

**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

December 6, 1990

Ms. Tish Gonzalez
Acting Executive Administrator
Texas Housing Agency
P. O. Box 13941, Capitol Station
Austin, Texas 78711-3941

LO-90-107

Dear Ms. Gonzalez:

You inform us that the Texas Housing Agency contracts with private entities to "service" loans. See generally V.T.C.S. art. 12691-6, § 8(a)(9). Occasionally, you explain, it is necessary for the agency to transfer the servicing contract from one entity to another. In that regard you ask the following questions:

1. Does Sec. 8(a)(9) permit THA to enter into agreements to indemnify an independent contractor, such as a master servicer, in the form attached hereto ("Agreement")?
2. What, if any, are the statutory limits on a State agency's ability to enter into a contract of indemnity?
3. If a State agency may indemnify a contractor, may the agency enter into an agreement to indemnify for a transfer which occurred approximately three (3) years ago?

We first note that this office does not approve and disapprove contracts. We can, however, set out the legal principles that are relevant to your question.

In Attorney General Opinion MW-475 (1982) this office considered the authority of a state university to enter into an indemnity contract. The opinion stated:

To the extent that [an indemnity] clause merely reinforces obligations the university has legally undertaken elsewhere, and does

not expand or increase the school's liability or the scope of its liability, it is harmless surplusage. But to the extent that it purports to create liability or potential liability on the part of the university beyond its statutory or constitutional powers to incur liability, it is invalid.

The opinion went on to state that because of constitutional restrictions on the creation of "debt" by the state, a state agency would "ordinarily be unable to execute an enforceable indemnity agreement in favor of another party." Id. at 2; Tex. Const. art. III, §§ 49, 49a. See also Tex. Const. art. III, § 50 (prohibition on lending of credit by state); Tex. Const. art. III, § 51 (prohibition on grants of public money). Galveston, H. & S.A. Ry. Co. v. Uvalde County, 167 S.W.2d 305 (Tex. Civ. App. - San Antonio 1942, writ ref'd w.o.m.) (holding that to the extent that an indemnity contract imposed liability on a county that would not otherwise be the county's liability, such a contract would constitute a "lending of credit").

A determination as to whether a particular contract is valid and enforceable against the state is outside the scope of the opinion process.

Yours very truly,



Sarah Woelk, Chief
Letter Opinion Section
Opinion Committee

SW/lcd

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