September 8, 1975

ALAN SAGNER, *Commissioner*
Dept. of Transportation
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION NO. 23—1975

Dear Commissioner Sagner:

You have asked whether the State of New Jersey through its Department of Transportation may accept loans from the Federal Government pursuant to Section 3 of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602) and Sections 211 and 403 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 721 and 763). We understand that the federal loans would be made to the Commuter Operating Agency, established by N.J.S.A. 27:1A-15 to 26, for purposes generally authorized by the Agency's enabling legislation. The issue raised is whether the receipt of such federal loans would be violative of the Debt Limitation Clause of the State Constitution. *N.J. Const.* (1947), Art. VIII, § II, par. 3. It is our conclusion that the receipt of such loans from the Federal Government by the Department of Transportation would be consistent with this provision of our State Constitution.

The Debt Limitation Clause of our Constitution provides as follows:

> "The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. *This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States.* Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, to repel invasion, or to suppress insurrection or to meet an emergency caused by diaster or act of God." (Emphasis added.)

The sentence emphasized in the quotation is dispositive of your request. This sentence, in substantially the same form as it appears above, was added as an amendment to the Debt Limitation Clause under consideration by the New Jersey State Constitutional Convention of 1844. The only language which has survived to indicate the context in which the amendment was offered appears in a report of the Conven-

tion, having resolved itself into the committee of the whole, when the committee considered the content of the debt limitation provision to be included in that constitution. The language in the report is simply as follows:

> "After much debate Mr. Willis offered an amendment that the section should not apply to any monies that are or may be deposited with this State by the General Government—agreed to." *Proceedings of the New Jersey State Constitutional Convention of 1844* (1942) at 310.

The Convention itself later adopted the amendment made by the committee of the whole, but also without any reported discussion of the amendment. *Id.* at 522.

The history of the inclusion of the sentence excepting federal funds from the constitutional debt limitation provision is significant. While there does not appear to be any written history of this sentence, the reasons for its inclusion may be reasonably inferred from certain facts. As early as 1816, the Secretary of the Treasury of the United States indicated that the Federal Government would have an available surplus of revenues over all expenditures. In 1827, the first proposition to distribute the surplus was made in Congress by Mr. Dickerson of New Jersey. He stated that his principal object was to provide the States with money for educational and internal improvements. This suggestion was not adopted and the federal surplus continued to increase. There was considerable discussion at the federal level as to the constitutionality of Congress appropriating this surplus for internal improvements, such as roads and canals, and, in his message to Congress in 1829, President Andrew Jackson suggested the surplus be distributed among the States to enable them to make such internal improvements without the assistance of Congress. Ultimately, Congress enacted a statute to distribute the surplus among the states; however, during its pendency in the Senate, the measure was changed from a distribution to a deposit of monies with the states and the credit of the states was to be pledged to the return of the money. Act of June 23, 1836, Twenty-Fourth Congress, Session 1, Chapter 115, §§ 13 and 14. The federal statute made the distribution to any state contingent on the state authorizing by law its competent authorities to receive the monies on the terms specified in the federal legislation. On November 4, 1836, the State of New Jersey enacted "an act to authorize the reception of the surplus revenue of the United States", which specifically referred to the federal statute and authorized appropriate state officials to receive the federal deposit from the general government and to give certificates of deposit to the Secretary of the Treasury of the United States in the amount of the federal deposit. Act of November 4, 1836, Sixty-First General Assembly, First Sitting, p. 10. New Jersey was to receive $1,019,560.81 pursuant to the federal legislation, although the United States Government distributed only three out of the four installments specified in the federal act. No state paid back any of these monies to the Federal Government. See generally, John Jay Knox, *United States Notes* (1884) at 167-92.

Since the proposed State debt limitation provision of the Constitution of 1844 prohibited the Legislature from creating, with certain exceptions, any debt which singly or in the aggregate with any previous debts would exceed $100,000, it is readily apparent that the participants in the 1844 Constitutional Convention would have wanted to exclude from this amount the relatively recent deposit of over three quarters of a million dollars by the Federal Government in the State Treasury. However,

the sentence incorporated into the constitution referred not only to monies already deposited but also to monies which "may be" deposited with the State in the future. The specific original language of this sentence of the Debt Limitation Clause in the 1844 Constitution is as follows:

> "This section shall not be construed to refer to any money that has been *or may be*, deposited with this state by the government of the United States." *N.J. Const.* (1844), Art. IV, § VI, par. 4 (Emphasis added).

It was clear on January 1, 1839 that the fourth and final installment of the payment to the State pursuant to the Act of June 23, 1836 would never be made. Knox, *supra,* at 187-89. It seems reasonable to conclude, therefore, that the participants in the 1844 constitutional convention, five years after it was clear that no more payments under the 1836 Act would be made, included the exception of federal funds from the Debt Limitation Clause to provide the exception not only for the funds, distributed pursuant to the 1836 Act but also for any federal funds distributed to the states pursuant, at the very least, to analogous legislation.

There was no discussion of this sentence of the Debt Limitation Clause in the proceedings of the Constitutional Convention of 1947 nor has there been any construction of the same in any court opinion. The only reference to this constitutional language is found in Formal Opinion 1961—No. 21 of the Attorney General. In that opinion the Attorney General ruled, in part, that the sentence excepting federal funds from the constitutional debt limitation provision did not apply to a situation in which the entire cost of acquisition by a lease-purchase agreement of office space for the Division of Employment Security in the Department of Labor and Industry would be defrayed by grants from the Federal Government. The reasoning of the Attorney General was that the procedure for the payment of amounts due to a third party under the lease-purchase agreement would be the same as for any payment of funds from the State Treasury pursuant to an appropriation by the Legislature, so that, apparently, the Federal funds would not be distinguishable from State funds in terms of the applicability of the constitutional Debt Limitation Clause. It is significant that in the situation discussed in Formal Opinion 1961—No. 21, the role of the Federal Government was to grant funds to the State for the use of the State in connection with an agreement with a third party.

The Urban Mass Transportation Act of 1964 and the Regional Rail Reorganization Act of 1973 seem to be in many ways modern equivalents of the federal surplus distribution act of 1836. All of these statutes make federal funds available to the State, as loans to be repaid by the State, for the general purpose of internal improvements, specifically roads, canals and railways. This legislation is different from that discussed in Formal Opinion of the Attorney General 1961—No. 21 in that the monies made available in the present legislation would be loans and not grants and would not be treated the same as the general funds of the State. It is clear that all such funds would continue to be an obligation of the State to the Federal Government until repaid, and the basic agreement is thus between the two governments rather than between the State and a third party.

You are therefore advised that loans of federal funds to the State Department of Transportation under the terms of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602) and Sections 211 and 403 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 721 and 763) would be exempt from the Debt Limitation Clause

of the State Constitution. *N.J. Const.* (1947), Art. VIII, § II, par. 3.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: RICHARD M. CONLEY
Deputy Attorney General

September 17, 1975

HONORABLE RICHARD C. LEONE
State Treasurer
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 24—1975

Dear Treasurer Leone:

You have asked for an opinion on questions dealing with the discretion of the Director of the Division of Building and Construction (Director) to reject the lowest bidder on a public construction project solely on the basis that the bidder employs nonunion affiliated labor, and to award the contract to the next lowest bidder who employs only union affiliated labor.

In order to determine the correctness of this form of administrative decision making, it is necessary to consider the controlling legislative standard which bears on the discretion of a contracting officer in his award of a contract for the construction or repair of State public buildings. The relevant statutory provision in this instance is N.J.S.A. 52:32-2 which provides as follows:

> "When the entire cost of the erection, construction, alteration or repair by the State of any public buildings in this State will exceed $2,000,00, the person preparing the plans and specifications for such work shall prepare separate plans and specifications for the plumbing and gas fitting and all work kindred thereto, the steam and hot water heating and ventilating apparatus, steam power plants and all work kindred thereto, and electrical work, structural steel and ornamental iron work, and all other work and materials required for the completion of the project.
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> "The board, body or person authorized by law to award contracts for such work shall advertise for, in the manner provided by law, and receive (a) separate bids for each of said branches of the work and (b) bids for all the work and materials required to complete the project to be included in a single over-all contract, in which case there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in (a)