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SPRINGFIELD

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FILE NO. 85-003

STATE MATTERS:  
Audit of The Illinois State  
Toll Highway Authority

Honorable Robert G. Cronson  
Illinois Auditor General  
509 South Sixth Street  
Springfield, Illinois 62701

Dear Mr. Cronson:

I have your letter in which you state that the bond resolution of The Illinois State Toll Highway Commission for the issuance of Northern Illinois Toll Highway Bonds, Series of 1955 (hereinafter 1955 Bond Resolution), requires that an annual audit of the Commission's (now The Illinois State Toll Highway Authority's) books and records be made by a public accountant independent of the Authority and the State of Illinois. You ask the following questions relating to the audit of The Illinois State Toll Highway Authority:

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- (1) Does the independent audit requirement incorporated in the 1955 Bond Resolution limit or affect the Auditor General's statutory power and duty to audit the Toll Highway Authority?
- (2) Do the statutory audit requirements replace and supersede the independent audit requirement provided in the 1955 Bond Resolution?
- (3) If not, can the independent audit requirement in the 1955 Bond Resolution be amended or deleted by legislation?
- (4) If the Auditor General retains an otherwise independent public accountant to audit the Toll Highway Authority under the Auditor General's supervision, and the Toll Highway Authority and the Bond trustee agree to select that accountant to perform the audit required by the 1955 Bond Resolution, would the resulting audit satisfy the covenants of the resolution?

For the reasons hereinafter stated, it is my opinion that the audit requirement imposed by the 1955 Bond Resolution is separate and distinct from the statutory audit requirements, and does not limit or affect the latter. Further, the statutory audit requirements do not replace or supersede the audit required by the 1955 Bond Resolution, because such audit requirement cannot constitutionally be replaced or superseded by legislative enactment. Lastly, it is my opinion that the retention of an accountant by the Auditor General to audit the Toll Highway Authority would constitute an interest in a contract with the State which would render the accountant ineligible to satisfy the 1955 Bond Resolution's requirement of independence.

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The Illinois State Toll Highway Commission was created by "AN ACT in relation to the construction, operation, regulation and maintenance of a system of toll highways and to create The Illinois State Toll Highway Commission and to define its powers and duties, etc." [Toll Highway Commission Act] (Laws 1953, p. 1314, effective July 13, 1953). (See Ill. Rev. Stat. 1983, ch. 121, par. 314a26 et seq.) Among the powers granted to the Commission was the power to issue and sell bonds to finance the toll highway system. (Ill. Rev. Stat. 1983, ch. 121, par. 314a39.) On October 15, 1955, the Commission adopted a resolution for the issuance and sale of \$415,000,000 in Northern Illinois Toll Highway Revenue Bonds, Series of 1955, this being the bond resolution in question.

Section 7.12 of the 1955 Bond Resolution provides in pertinent part:

"\* \* \* The Commission covenants that it will keep an accurate record of the total cost of The Facility [Toll Highway], of the Revenues collected, of the number and class of vehicles using The Facility, and of the application of such Revenues.

\* \* \*

The Commission further covenants that in the month of January in each year it will cause an audit to be made of its books and accounts relating to The Facility by an Independent Public Accountant of recognized ability and standing, to be chosen by the Commission and approved by the Trustee. \* \* \* Each such audit report shall set forth in respect of the preceding fiscal year the same matters as are hereinabove required for the

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quarterly reports and also the findings of such Independent Public Accountant whether the moneys received by the Commission under the provisions of this Resolution have been applied in accordance with the provisions of this Resolution, and whether any payments for Maintenance and Operation Expense in the preceding fiscal year were in excess of the annual budget for such fiscal year.

\* \* \*

The Commission further covenants that it will cause any additional reports or audits relating to The Facility to be made as required by law. \* \* \*

\* \* \*

Section 1.01 of the 1955 Bond Resolution provides in pertinent part:

" \* \* \*

(m) 'Independent Public Accountant' means any accountant or firm of such accountants duly licensed or registered, or entitled to practice, and practicing as such under the laws of the State of Illinois appointed and paid by the Commission, who or each of whom:

(1) is in fact independent and not under the domination of the Commission or the State of Illinois;

(2) does not have any substantial interest, direct or indirect, in any contract with the Commission or the State of Illinois other than his contract of employment;

(3) is not connected with the Commission or the State of Illinois as an officer or employee of the Commission or the State, other than being regularly retained by the Commission.

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The Illinois State Toll Highway Authority was created by "AN ACT in relation to the construction, operation, regulation and maintenance of a system of toll highways and to create The Illinois State Toll Highway Authority, and to define its powers and duties, etc." [Toll Highway Authority Act] (Laws 1967, p. 2748, effective April 1, 1968). (See Ill. Rev. Stat. 1983, ch. 121, par. 100-1 et seq.) In addition to the specific powers granted by statute to the Toll Highway Authority, section 33 of the Toll Highway Authority Act (Ill. Rev. Stat. 1983, ch. 121, par. 100-33) provides:

"On April 1, 1968, all duties, obligations, functions and powers of The Illinois State Toll Highway Commission, together with all property, whether real or personal, rights, privileges, interest and any and all other assets whether real, personal or mixed, shall be transferred to and shall vest in The Illinois State Toll Highway Authority, which shall own, operate and control the same in accordance with the provisions of 'An Act in relation to the construction, operation, regulation and maintenance of a system of toll highways and to create The Illinois State Toll Highway Commission, and to define its powers and duties and to repeal an Act therein named', approved July 13, 1953, as amended, and all terms, covenants and conditions set forth in any resolutions heretofore or hereafter adopted authorizing and providing for the issuance of Revenue Bonds by The Illinois State Toll Highway Commission \* \* \*

It is the intention and purpose of this Section to transfer management and operation of the existing toll highways of The Illinois State Toll Highway Commission to the board of directors of The Illinois State Toll Highway Authority, but to require that the Authority comply with all covenants, conditions, terms and provisions

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imposed by 'An Act in relation to the construction, operation, regulation and maintenance of a system of toll highways and to create The Illinois State Toll Highway Commission, and to define its powers and duties and to repeal an Act therein named', approved July 13, 1953, as amended, until after all obligations of any kind or character whatsoever incurred by The Illinois State Toll Highway Commission under that Act have been paid in full from revenues, or income from whatever source derived \* \* \*.

\* \* \*

"

(Emphasis added.)

Thus, until such time as the 1955 Series revenue bonds are retired, it is the duty of the Toll Highway Authority, as successor to The Illinois State Toll Highway Commission, to perform the obligations and covenants of the 1955 Bond Resolution.

At the time of the adoption of the 1955 Bond Resolution, it appears that the Toll Highway Commission was not subject to audit by the Auditor of Public Accounts. Following the enactment of The Illinois Auditing Act (Laws 1957, p. 2306), which created the office of Auditor General and the Department of Audits, section 19 of the Toll Highway Commission Act (see Ill. Rev. Stat. 1983, ch. 121, par. 314a44) was amended to provide for the semi-annual audit of the books and records of the Toll Highway Commission by the Auditor General. This audit requirement was incorporated in section 23 of the

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Toll Highway Authority Act (Ill. Rev. Stat. 1983 Supp., ch. 121, par. 100-23), which now provides in part:

"\* \* \* It shall also be the duty of the Auditor General of the State of Illinois, annually to audit or cause to be audited the books and records of the Authority and to file a certified copy of the report of such audit with the Governor and with the Legislative Audit Commission, which audit reports, when so filed, shall be open to the public for inspection."

Moreover, because the Toll Highway Authority is "an instrumentality and an administrative agency of the State of Illinois" (Ill. Rev. Stat. 1983, ch. 121, par.100-3), the Authority is subject to audit by the Auditor General in accordance with the general provisions of the Illinois State Auditing Act (Ill. Rev. Stat. 1983, ch. 15, par. 301-1 et seq.). Thus, even absent the specific requirement set forth in section 23 of the Toll Highway Authority Act, the Auditor General would be empowered to audit the Authority at least biennially. (Ill. Rev. Stat. 1983, ch. 15, par. 303-2.)

You advise that the two audit requirements in question, the one contractual in nature, the other statutory, result in a duplication of effort and a concomittant waste of State resources. This circumstance has prompted your inquiry into methods whereby duplication may be eliminated while still fulfilling your constitutional and statutory duties.

In response to your first and second questions, it is clear that the audit requirement in the 1955 Bond Resolution

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originated separately and distinctly from the statutory audit responsibility now delegated to the Auditor General. As noted above, section 7.12 of the 1955 Bond Resolution imposed the requirement of an annual independent audit upon the Toll Highway Commission. According to section 1.02 of the 1955 Bond Resolution, the resolution is a contract between the Commission and the bondholders, which, pursuant to section 33 of the Toll Highway Authority Act, now constitutes an obligation of the Authority. Being contractual in nature, the audit requirement of the 1955 Bond Resolution inures principally to the benefit of the bondholders, and not to the public at large.

The power of the Auditor General to audit the Toll Highway Authority, however, originates in the statutes. (Ill. Rev. Stat. 1983, ch. 15, par. 301-7, 303-2; ch. 121, par. 100-23.) The statutory audit requirements are intended to insure "that the government of the State of Illinois will be accountable to the General Assembly and its citizens and taxpayers" (Ill. Rev. Stat. 1983, ch. 15, par. 301-2). Thus, the audit requirements in question arise from different sources and serve different interests.

Therefore, in the absence of a statutory exception so providing, it is my opinion that the mere existence of a contractual audit requirement originating in the covenants of the 1955 Bond Resolution in no way limits or affects the power of the Auditor General to perform his statutory duties in auditing



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The Illinois State Toll Highway Authority. Similarly, the Auditor General's audit powers and responsibilities do not serve to supplant or supersede the audit requirement created by the 1955 Bond Resolution, which effectuates the contractual agreement between the Commission and the bondholders. Since each audit serves a different purpose and neither interferes with or affects the performance of the other, each should be carried out in accordance with the authority creating it.

In response to your third question, it has been noted above that the terms of the 1955 Bond Resolution constitute a contract between the Toll Highway Authority and the holders of Series 1955 Northern Illinois Toll Highway Revenue Bonds. The parties to a valid contract are bound to perform it according to its terms. (Nation Oil Co. v. R.C. Davoust Co., Inc. (1964), 51 Ill. App. 2d 225, 238.) The covenants of the 1955 Bond Resolution are, by statute, enforceable against the Toll Highway Authority, and its officers, agents or employees by any holder of the bonds or bond coupons issued by the Toll Highway Commission under the Resolution. (See Ill. Rev. Stat. 1983, ch. 121, pars. 314a39; 100-17, 100-33.) Clearly, section 7.12 of the 1955 Bond Resolution and the pertinent statutes create a vested contractual right in the bondholders to the performance of the covenants of the 1955 Resolution, including the performance of an annual audit by an auditor who meets the criteria for independence set forth in section 1.01 of the 1955 Bond Resolution.

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It is well settled that a State cannot constitutionally enact a retrospective law impairing the obligation of contracts. (U.S. Const., art. I, § 10; Ill. Const. 1970, art. I, § 16; People ex rel. Eitel v. Lindheimer (1939), 371 Ill. 367, 373, appeal dismissed, 308 U.S. 505 (1939), reh'g denied, 308 U.S. 636 (1939); Schewe v. Glenn (1922), 302 Ill. 462, 467; R. Blackwell & Co. v. Auditor of Public Accounts (1826), 1 Ill. 196.) A legislative enactment impairs the obligation of a contract when it attempts to take away from a party a right to which he is entitled by its terms. (Superior Motors, Inc. v. Winnebago Industries, Inc. (D.C.S.C. 1973), 359 F. Supp. 773, 777.) Once two parties to a contract, as between themselves, have allocated rights and responsibilities, it is not within the power of the government to rearrange them. South Terminal Corp. v. Environmental Protection Agency (1st Cir. 1974), 504 F.2d 646, 680, citing Home Building & Loan Ass'n v. Blaisdell (1934), 290 U.S. 398, 428.

If the General Assembly attempted, by statute, to alter the terms of the 1955 Bond Resolution, the result would be to take away a right vested by contract in the bondholders. Such an enactment would unconstitutionally impair contractual rights already in existence. For this reason, it is my opinion that the independent audit requirement incorporated in the 1955 Bond Resolution cannot be amended or deleted by legislation.

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In response to your final question, section 7.12 of the 1955 Bond Resolution requires the annual audit of the Toll Highway Commission (now Toll Highway Authority) to be made by an "independent public accountant". As defined in section 1.01 of the 1955 Bond Resolution, an independent public accountant is a public accountant or firm of accountants who have no substantial interest, direct or indirect, in any contract with the Commission (now Toll Highway Authority) or the State of Illinois other than the contract of employment with the Authority. If the Auditor General were to retain an accountant to perform the statutory audit of the Toll Highway Authority, the accountant's interest in the contract with the State would immediately render him ineligible, under the definition of "independent public accountant", to perform the contractual audit under the 1955 Bond Resolution. Therefore, it is my opinion that a single accountant or accounting firm, if retained by the Auditor General, cannot simultaneously conduct both the statutory and contractual audits of the Toll Highway Authority and produce an audit which satisfies the requirements of the 1955 Bond Resolution.

Very truly yours,

  
A T T O R N E Y   G E N E R A L