



RANDALL M DESHOTEL
CLERK OF COURT

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August 30, 2022



Re: Unauthorized Incurrence of Debt/Cooperative Endeavor Agreements

TO WHOM IT MAY CONCERN:

It has come to our attention that increasingly public entities are utilizing cooperative endeavor agreements (CEAs) or other agreements as a mechanism to fund various capital and operating projects. As used herein, the term "CEA" includes joint ventures, public private partnerships or other similarly designated structures.

The Louisiana Constitution, Article VII, § 8 provides as follows:

No bonds or other obligations shall be issued or sold by the state, directly or through any state board, agency, or commission, or by any political subdivision of the state, unless prior written approval of the bond commission is obtained.

Louisiana Revised Statute 39:1401 *et seq.* sets forth the required procedures for public entities to incur debt. These procedures must be followed in order to enter into agreements wherein public entities incur debt; otherwise the agreement shall be null and void and penalties for violations shall be assessed under La. R.S. 39:1410.63 against persons specified therein.

The Attorney General has opined that State Bond Commission approval is not a prerequisite to enter a CEA as long as the obligations of the State, or its political subdivisions, do not constitute debt. AG Op. No. 19-0093. As the Attorney General has also noted, however, debt is "...more than an obligation to pay a sum of money. As defined in the statute, debt is incurred when there is financing." AG Op. No. 05-0039 (citing La. R.S. 39:1405(B)).

Based on the review by our offices, it appears public entities should review these transactions carefully prior to entering into these CEAs. There should be a determination that no debt is incurred without State Bond Commission approval.

In AG Op. No. 19-0093, the CEAs reviewed by the Attorney General were for services, contained non-appropriation clauses, and contained a termination fee that was not mandatory. The CEAs at issue here are not for services but for both the installation of movables, such as water

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meters, and for public works projects, such as sewerage systems and railroads. The public entity should determine whether the facts specific to their particular agreement constitute borrowing money to finance the pre-construction and construction costs for public works projects.

Generally, under the financing arrangements of the CEAs we have reviewed, a private company is the sole member and managing partner of an LLC that owns the infrastructure. The political subdivision owns the right of use of the infrastructure and has the obligation to pay the calculated usage fee. The agreements allow for termination without a fee but only to the extent that the infrastructure can be returned. Due to the unfeasibility of returning major infrastructure (as opposed to some movables) this may constitute a “mandatory” termination fee. Finally, there is a question as to whether the non-appropriation clauses in these proposed CEAs relieve the political subdivisions from all obligations under the agreement if funds are not appropriated in the future.

Therefore, when considering whether to enter into such agreements, we would urge you to consult with your attorneys and consider the following in order to determine whether entering into the CEA constitutes incurring of a debt subject to State Bond Commission approval:

1. Whether the CEA provides for, either directly or indirectly, an interest rate (either stated or imputed), finance charge or carrying charge or other similarly designated charges.
2. Whether the CEA has a true non-appropriation clause pursuant to which if the funding for the CEA is impaired the political subdivision may terminate the CEA without penalty or charge.
3. Whether the CEA obligates the political subdivision to exercise authority to raise fees, taxes, charges or assessments to fund the CEA.
4. Whether the CEA has penalties, fees, charges or make-whole provisions for early cancellation, returns of products or other similar provisions upon termination of the CEA.
5. Whether upon termination or expiration, the political subdivision will own the goods and products which are the object of CEA or whether title to those goods and products transfers, reverts or remains vested with the private-party to the CEA.
6. Whether there is any condition that requires granting of a security interest.


It appears to us that if one or more of the above provisions is present, the CEA may constitute the incurrence of debt requiring approval by the State Bond Commission. Any debt incurred without approval by the State Bond Commission would be contrary to Louisiana law and therefore null and void, *ab initio*.

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If you or your counsel wish to have further discussions concerning these CEAs, please contact the office of the Treasurer or the Louisiana Legislative Auditor.

Sincerely,



John M. Schroder
Louisiana State Treasurer



Michael J. "Mike" Waguespack, CPA
Louisiana Legislative Auditor

