

May 6, 1974

Re: Bond Counsel on Commonwealth of Pennsylvania  
General Obligation Issues

In connection with the issuance from time to time of State general obligation bond issues, the legal matters from the standpoint of the State are supervised by the Attorney General. However, the purchasers of such bonds necessarily require the advice and approval of independent bond counsel who, as soon as the issuing officials decide to float an issue, begins to act as the legal watchdog for the underwriters. This independent counsel prepares all documents in connection with the solicitation of bids in the bond market, the opening of those bids, the acceptance of the best bid, and the settlement, at which the Commonwealth receives the proceeds.

Since the successful bidder is not known until after all the preliminary legal work has been completed, the bid papers prepared and circulated, and the best bid accepted, this independent counsel can not be selected by any one bidder, but must be one who will be acceptable to all bidders. For the same reason, the independent counsel is in practice selected, not by any bidder, but by the State, which will be liable for the bond purchasers counsel's fee in any event. In order for such independent Bond Counsel to be acceptable to the bidders, it is necessary that counsel be selected by one of the nationally recognized law firms considered to be qualified to render opinions on bonds such as these and whose qualifications are accepted by the underwriting fraternity generally. The yardstick for such qualification of independent Bond Counsel is that their name be so recognized in the "red book", an index of municipal bond counsel. In short, the Attorney General is responsible for the legal interests of the State as seller of the bonds and Bond Counsel is responsible for the legal interests of the prospective buyers of the bonds. The opinions of both counsel are incorporated in the final papers and are printed on each of the bonds. This practice gives maximum protection to both the seller and the buyers of the bonds, who have a common interest in the successful marketing of indisputably valid securities at the best price obtainable.

In recent years, there has developed a practice in a very limited number of states of not having independent Bond Counsel, the reasoning being that the Attorney General is qualified to pass upon legalities for all parties. Part of the reasoning appears to be that the state not using independent Bond Counsel thus saves the cost thereof. In fact, however, such a practice has no practical benefit to the state involved.

This is so because, when the Attorney General's opinion is the sole confirming opinion, sophisticated buyers customarily employ their own bond counsel to perform the same function as independent Bond Counsel performs in Pennsylvania. The expense represented by such counsel's fee is one of the factors included in determining the prospective bid price. Thus, the state pays the fee in any event. In addition, no independent Bond Counsel opinion is printed on the bond and the State loses whatever beneficial effect such opinion might have. Another factor is that leading underwriting houses being situated in New York customarily use New York law firms who, while generally knowledgeable, are not as informed in the details of Pennsylvania law as are qualified Pennsylvania independent Bond Counsel.

It therefore appears that there is no real economic or other advantage in not having independent Bond Counsel.

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The Auditor General and State Treasurer are notified by means of a carbon copy of a letter from the Budget Secretary to the Governor advising of the contemplated need for the issuance of General Obligation Bonds or Tax Anticipation Notes. The letter contains a recommended amount and a proposed bid opening date.

The Budget Secretary then calls the State Treasurer, who by virtue of office must do a great deal of the work in processing the sale, to request that work on the issue be initiated by suggesting a Loan and Transfer Agent and Bond Counsel.

Keeping in mind the suggestions of the Auditor General, the State Treasurer then calls the Governor to discuss Loan and Transfer Agent and Bond Counsel. Selection of such principals rotates from east to west. Bond Counsel and Loan and Transfer Agent are always selected from the same city because of the need for the two to work together.

The Auditor General is called to ask if the suggestions are agreeable to him.

After the concurrence of the Auditor General is received, the Budget Secretary is called and notified of the selection of Bond Counsel and Loan and Transfer Agent. The principals are advised in writing by the Governor's Office of their selection and work on the issue begins.