47 Op. Att'y Gen. No. 7

BONDS - Determining proper source for shortfall on general obligation bonds;
PUBLIC FUNDS - General fund pledged as security for bonds;
STATE AGENCIES - Determining proper source for shortfall on general obligation bonds;
MONTANA CODE ANNOTATED - Sections 1-2-101, -102, 17-2-108(1), 17-5-402(2), -414 to -416, -423, -424, -802, -802(2), 17-7-304, 67-1-301(3), (4), (4)(a)(i), -302(4);

HELD:

The state general fund is the proper source for payment of a shortfall to bondholders with respect to long-range building program bonds issued to create the airport loan program.

July 18, 1997

Mr. Marvin Dye, Director
Montana Department of Transportation
2701 Prospect Avenue
P.O. Box 209726
Helena, MT 59620-9726

Dear Mr. Dye:

You have requested my opinion on the following question, which I have rephrased as follows:

Is the general fund or a special revenue fund defined in Mont. Code Ann. § 67-1-301(4) responsible for payment of bonds issued under the long-range building program when the bond proceeds were appropriated for use by the airport loan improvement program?

In 1983, the legislature established an airport loan program in order to provide matching funds for the federal Airport and Airway Improvement Act of 1982. Montana Code Annotated § 67-1- 301(3) (1983) provided that there would be deposited in a special revenue fund to the credit of the Department of Administration an amount not to exceed the matching amount necessary to participate in the federal act. This special revenue fund would be composed of proceeds from the sale of bonds under the long-range building program as well as any repayments made on the loans.

House Bill 900, 1983 Mont. Laws, was an appropriation bill that allocated $1.3 million in long-range building bond proceeds to airport improvements. Section 9 of House Bill 900 specifically addressed payment on the bonds and provided, "[T]here is appropriated from the general fund to the Department of Administration an amount sufficient to pay all interest and principal due and owing on bonds issued and sold pursuant to House Bill 558." House Bill 558 was codified as Mont. Code Ann. §§ 17-5-414 to -416 and granted the board of examiners authority to issue and sell long-range building program bonds in the manner prescribed by Mont. Code Ann. title 17, chapter 5, part 8. Title 17, chapter 5, part 8 generally described the issuance of general obligation bonds by the State of Montana and provided in § 17-5-802(2) (1983) that the full faith and credit of the state was pledged for payment of all bonds and notes issued pursuant to that part. Section 17-5-802 further provided that all principal, interest and redemption premium, if any, becoming due during a fiscal year "must be included in the state budget for such year and sufficient revenues must be appropriated for payment thereof from the general fund and, if the general fund is not sufficient, from any other funds of the state legally available for payment thereof."

The bonds issued under the long-range building program contained a security clause that mirrored the statutory language in which the full faith and credit and taxing powers of the state were pledged for payment of the principal and interest on the bonds. The clause further acknowledged that the budget for any fiscal year must include sufficient revenues for payment of the interest and principal on the bonds.

In its appropriation to other programs of proceeds from the account containing the proceeds of the long-range building fund, section 9 of House Bill 900 provided:

[T]he department of administration is hereby irrevocably instructed to provide for payment of principal, interest, and redemption premium on such bonds, if any, from the money in the general fund and, if the general fund is not sufficient for such purpose, to provide for payment thereof from any other funds of the state legally available for payment thereof.

The statewide airport improvement program received $1.3 million in long-range building bond proceeds under section 5 of House Bill 900.

A special revenue account, credited to the Department of Administration, was established for the bond proceeds. Mont. Code Ann. § 67-1-301(3) (1983). The Department of Administration was authorized to provide loans to local and state government agencies for airport improvement projects not to exceed the amount required as a sponsor's share for projects authorized under the federal Airport and Airway Improvement Act of 1982. All repayments on the loans were also to be credited to this special revenue account. The loans were to bear an interest rate intended to fully retire the long-range building bonds issued under the authorization provided by the 48th Montana Legislature. Mont. Code Ann. §§ 17-5-414 to -416 (1983). An amount equal to 1% of the loans was allocated from the special revenue fund for administrative purposes.

You have provided me with a memorandum of understanding, executed in October 1983, between the Department of Administration and the Department of Commerce describing each agency's duties and responsibilities under the new airport loan program. The memorandum essentially mirrors the legislation, providing that the Department of Administration would maintain overall responsibility for the fund while the Department of Commerce would be responsible for issuing loans, repayment of which was intended to fully retire the long-range building bonds.

Prior to establishment of the program for airport improvement loans, another special revenue fund existed which was created through a tax of one cent per gallon on aviation fuel. The money from this tax was deposited to the credit of the Department of Commerce "for the sole purpose of carrying out its functions pertaining to aeronautics." Mont. Code Ann. § 67-1- 302(4) (1983).

In 1985, the legislature continued the airport loan improvement program. Section 1, chapter 676, 1985 Mont. Laws, appropriated $1.7 million from the long-range building program account to provide loans for the sponsor's share of airport improvement projects under the federal act. This appropriation was "contingent upon the authorization and sale of general obligation bonds by the 49th Legislature and the Board of Examiners." Id. You have provided me with another memorandum of understanding between the Department of Administration and the Department of Commerce, executed in June 1985, which is substantially similar to the memorandum executed in 1983. The aeronautics program was transferred to the Department of Transportation in 1991.

In 1987, the airport loan program was extended another two years. The legislature provided, however, that the program would end on June 10, 1989. 1987 Mont. Laws, ch. 4; Mont. Code Ann. § 67-1-301(4) (temp.). Additionally, the Department of Administration proposed an amendment to the program which provided:

When the airport loan program is terminated, any balance of the bond proceeds that is not loaned must remain in the state special revenue fund to be invested, and the income must be used to retire the outstanding debt on the bond proceeds.

The Department of Administration proposed this amendment because only $200,000 of the $1.7 million of bond proceeds that had been appropriated in 1985 had been used for loans. The department proposed that the unexpended bond proceeds and interest on the bond proceeds be invested and the income used to retire the debt. Otherwise, reasoned the department, under § 17-7-304 the excess funds would revert to the long-range building program and would be available for reappropriation. If the funds were reappropriated to another agency and the agency did not retire the debt, the department recognized, "the general fund would be forced to assume the remaining debt payments." Mins., Sen. Local Gov't Comm., Feb. 5, 1987, Hearing on HB 159, Ex. 1. Thus, the legislation was designed to protect the general fund in case there was a shortfall on reappropriation of the funds.

Your inquiry arises because as the bond retirement occurred, a deficit was nonetheless created between the bond payments and the repayment on the loans. You state that several factors appear to have combined to create this shortfall. Not all of the available bond proceeds were loaned, thereby reducing the loan and interest payments. The proceeds were invested in a short-term investment pool at an interest rate that was less than the bond rate. Lastly, some loans were prepaid with no penalty. As a result, approximately $110,000 beyond the balance of the special revenue account was necessary to fully retire the bonds.

I am told that this shortfall has already been paid out of the general fund by the Department of Administration. Nonetheless, an audit was performed by the Legislative Auditor's Office which reviewed the special revenue accounts of the program at the end of fiscal year 1994-95. The report of the audit recommended that the special revenue accounts of the Aeronautics Division be responsible for the shortfall. The two special revenue accounts referenced in the audit report were the Aeronautics Division account, which was established pursuant to a one-cent tax on aviation fuel as currently defined in Mont. Code Ann. § 67-1-301(4)(a)(i), and an account established through a one- cent aviation fuel tax that allowed for loans to local governments. In 1993, the legislature had replaced the airport loan program in which the money for the loans was derived from bond proceeds with a program in which the money for lending was derived from a one-cent fuel tax. Mont. Code Ann. § 67-1- 301(4)(b). The Legislative Auditor's Office suggested that either special revenue fund should be used to pay for the shortfall on the bonds issued for the airport loan program.

Your question is whether the general fund or the aeronautics special revenue funds are responsible for the shortfall. As discussed below, I conclude that the general fund was responsible, because the bonds were issued as general obligation bonds and there was no provision for reimbursement to the general fund from the special revenue funds.

The source of payment of bonds is determined from the applicable laws and from the provisions of the bond instruments themselves. McQuillin, Municipal Corporations § 43.128 (1981 ed.). Here, the bond instrument and the appropriation of bond proceeds both clearly show that the general fund was the proper source for payment on the bond shortfall. In House Bill 900, the 1983 legislature expressly stated that the Department of Administration was "irrevocably instructed to provide for payment of principal, interest, and redemption premium on such bonds, if any, from money in the general fund." The bonds that were issued were long-range building program bonds for which the full faith and credit of the state was pledged. Mont. Code Ann. § 17-5-402(2). Under the specific authorizations for issuance of the bonds used for the airport loan program, Mont. Code Ann. §§ 17-5-414, -423, the bonds were issued pursuant to title 17, chapter 5, part 8. Montana Code Annotated § 17-5-802 pledges the full faith and credit and taxing powers of the state, and requires the budget to include sufficient funds for payment of the bond principal and interest from the general fund. The bond instruments themselves, for the 1983 and 1985 bond issuances, pledged the state general fund as security for the bonds. The applicable law and bond instruments therefore expressly provided that the general fund would be ultimately responsible for bond payments.

In 1987, the Department of Administration recognized this and attempted to protect the general fund from a shortfall by having the legislature authorize the investment of excess bond proceeds and use of the income to pay for retirement of the bonds. Mont. Code Ann. § 67-1-301(3) (temp. 1995). This attempt ultimately failed, however, because the income on the investment of excess bond proceeds together with the loan payments was not sufficient to cover the bond obligations. A deficit occurred and the general fund became obligated.

This is not to say that the legislature could not direct that a special revenue fund be primarily responsible for the payment on the bonds. Generally, under § 17-2-108(1), every state entity is required to "apply expenditures against appropriate nongeneral fund money whenever possible before using general fund appropriations." If there is a special revenue fund that should be applied to an expense, it must be used before the general fund. It is presumably based upon this principle that the audit report suggested that the aeronautics special revenue funds be accountable for the shortfall.

There are specific situations where special funds have been expressly pledged for retirement of long-range building bonds. Sections 17-5-416 and -424 provide for the Department of Fish, Wildlife, and Parks to repay to the state treasurer the principal and interest paid on long-range bonds. Sections 17-5- 421 and -

425 provide for the repayment of principal and interest on the bonds by the Board of Regents. Such provisions are conspicuously absent with respect to bond proceeds allocated to the airport loan program. It is not my prerogative to read such a requirement into the laws. Mont. Code Ann. §§ 1-2-101, -102.

Although the legislature established a different loan program in 1993 with imposition of a one-cent tax on aviation fuel, Mont. Code Ann. § 67-1-301(4)(a)(ii), neither the statutory language of that provision nor the legislative history of the new loan program suggests that proceeds from that special tax were to be used for payment of bond proceeds under the previous loan program.

THEREFORE, IT IS MY OPINION:

The state general fund is the proper source for payment of a shortfall to bondholders with respect to long-range building program bonds issued to create the airport loan program.

Sincerely,

JOSEPH P. MAZUREK Attorney General

jpm/elg/dm