Clayton State University

Letter to Contractors/Vendors Regarding Legal Issues Related to Clayton State University Contracts

Dear Sir/Madam:

As a public institution and an instrumentality of the State of Georgia, Clayton State University (CSU) is subject to a number of regulations that prevent us from entering into certain kinds of contracts. While these rules may occasionally make the process of negotiating a contract with the University more difficult, these rules are not unique to CSU. They apply to all of the other public colleges and universities in Georgia. In fact, many if not most public institutions of higher education throughout the United States are subject to similar restrictions.

1. Legal Name of CSU

The correct legal name of CSU, which should appear on all of CSU's contracts, is "Board of Regents of the University System of Georgia by and on behalf of Clayton State University".

CSU is a unit of the Board of Regents of the University System of Georgia, and is not a separate legal entity. Using names such as "CSU" or "Clayton State University" or the name of a college or department within the university is not appropriate for contracts.

2. Indemnities

An indemnity is a contractual clause by which a contractor may ask that the University defend it against any claims of other persons who might be injured as a result of something that happens while the parties are carrying out their duties under the contract. The Georgia Attorney General has determined that public agencies cannot enter into agreements indemnifying contractors, or any other entity, against third party claims. A copy of an official opinion from the Attorney General to this effect is attached to this letter as Exhibit "A."

Occasionally a contractor will attempt to deal with this restriction by rewriting an indemnity clause so as to eliminate the words "indemnity" or "indemnify," while leaving the intent of the clause intact – that is, to obligate the University to defend the contractor against third party claims. "Indemnity" is not a magic word, and if a contract clause has the effect of creating an indemnity, we would not be able to agree to it even though that word has been removed.

CSU does not enter into clauses that obligate it to indemnify a contractor "to the extent permitted by law." There are two reasons for this. From our standpoint, because we know that the extent to which the law permits us to indemnify contractors is no extent whatsoever, it would be disingenuous for us to imply in a contract that there might be some set of circumstances under which we would defend the contractor against a third party claims. We would not agree to something that we know we could not do. Secondly, the "extent" clause is simply an invitation to litigate the matter in the event a third party claims arises, and we prefer not to enter into agreements that invite litigation.

Please do not ask us to ignore this rule. Because the University lacks the contractual authority to enter into an indemnity, any person who is signing such a document on the University's behalf signs it without authority to do so. We would not ask our administrators to expose themselves to personal liability by signing contracts that they know cannot be enforced.

We find that the indemnity issue is seldom a problem once contractors understand that we cannot provide indemnities, and why. If you think about what an indemnity is, it starts to look a lot like a policy of liability insurance. While the University cannot offer its contractors indemnities, there are many insurance companies that exist for precisely that purpose.

3. Insurance

Many contractors ask for clauses that define the manner in which the University insures itself. As a state instrumentality, the University is covered under the Georgia State Tort Claims Act (GSTCA), O.C.G.A. § 50-21-20 et seq. The GSTCA is too voluminous to attach to this letter, but you can see it online at http://w3.lexis-nexis.com/hottopics/gacode/Default.asp. Look at Title 50, Chapter 21, Article 2. The State of Georgia waives its sovereign immunity as to covered claims, but retains it as to other claims.

The GSTCA works in much the same way as liability insurance, or self-insurance. For all the types of claims that are covered under the GSTCA, coverage is provided at a limit of $1,000,000 per person, $3,000,000 per occurrence. GSTCA coverage is administered by the Georgia Department of Administrative Services, Risk Management Division.

The GSTCA is different from liability insurance in that we cannot adjust the coverage limits upward or downward; the limits are set by law. Also, because it is not insurance in the conventional sense, we cannot add contractors as additional insured parties.

4. Multi-year contracts

The authority to commit taxpayer funds to various agencies for various purposes from year to year belongs to the Georgia General Assembly. While the Board of Regents of the University System of Georgia receives an appropriation every year, and the Board of Regents allocates a portion of that appropriation each year to CSU, we cannot presume by contract to commit the General Assembly to doing so. That power belongs to the General Assembly exclusively. Consequently, we cannot enter into contracts that commit funds from future years' appropriations. For example, we cannot enter into multiyear leases with public funds. An opinion of the Georgia Attorney General on this point is attached to this letter as Exhibit "B".

This does not mean that we cannot enter into any multiyear contract. Contracts that have appropriate escape clauses do not create problems. Nor do contracts that do not require funding, such as sponsorship contracts. And contracts that are funded through non-public sources of money may be permitted under some circumstances.

5. Unliquidated expenses

We cannot presume that we would have funds available to pay for claims that might exceed our available funding. Certainly indemnities would fall into this category – who can say how it might cost to fund an indemnity that has no cap? But the same thing is true as to any other potential expense that cannot be calculated, such as paying a contractor's attorney's fees, paying for add-ons which aren't priced in the contract, paying for unknown cost increases during the life of the contract, and so on.

6. Credit agreements; interest

The Board of Regents lacks the legal authority to borrow money. An opinion by the Georgia Attorney General on that point is attached as Exhibit "C." When the State of Georgia borrows, it does so by issuing bonds through the Georgia State Finance and Investment Commission. Other State agencies don't borrow money. Please don't ask us to fill out credit applications in conjunction with contracts. We

simply cannot do that. Nor can we agree to pay interest on late payments, which is tantamount to borrowing money. The State of Georgia enjoys the highest bond ratings, and CSU is an excellent customer with a reputation for honoring its financial obligations promptly. We do that without the need to apply for credit, and without the threat of interest charges.

7. Waivers of jurisdiction and service; arbitration; laws of another state

Under Georgia's constitution, the Attorney General is the State's attorney for all purposes – including, especially, management of litigation. CSU cannot usurp his authority by agreeing in advance to control the way litigation would be managed in the event of a dispute. We cannot agree that we would submit to the laws or jurisdiction of another state, that we would waiver formal service of process, or to binding arbitration. It doesn't mean, for example, that we would absolutely refuse to arbitrate a dispute if one arose. It simply means that decisions of that nature are reserved for the Attorney General and we cannot sign a contract that would usurp his constitutional authority. However, we are always willing to consider mediation as a non-binding dispute resolution alternative. The text of Art. 5, Sec. 3, Par. 2 is attached to this letter as Exhibit "D."

8. Confidentiality

As a State institution, CSU is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.). While many types of records are protected by the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA), and by various exceptions contained within the Georgia Open Records Act, this Act gives any party the right to inspect and receive copies of most university records, including documents, contracts, and communications related to CSU's normal course of business. We cannot agree, for example, to provisions that attempt to prohibit CSU from releasing bid or contract documents, or the release of communications between CSU and a contractor/vendor, to any party that submits a request to inspect and obtain such records.

In conclusion

There are a few other special rules that come up from time to time, but these are the rules that come into play most often. CSU enters into hundreds of contracts every year, with a huge array of vendors and contractors from every field imaginable. With an impact worth hundreds of millions of dollars a year to the local economy, CSU is the kind of customer vendors cherish. Though the special rules that apply to public institutions can make doing business with us a little different, we think the value of a business relationship with CSU is well worth the effort for our vendors. On very rare occasions, these rules do prevent us from entering into a contract with a vendor. But the University works hard, and creatively, to find ways to work with vendors to build good business relationships while staying within the rules. And we find that most of our vendors are willing to work just as hard, and just as creatively, to achieve the goal. We appreciate the understanding that all of our vendors show. If there is any further information that you need to help you understand the rules that govern CSU, please contact contract review at http://www.clayton.edu/contract-administration.

EXHIBIT A

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA

OPINION 80-67

1980 Ga. AG LEXIS 138; 1980 Op. Atty Gen. Ga. 141

May 23, 1980

To: Superintendent, Georgia Fire Academy

From: ARTHUR K. BOLTON, ATTORNEY GENERAL

You have requested an opinion from the Attorney General on the question of whether or not the Georgia Fire Academy may agree to terms set forth in a Georgia Power Company Encroachment Agreement which would require the Fire Academy to indemnify the Power Company for money paid for personal injuries and property damages arising from the Fire Academy's use of its right of way and to reimburse the Power Company for its cost for any damage to its facilities resulting from the Fire Academy's use of its right of way.

Paragraph 8 of the Encroachment Agreement requires the Fire Academy "to indemnify and save harmless and defend the Power Company" from the payment of money on account of injuries to persons or damage to property in any way attributable to use of the right of way by the Fire Academy. Article III, Section VIII, Paragraph XII of the Constitution of Georgia of 1976 (Georgia Code Annotated § 2-1413) forbids the state's granting "any donation or gratuity in favor of any person, corporation, or association." In Washburn v. MacNeill, 205 Ga. 772 (1949), the Georgia Supreme Court held that the prohibition against gratuities prevents the state from refunding payments made by sureties on a recognizance bond. See also, McCook v. Long, 193 Ga. 299 (1942); Op. Att'y Gen. U76-28.

Op. Att'y Gen.68-328 (unofficial) interpreted Article III, Section VIII, Paragraph XII of the Constitution to prohibit an indemnity and hold harmless clause in a proposed contract,
under which clause the Georgia State Patrol would indemnify Brink's, Incorporated, for any liability, personal injury and property damage incurred as a result of use by the State Patrol of a vehicle leased pursuant to the proposed contract.

The opinion advised that the "hold harmless" agreement in the proposed Brink's contract was also violative of Article VII, Section III, Paragraph III of the Constitution of Georgia of 1945 (Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 [Georgia Code Ann. § 2-4804]) which provides that "the credit of the State shall not be pledge or loaned to any individual, company, corporation or association." See also, Op. Att'y Gen. 74-115 which discusses the application of this constitutional provision to the contractual incurring of a liability which is not to be discharged by a tax levied within the year in which the liability is undertaken. It is my opinion that the proposed hold harmless provision in Paragraph 8 of the Encroachment Agreement constitutes both a gratuity and a pledge of the state's credit and thus falls within the prohibitions contained in Article III, Section VIII, Paragraph XII and in Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.

By virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts of this state against the state without the express consent of the legislature. Koehler v. Massell, 229 Ga. 359 (1972);

Crowder v. Department of State Parks, 228 Ga. 436, 438 (1971). See the discussion contained in Op. Att'y Gen. 66-261 in which the Attorney General advised the Board of Regents that the legislature's delegation of the power to contract to the Regents does not include by implication the power to waive sovereign immunity by the contractual assumption of tort liability and that an attempt by Regents to do so would be ultra vires and void. Similarly, an attempt by the Georgia Fire Academy to contractually waive the state's sovereign immunity by entering into an indemnity agreement would be ultra vires and void.

Therefore, in summary it is my official opinion that Article III, Section VIII, Paragraph XII and Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 prohibit execution of an indemnification agreement by the Georgia Fire Academy and that such an agreement would furthermore be invalid as an unauthorized attempt to contractually waive the state's sovereign immunity.

In Paragraph 6 of the proposed Encroachment Agreement the Fire Academy agrees to reimburse the Power Company for all cost and expense for any damage to Power Company facilities resulting from its use of the right of way. The Fire Academy further agrees that if in the opinion of the Power Company it becomes necessary, as a result of the Fire Academy's use of the right of way, to relocate, rearrange, change or raise any of the Power Company's facilities, it will promptly reimburse the Power Company for this expense. Since Paragraph 6 involves a contractual pledge of the state's credit to pay for damages and expenses incurred by the Power Company without time or monetary limits, it is my official opinion that it is prohibited by Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.

EXHIBIT B

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA

Opinion 74-115

1974 Ga. AG LEXIS 115; 1974 Op. Atty Gen. Ga. 242

August 23, 1974

To: State Auditor

From: Arthur K. Bolton, Attorney General

This is in reply to your request for my opinion as to whether, and under what circumstances, a state agency may lawfully execute a contract with a private party to purchase goods or services where the term of the contract extends beyond the current fiscal year. Your request is drawn in terms of an inquiry as to a proposed contract by the Department of Administrative Services for computer goods and an inquiry as to the extent the Board of Regents of the University System of Georgia is bound by the principles applicable to other state agencies in this area.

Because prior opinions on this question may not adequately explain their reasoning sufficiently to govern the specific inquiries made, I have undertaken to set forth herein a restatement of the underlying rationale and specific conclusions for the purpose of future guidance.[1]

I.

The resolution of the issue presented requires consideration of several constitutionally embodied concepts, each of which is related to the underlying purpose of foreclosing the state from incurring "debt" except in specified instances.

The first of these is Art. VII, Sec. III, Par. IV. With certain exceptions authorizing certain types of debt, none of which is here pertinent, it provides that

> ". . . the credit of the state shall not be pledged or loaned to any individual, company, corporation or association. . . ." Ga. Const., Art. VII, Sec. III, Par. IV (Ga. Code Ann. § 2-5604).

[1] This opinion deals exclusively with contracts between state agencies and private parties. Contracts between state agencies or between a state agency and another instrumentality of the state involve different considerations. Ga. Const., Art. VII, Sec. VI, Par. I (Ga. Code Ann. § 2-5901).

This limitation, which gathers meaning from its own terms and from the exceptions authorizing the state to incur debt for certain purposes, forecloses the execution of any contract which pledges the faith and credit of the state. State Ports Authority v. Arnall, 201 Ga. 713 (1947). The purposes and meaning of this prohibition, contained also in the Constitution of 1877, were exhaustively treated by the Supreme Court in City Counsel of Dawson v. Dawson Waterworks Co., 106 Ga. 696 (1899), where, although dealing specifically with similar prohibitions applicable to political subdivisions of the state, the court delineated the pertinent limitations with reference to the state itself. The court noted that

> "Taking into review, as the framers of the Constitution did, the condition of the public debt of the state . . ., nothing can be plainer than that the power to create debts, incur liabilities and impose burdens to be discharged in the future, was liable to be grossly abused, if the same existed without restrictions . . . in the hands of the General Assembly. . . . In light of all those facts, what is meant by the various provisions of the constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose except those few above mentioned. * * * The various departments of government must be supported from year to year by taxation, and only in [certain] instances is the state authorized to incur a debt. . . ." Id. at 705-706.

The Supreme Court's definition of "debt" was also drawn in reference to the state itself. "Almost without exception," the court noted, "not only in regard to the subordinate public corporations of the state, but in regard to the state itself" the general rule had been that ". . . salaries and all expenses of government are paid by the year out of taxes raised during the year in which the service to be compensated was rendered. * * * Debt, therefore, as used in the Constitution is to be understood as a liability which is undertaken and which must be discharged at some time in the future but which is not to be discharged by a tax levied within the year in which the liability is undertaken." Id. at 711-712.

Specifically, the court held that

> "The policy of the Constitution is not only against the incurring of liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performances of some service to be rendered in the future." Id. at 712.

This delineation of the debt limitation was incorporated in the present constitutional provisions. Thompson v. Talmadge, 201 Ga. 867, 885-86 (1947).

Much of the court's discussion in Dawson, supra, is, of course, directed to municipalities of the state where there is a union of legislative and executive powers. When the issue is drawn to the state level, however, the required correspondence of the obligation and taxation as stated in Dawson, supra, is not entirely dispositive. That principle, established in Art. VII, Sec. III, must be considered with related provisions of the Constitution also bearing on the issue presented.

Article III, Sec. VII, Par. XI, provides:

> "No money shall be drawn from the Treasury except by appropriation made by law." (Ga. Code Ann. § 2-1911).

Article VII, Sec. IX, Par. I, requires the General Assembly to

> ". . . annually appropriate the funds necessary to operate all the various departments . . . and meet the current expenses of the state for the next fiscal year." (Ga. Code Ann. § 2-6201).

On the other hand, Art. VII, Sec. IX, Par. II, of the Constitution provides that the General Assembly

> ". . . shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus . . . together with an amount not greater than the total Treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds. . . ." (Ga. Code Ann. § 2-6202).
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> These constitutional provisions are implemented by the Budget Act. Ga. Code Ann. Ch. 40-4, based on Ga. Laws 1962, p. 17, as amended.

Both under the Constitution and by statute, therefore, the General Assembly has, for purposes of the present issue, complete and absolute control over appropriations and other sources of state funds which may be made available to the department and has neither authorized any state agency to obligate the continued availability of appropriations or of any other sources of state funds, nor could it constitutionally do so, beyond the authorization contained in a presently effective General Appropriations Act.[2]

The import of these concepts on the question you presented may be succinctly stated: No agency of the state may execute a contract with a private party for the purchase of goods or services which purports to obligate appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the state agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds.

As a matter of general application, this principle forecloses a state agency from executing a contract the term of which extends beyond the current fiscal year.[3] In such a case, the required correspondence of the incurring of an obligation and the availability of funds to satisfy the obligation is provided.

However, this is not necessarily the case. For example, a state agency may execute a contract for the purchase of goods and services even though the term of that contract extends to the next fiscal year if the state agency has on hand at the time of the execution of the contract available appropriated funds necessary to meet its entire obligation under the contract. Such a contract does not obligate an appropriation not then made. Moreover, the Constitution itself specifically provides that appropriations which would otherwise lapse at the close of the fiscal year do not so lapse if the appropriated funds are "contractually obligated." Art. VII, Sec. IX, Par. II (Ga. Code Ann. § 2-6202). The Constitution itself, therefore, specifically contemplates contracts of the type discussed above.

On the other hand, a state agency generally may not contract for the present purchase of goods or

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[2] In certain instances, the Constitution mandates a continued availability of funds and we do not deal with those instances here. See, e.g., Ga. Const., Art. VII, Sec. IX, Par. IV (b) (Ga. Code Ann. § 2-6204).

[3] The implication in prior opinions that the frame of reference is any twelve month period is, of course, not correct. See, e.g., Ops. Att'y Gen. 70-8, 67-345.

services in one fiscal year which is to be paid for out of appropriations, or funds to be derived from other sources, in a subsequent fiscal year.

A state agency may, however, under certain circumstances, execute a contract the term of which extends to the next fiscal year where the state's fiscal obligation is for services rendered or goods to be received in the subsequent fiscal year and is payable from an appropriation for that subsequent year as long as the General Appropriations Act for that fiscal year making the appropriation has become effective. While the appropriation constitutionally does not become available for expenditure until the fiscal year for which it is made begins, such a contract does not anticipate future appropriations or obligate other sources of funds, and thus does not create a present, unfunded obligation.

II.

In prior informal reviews of state agency contracts by this office, we have encountered multi-year contracts which contained several types of provisions designed to obviate the conflict with the Constitution which would otherwise be posed.

The first of these is a contract, otherwise within the limitations stated above, which grants to the state agency, but not to the private party with whom the contract is made, an option to extend the term of the contract for an additional fiscal year. Generally, the option may be exercised by the state agency within 60 days prior to the beginning of the next fiscal year and thus at a time when appropriations for that fiscal year under a General Appropriations Act have become effective. Such a provision does not in any way obligate future appropriations and is thus within the constitutional limitations set forth above.[4]

A second alternative employed in otherwise invalid multi-year contracts is an attempt to deal directly with the problem inherent in them. Under this approach, a multi-year contract is subject to automatic termination at the end of any fiscal year included in its term if there is a failure on the part of the General Assembly to appropriate sufficient funds for its continuation. Several factors make it apparent that such a clause is insufficient to avoid the constitutional deficiency otherwise inherent in the contract. The General Assembly does not, in fact, and serious doubts exist as to whether constitutionally it may, appropriate with reference to specific contracts executed or to be executed by state agencies. Op. Att'y Gen. 73-132 (and constitutional provisions cited); Ga. Const., Art. I, Sec. I, Par. XXIII (Ga. Code Ann § 2-123); Fuller v. State, 232 Ga. 581 (1974) (concurring opinion of Hall, J.); Boston & Gunby v. Cummins, 16 Ga. 102, 105 (1854). Absent such a scheme for the appropriations process, the continuing fiscal obligation inherent in such contracts would purport to govern expenditure of appropriations in fact made to the state agency. See, Irons v. Harrison, 185 Ga. 244, 253-54 (1937); Harrison v. State Highway Dept., 183 Ga. 290 (1936). For these reasons, it is my opinion that a "failure of appropriations" clause does not save an otherwise invalid multi-year contract.

The third device is a provision granting to the state agency, or to both parties, under a contract which otherwise violates the Constitution, an option to terminate the contract. Generally, such an option is subject to exercise within a period of time immediately preceding the beginning of a new fiscal year. In my opinion, such a contract does not comply with the Constitution and is beyond the authority of a state agency. A state agency is not authorized to pledge the credit of the
state. A multi-year contract obligating future appropriations, even with an option to terminate, is a pledge of the state's credit thus beyond the authority of the state agency in the first instance and

[4] Prior opinions make clear, however, that penalties imposed on the state agency incident to the failure to exercise the options are invalid. See, e.g., Ops. Att'y Gen. 1963-65, p. 221; Op. Att'y Gen. 70-8.

therefore void. Barwick v. Roberts, 188 Ga. 655 (1938); Ops. Att'y Gen. 1963-65, p. 221. The option to terminate the contract does not modify the pledge of credit and purports to vest in the state agency a power to determine whether the pledge shall be terminated. No state agency has such a power and this becomes especially apparent in view of the fact that, under such a contract, the state agency's neglect will suffice to continue the pledge as sufficiently as a conscious determination not to exercise the power. Ops. Att'y Gen. 1963-65, p. 221.

III.

As you noted in your request, the Board of Regents of the University System of Georgia is not subject to the same limitations imposed on agencies of the state. See, e.g., State of Georgia v. Regents of the University System of Georgia, 179 Ga. 210, 222 (1934); Ga. Const., Art. VIII, Sec. IV, Par. I (Ga. Code Ann. § 2-6701). On the other hand, the Board of Regents is not authorized to obligate future appropriations which are made to it in its departmental capacity. State of Georgia v. Regents, supra; State Ports Authority v. Arnall, 201 Ga. 713 (1947). With respect to appropriations to it, the Board of Regents is subject to the same limitations which apply to other agencies of the state.

In your request, you make reference to a specific multi-year contract executed by the Board of Regents for computer equipment which it now desires to replace. In the bid documents issued incident to securing replacement equipment, prospective vendors are advised that the successful vendor must make the necessary arrangements to liquidate the existing contractual obligation to the vendor of the equipment to be replaced. Without reference to the existing contract, of course, I cannot reach an opinion as to the validity of that document.

The limitations applicable to other state agencies are also applicable to the Board of Regents of the University System of Georgia to the extent its contractual obligations are dependent upon appropriations made to it in its capacity as a department of State Government.

IV.

Your specific request with respect to the Department of Administrative Services seeks my opinion as to whether, as presently drawn, a proposed contract for the rental by that department of computer equipment and related goods is consistent with the limitations stated above.

Under that contract, the department agrees to rent the equipment for an initial six-year period for a rental payable in monthly increments of $125,000. Anticipating the issue presented here, the contract provides:

> "[DOAS] may terminate items of equipment . . . upon . . . written notice of thirty (30) days or the remainder of the . . . fiscal year, whichever is less, certifying that the availability of budgetary funding from those sources currently supporting these items of equipment can no longer support the affected items . . . so that termination of those items will have resulted from the loss of funding. It is not the intent of this provision to permit [the Department] to then make, request or allocate budgetary funding for the acquisition of new or use of existing [non-vendor] equipment. . . ."

The Department of Administrative Services, in its provision of computer services, is in a unique position. Under the present statutory framework, the department does not receive for the provision of

those services a direct appropriation to it. Instead, DOAS invoices the state agency users of that equipment and by this method funds the costs of providing those services.

That the fiscal obligations of DOAS under contracts with vendors are not payable from direct appropriations to it but depend instead on user fees in turn supported by direct appropriations does not render any less applicable the debt limitations stated above. See, State Ports Authority v. Arnall, 201 Ga. 713 (1947); Op. Att'y Gen. 72-59. Unless the "escape" clause noted above is sufficient to negate a future obligation, it is my opinion that the contract is invalid.

In my opinion, moreover, the "escape" clause is not sufficient to avoid the conclusion that the contract creates a debt. In the first instance, the initial obligation of the Department of Administrative Services is stated as a continuing, general obligation. Even if the quoted language were otherwise sufficient to modify this conclusion as to the nature of the obligation, however, the contract imposes an obligation not to "make, request or allocate budgetary funding for the acquisition or use of [non-vendor] equipment. . . ." In my opinion, such a limitation retains the original character of the department's obligation and thus not only is insufficient to avoid the debt impediment but is further invalid because the nature of the obligation incurred and the period of time which that obligation encompasses is also beyond the contractual authority of the department conferred, or which might be conferred, by statute.[5]

However, because of the unique position occupied by the Department of Administrative Services, it is my conclusion that different considerations are applicable to its powers in connection with multiyear contracts. In my opinion, the department may remedy the deficiencies inherent in the existing language of the proposed contract if in lieu of the language quoted above the following is substituted:

> "(a) The total monthly charge established hereunder is payable by the customer solely from fees received by the customer from other agencies of the State of Georgia for their use of the products, which, to the extent authorized by law, are established in the sole discretion of the customer. In no event shall the sum of the total monthly charges made in any fiscal year of the customer exceed the sum of the fees so received by the customer during such fiscal year.
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> "(b) In the event that the source of payment for the total monthly charge no longer exists or is insufficient with respect to the products or to any of them, then this contract as to all products, or, as the case may be, as to any products included under this contract, shall terminate without further obligation of the customer as of that moment. The certification by the customer of the event stated above shall be conclusive."
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> Under such a clause, the department does not obligate the continuation of any source as state funds and thus neither pledges the credit of the state nor obligates the state in a manner beyond the authority conferred by statute. See, e.g., City Counsel of Dawson v. Dawson Waterworks Co., 106 Ga. 696, 712 (1899); Miller v. Head, 186 Ga. 694 (1938).

It is my opinion, therefore, that if the Department of Administrative Services amends the proposed contract in the manner stated above, then the fact that the term of the contract extends beyond the current fiscal year does not invalidate the contract.

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[5] Other considerations may also bear on the validity of such an undertaking but they are not pertinent here. Ga. Const., Art. IV, Sec. IV, Par. I (Ga. Code Ann. § 2-2701); Ga. Code Ann. § 26-2308 (a), based on Ga. Laws 1968, pp. 1249, 1308; Op. Att'y Gen. 67-23.

EXHIBIT C

April 8, 1948

Hon. Harmon Caldwell, President
University of Georgia

I am pleased to acknowledge your letter of March 25th, in which you state the following:

"The question has arisen as to whether the University of Georgia Athletic Association is authorized to borrow money for the purpose of financing its operations. For many years the Association has followed the practice of borrowing money during the spring and summer months and repaying the loans during the fall when the sales of football tickets are made …. The Athletic Association of the University was incorporated in 1928 by action of the Superior Court of Clarke County. This charter expired last month. A petition is now pending for a renewal of the charter…..

"We should greatly appreciate your giving us an official ruling on the question of the Association's right to borrow money so that we will know how we can safely proceed in handling the affairs of the Athletic Association."

Article 8. Section 4, Paragraph I of the Constitution provides in part as follows:

"There shall be a Board of Regents of the University System of Georgia, and the government, control, and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia…. The said Board of Regents of the University System of Georgia shall have the powers and duties as provided by law existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereafter provided by law."

It is well settled that physical education, which includes football and other athletic contests, are integral parts of the educational program conducted by the State of Georgia. See Allen v. Regents of the University System of Georgia, 82 L. Ed. 1448, and the cases cited therein. It must likewise follow that athletic contests engaged in by State institutions are under the control and management of the Board of Regents of the University System of Georgia. There is no legal method by which the Board of Regents of the University System of Georgia can be divested of this control over the athletic program conducted by the University and its various branches. It is also true that this authority cannot be delegated to a private corporation in such a way that the corporation will be performing functions and duties which are vested exclusively under the control and management of the Board of Regents.

The above statements however, do not prohibit the Board of Regents from exercising a sound discretion as to the means and methods to be employed in carrying out their control and management of the University System and its institutions. The only restriction on such authority is that to be found in the Constitution and statutory laws passed in pursuance thereof. The Board of Regents, being a constitutional department of the State government, is necessarily bound by all restrictions and limitations contained in the laws of this State to the same extent as all other departments and branches of the State government. The Board of Regents cannot contract debts or obligations on behalf of the State in violation of Article 7, Section 3, Paragraph I of the Constitution. Neither can the Board of Regents pledge the credit or property of the State to any individual, company, corporation or association, nor shall the State "become a joint owner or stockholder in or with, any individual, company, association or corporation." This would be in violation of Article 7, Section 3, Paragraph 4 of the State Constitution.

The Supreme Court of Georgia in the case of State of Georgia v. Regents of the University, 179 Ga. 210, at page 221 of the opinion in speaking of the status of the corporation known as Regents of the University System of Georgia, observed the following:

"The limitations upon the creation of State indebtedness as contained in that instrument do not apply to separate legal entities created as corporations by the State. The framers of the constitution saw fit to limit the bonded indebtedness which might be incurred by counties, cities, and other political divisions of the State, and it would seem that the omission of any limitations upon the university would imply that note of the inhibitions could be referable to that institution. Furthermore, the language of these constitutional provisions as to State indebtedness clearly indicate their applicability only to the State itself as a sovereign."

On page 222 of the opinion, the court in considering whether the bonds issued by the corporation were debts against the State held as follows:

"Regardless of the stipulations made, the State of Georgia could never be called upon to pay these bonds. Nor would it be under any obligation, moral or otherwise, to levy any tax for the purpose of repairing any loss that might result to the university in consequence of these transactions, if the action of the board should ultimately prove to be unwise and a loss should result…

"The university corporation is not the State, or a part of the State, or an agency of the State. It is a mere creature of the State, and a debt of the creature does not stand upon a level with the creator and never can rise thereto. It is first, last, and always a debt of the creature and in no sense a debt of the creator."

Following the law as announced by the Supreme Court of Georgia in the above case, we must come to the conclusion that under no circumstances could the credit or property of the State be pledged by the Athletic Association, and likewise it is clear that this association could in no way create a debt against the State of Georgia. Regardless of the stipulation made in any agreement between the Athletic Association and the financial institution or person loaning money to it, it must be clearly understood that the State of Georgia is in no way responsible for such obligations. As stated above, the Constitution absolutely prohibits this.

Since you do not set forth the agreement or method by which it is proposed to permit the Athletic Association, Inc. to aid or assist in conducting the athletic program in State institutions, it must be understood that this opinion cannot rule upon the relationship between the Board of Regents and the corporation. The powers of the Board of Regents in exercising management over the various phases of the State educational system are very broad and comprehensive. In speaking of these powers, the Supreme Court of Georgia in State of Georgia v. Regents of the University, supra at page 218 of its opinion, held as follows:

"So long as the Board does not exercise its powers capriciously or arbitrarily, or so as to thwart the purpose of the Legislature in establishing a system of university education, the board itself must determine what is necessary for the usefulness of the system, and thus will govern the University of Georgia and its several branches. The powers granted are broad and comprehensive, and, subject to the exercise of a wise and proper discretion, the regents are untrammeled except by such restraints of law as are directly expressed, or necessarily implied. The Legislature does not pretend to govern the system, but has entrusted this responsibility to the Board of Regents."

The Board of Regents being a constitutional department of the State government and charged with the control and management of the entire university system, it must necessarily follow that at all times every phase and detail concerning the operation of the State educational system are under the direct and exclusive authority of the said Board of Regents. It can in nowise delegate this duty and responsibility to the Athletics Association, Inc. Likewise, any State function which may be performed by the Athletic Association, Inc. is always subject to the supervisory powers of other State officials who by law are charged with certain responsibilities to all departments of the State government. In other words, the State Auditor must at all times have complete access to the books and records of the Athletic Association, and the same is subject to his authority and direction to the same extent as any other department or unit of the State government.

It likewise follows that if the Board of Regents see fit to permit the Athletic Association to aid or assist in the performance of the State educational program, this corporation is subject to the investigative powers of the Attorney General. In other words, the Board of Regents cannot escape its complete and full responsibility in relation to its athletic program.

In view of the above laws and legal circumstances, it is my opinion that the Georgia Athletic Association may incorporate and borrow money to finance its operations, as a private corporation without in any way creating a debt or obligation against the State; but that it must operate under the supervision of the State Board of Regents subject to the Constitution and all provisions of law relating to the powers and duties of the Board of Regents in its control and supervisory power which in the present case is based upon its control and supervision of football as a part of the educational program of the University of Georgia.

EXHIBIT D

Georgia Constitution, Art. 5, Sec. 3, Par. 3

The Attorney General shall act as the legal advisor of the executive department, shall represent, the state the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.