has been paid under the terms of an Interim Lease) in rentals under

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the terms of this lease and all renewals thereof plus any other amounts which Lessor may have paid to protect its interest hereunder, this Lease shall terminate and Lessor shall transfer to Lessee all of Lessors right, title and interest in and to said Facilities, and also jurisdiction or title to all parts of the property described in Paragraph 5 hereof as to which the Lessee has theretofore transferred jurisdiction or title to the Lessor pursuant to the Act, all free and clear of the terms of this Lease and all other encumbrances, except any presently existing and except Acts done or suffered by Lessee, or other cause beyond the control of Lessor." (emphasis added.)

The appellate court in Talandis Construction Corp. v. Illinois Building Authority, 23 Ill. App. 3d 929, has held, however, that this paragraph does not provide authority for the IBA to require the using agency to indemnify the IBA for judgments obtained by a contractor. The court explained at page 934:

"The language of the provision is plain and unambiguous. The University is bound to pay only the additional expenses incurred by the Authority in protecting its interest 'hereunder,' or under the lease. Under the lease the Authority is to receive the annual rent, to be assured that the University pay any taxes due, make repairs, not overload the floors, etc. If the University should fail in any of the obligations stipulated in the lease, the University must reimburse the Authority for monies paid 'to protect its interest hereunder.' The

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Authority is seeking indemnification from the University for additional construction costs resulting from the Authority's alleged breach of a separate contract between itself and the plaintiff construction company. There is nothing in the language of the provision that requires the University to indemnify the Authority under the circumstances. In essence, the Authority is not seeking indemnification for any rights it may possess by virtue of the lease."

If the provisions in the lease do not require the using agency to indemnify the IBA, it follows that the language could not be construed to allow the Authority to require payment for the amount of a judgment incurred in connection with the facility before conveying the facility to the using agency, which would be accomplishing indirectly what the court said could not be done directly. Thus, the IBA cannot require additional funds under the present standard lease from the using agency.

An alternative to making greater rental or other payments under the lease would be for the using agency to make a direct grant to the IBA. The problem here is whether the using agency could legally grant money to the IBA. The answer to this question depends on whether the using agency is empowered to make grants of money to a body politic and corporate for this purpose.

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If the using agency has no such power, it cannot grant the funds to the Authority. On the other hand, if the using agency does have the power to make grants to bodies politic and corporate for this purpose, it would be able to make the grant and could do so from funds appropriated for that purpose by the General Assembly or from other funds available for that purpose.

It is my opinion, therefore, that the Illinois Building Authority cannot obtain funds from the leasing agency by increasing payments required under the lease. It is further my opinion that the Authority cannot receive grants from a leasing agency whether such grants are from voluntary contributions or specific line item appropriations unless the leasing agency is empowered to make such grants.

Second you inquire whether the General Assembly has the authority to make a specific appropriation directly to the IBA for the payment of litigation costs. Section 1(a) of article VIII of the Illinois Constitution of 1970 states: "Public funds, property or credit shall be used only for public purposes." Payment of legal or moral obligations is a public purpose. (Hagler

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v. Small, 307 Ill. 460.) The Illinois Supreme Court has held that the Illinois Building Authority's stated purpose of furnishing facilities for use by the State of Illinois is "unquestionably a public purpose". (Berger v. Howlett, 25 Ill. 2d 128, at 131.) It follows clearly that appropriations for the payment of legal costs and judgments incurred by the IBA would be for a public purpose. Therefore, it is my opinion that the General Assembly could make an appropriation directly to the IBA for the payment of these legal costs and judgments.

Finally, you inquire whether there is some other available means of funding the unanticipated litigation costs. Perhaps the simplest means of paying the costs would be an appropriation directly from the General Assembly to those having claims against the IBA for such costs. An appropriation by the General Assembly to pay a legal or moral obligation is for a public purpose within the meaning of section 1(a) of article VIII of the Illinois Constitution of 1970 and may be made.

(Hagler v. Small, 307 Ill. 460.) Therefore, it is my opinion

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that the unexpected litigation costs could be funded by a direct appropriation from the General Assembly to those having such claims against the IBA.

In conclusion, my answer to your question is, subject to the assumptions I stated at the outset, as follows:

The funds to pay unanticipated legal costs and judgments may be obtained by the IBA from the using agency only if the using agency is empowered to make a grant to the IBA for that purpose. The General Assembly can appropriate funds directly to the IBA for the purpose of paying these legal costs and judgments or directly to those having claims against the IBA for legal costs and judgments.

Very truly yours,

A T T O R N E Y G E N E R A L