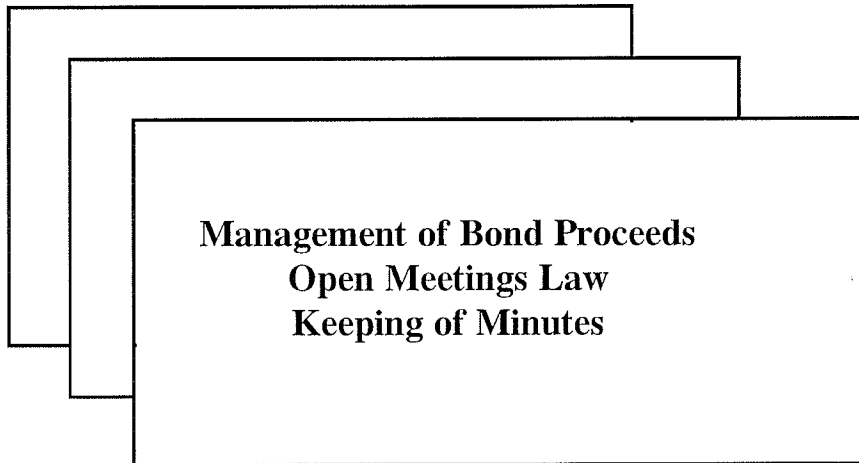


STATE OF WEST VIRGINIA

UPDATE OF THE

SCHOOL BUILDING AUTHORITY

PERFORMANCE AUDIT



OFFICE OF LEGISLATIVE AUDITOR
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February 1997

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Antonio E. Jones, Ph.D.
Director

February 9, 1997

The Honorable Edwin J. Bowman
State Senate
Building 1, Room 231-WW
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

The Honorable Joe Martin
House of Delegates
Building 1, Room 213E
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Gentlemen:

Pursuant to the West Virginia Sunset Law, we are transmitting an Update of the School Building Authority, which will be reported to the Joint Committee on Government Operations on Sunday, February 9, 1997. The issues covered herein are "Management of Bond Proceeds; Open Meetings Law; and Keeping of Minutes."

Sincerely,

A handwritten signature in black ink, appearing to read "Antonio E. Jones".

Antonio E. Jones

AEJ/wsc

Enclosure

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EXECUTIVE SUMMARY

This report is an update on issues reported during the 1995 interim period. In light of the issues reported in the 1995 interim period, the evaluation focused on the Authority's use of executive sessions and its keeping of minutes. The evaluation included direct observation of Authority meetings, correspondence and interviews with SBA staff, and review of the SBA's minutes from its meetings.

1995 Issue 1: School Building Authority is retaining interest earnings on county grant monies and appears to be managing bond proceeds responsibly

The SBA has continued using the exemplary process it had in place in 1995, whereby tri-party guaranteed investment contracts are initiated, providing: controls over the timing of disbursements made to counties receiving SBA grants; respectable rates of return; collateralization at no less than 103%; a perfected interest in securities held as collateral; and depository functions.

1995 Issue 2: The School Building Authority Board of Directors has violated the West Virginia Open Meetings Law

Since the report was received by the Joint Committee on Government Operations in December 1995, the School Building Authority has not called an executive session during a public meeting. At the public meetings in which audit staff has been in attendance, members of the Authority have engaged in spirited debate over such matters as awarding needs grants and hiring bond and issuer's counsels and underwriters for its planned bond refunding and reissue. Debates such as these are characteristic of the types of discussions for which the Authority formerly held executive sessions. In addition, the Authority has amended its bylaws (Section 12) to restrict the use of executive sessions.

1995 Issue 3: The School Building Authority Board of Directors has violated the Open Meetings Law with respect to the keeping of minutes

Because the School Building Authority has not held an executive session since the report was received by the Joint Committee on Government Operations in December 1995, there have been no instances which have required the preparation of such minutes as recommended in the 1995 issue.

OBJECTIVE, SCOPE AND METHODOLOGY

This performance evaluation is an update of the School Building Authority (SBA) and is conducted in accordance with the West Virginia Sunset Law, West Virginia Code, Chapter 4, Article 10. The objectives of this audit are to determine:

- whether the Authority is acquiring, protecting and using its resources economically and efficiently;
- whether the Division has complied with laws and regulations;
- whether the desired results and benefits established by the Legislature are being achieved; and
- the effectiveness of the Authority's program and functions.

This performance review is an update that will assist the Joint Committee on Government Operations in making one of the following three recommendations:

- the department, agency or board be terminated as scheduled;
- the department, agency or board be continued and reestablished;
- the department, agency or board be continued and reestablished, but the statutes governing it be amended in specific ways to correct ineffective or discriminatory practices or procedures, burdensome rules and regulations, lack of protection of the public interest, overlapping of jurisdiction with other governmental entities, unwarranted exercise of authority either in law or in fact or any other deficiencies.

This report is an update on issues reported during the 1995 interim period. The 1995 performance audit was scheduled to be completed during the 1996 interim period. However, this report is exclusively an update on the three issues completed in 1995. **First**, it was reported that the School Building Authority was capturing interest earnings that can be applied to other SBA projects through its use of guaranteed investment contracts (GICs). The issue was a positive finding to give the Authority credit for its responsible management of the State's resources. **Second**, it was reported that the SBA had violated the State's Open Meetings Law by calling executive sessions to discuss matters that are not permitted by statute. **Third**, it was reported that the SBA had violated the State's Open Meetings Law with respect to the keeping of minutes for these executive sessions. In light of the issues reported in the 1995 interim period, the evaluation focused on the Authority's use of executive sessions and its keeping of minutes. The evaluation included direct observation of Authority meetings, correspondence and interviews with SBA staff, and review of the SBA's minutes from its meetings.

To assess and report on the degree of the Authority's compliance with the 1995 performance audit recommendations, compliance measures have been utilized. These compliance measures are defined in TABLE 1.

TABLE 1
Levels of Compliance

| |
|--|
| In Compliance - The SBA has corrected the problems identified in the 1995 audit report. |
| Partial Compliance - The SBA has partially corrected the problems identified in the 1995 audit report. |
| Planned Compliance - The SBA has not corrected the problem but has provided sufficient documentary evidence to find that the Authority will do so in the future. |
| In Dispute - The SBA does not agree with either the problem identified or the proposed solution. |
| Non-Compliance - The SBA has not corrected the problem identified in the 1995 audit report. |
| Requires Legislative Action - The recommendation was intended to call to the attention of the Legislature to one or more statutory issues. |

1995 ISSUE 1: SCHOOL BUILDING AUTHORITY IS RETAINING INTEREST EARNINGS ON COUNTY GRANT MONIES AND APPEARS TO BE MANAGING BOND PROCEEDS RESPONSIBLY¹

Criteria

The Authority should continue or improve the money management strategies praised in the 1995 report.

Level of Compliance: **In Compliance**

During the 1995 evaluation, early concerns for the Authority's management of its bond proceeds prompted the audit to consider certain aspects of how the SBA delivers grant monies to counties. Of particular interest was the question of how the SBA guards against awarding monies to counties too early, resulting in lost interest earnings on the monies. Ultimately, the audit found that the SBA has an exemplary mechanism for retaining all interest earnings.

The SBA has continued using the process it had in place in 1995, whereby tri-party guaranteed investment contracts are initiated, providing: controls over the timing of disbursements made to counties receiving SBA grants; respectable rates of return; collateralization at no less than 103%; a perfected interest in securities held as collateral; and depository functions.

¹*The audit has only considered the strategy by which the SBA manages bond proceeds. This is not a financial audit report.*

1995 ISSUE 2: THE SCHOOL BUILDING AUTHORITY BOARD OF DIRECTORS HAS VIOLATED THE WEST VIRGINIA OPEN MEETINGS LAW

Recommendation 1

The School Building Authority Board of Directors should henceforth comply with the requirements of the Open Meetings Law in the following particulars:

a. Go into executive session only after (i) the presiding officer has identified the specific statutory authorization for doing so for both the governing board and the general public and (ii) the governing board has given its approval for a closed door session through a majority affirmative vote of the members present.

b. Invoke exceptions to the Open Meetings Law only in those cases which clearly warrant such action under the exceptions enumerated in section four of the act. Reserve the use of executive sessions for discussion of matters that necessarily must involve sensitive information, as in (i) personnel matters where disclosure could result in undue embarrassment for an individual public officer or employee or (ii) discussions affecting the purchase, sale or lease of property, the award of competitively bid contracts, construction plans and other matters involving competing commercial interests that, if made public, could adversely affect the financial or other interests of the state or any of its political subdivisions.

Level of Compliance: **In Compliance**

During the 1995 evaluation it was determined that the School Building Authority had a propensity to hold executive sessions and that some of those closed-door meetings were held to discuss matters not provided for under §6-9A, the Open Meetings Law. *Since the report was received by the Joint Committee on Government Operations in December 1995, the School Building Authority has not called an executive session during a public meeting (see Appendix A).* At two meetings in which audit staff was in attendance, members of the Authority engaged in spirited debate over such matters as awarding needs grants and hiring bond and issuer's counsels and underwriters for its planned bond refunding and reissue. Debates such as these are characteristic of the types of discussions for which the Authority formerly held executive sessions. In addition, the Authority has amended its bylaws to restrict the use of executive sessions (see Appendix B, Section 12).

1995 ISSUE 3: THE SCHOOL BUILDING AUTHORITY BOARD OF DIRECTORS HAS VIOLATED THE OPEN MEETINGS LAW WITH RESPECT TO THE KEEPING OF MINUTES

Recommendation 2

The School Building Authority Board of Directors should use greater diligence in the keeping of its minutes. All motions, proposals, resolutions, orders, ordinances and measures proposed, and the name of the person proposing the same and its disposition, that do not satisfy the conditions listed in section four, must be recorded in the minutes of that meeting. The specific reason for holding the executive session should be stated along with the statutory authority. The Board should be as descriptive as possible without compromising the sensitivity of the matter.

Level of Compliance: **In Compliance**

The 1995 evaluation also determined the SBA had not complied with §6-9A-5, which requires minutes of executive sessions to be maintained. ***Because the School Building Authority has not held an executive session since the report was received by the Joint Committee on Government Operations in December 1995, there have been no instances which require the preparation of such minutes (see Appendix A).***

Recommendation 3

Because decisions made in executive sessions can be annulled by a court where the law has not been followed, the Legislature should consider amending the Open Meetings Law to require a governing body to produce and maintain an audio recording or verbatim transcription of each executive session held. Without a record of the executive session, there is no way for the Courts or the Legislature to review a record of what transpired to determine if an executive session was illegal. Therefore, the Legislature should consider specifying in the law that such records are exempt from public disclosure, unless a court determines that the executive session violated the State's Open Meeting Law.

Level of Compliance: **Requires Legislative Action**

Recommendation 4

Because of the importance of the Legislative policy outlined in section one of the Open Meetings Law, the Legislature should consider amending the Open Meetings Law to require governing bodies to make minutes or transcriptions of executive sessions available to the public at such times as the authority under section four no longer applies.

Level of Compliance: **Requires Legislative Action**

APPENDIX A

AGENCY RESPONSE TO UPDATE REQUEST



School Building Authority of West Virginia
Clacy E. Williams, Executive Director

| | INITIALS | DATE | OFFICE |
|-------------|----------|------|--------|
| PREPARED BY | | | |
| APPROVED BY | | | |

2300 Kanawha Boulevard, East • Charleston, West Virginia 25311-2306 • Office Number (304)558-2541 • FAX Number (304)558-2539

December 6, 1996

Antonio E. Jones
West Virginia Legislature
Building 5, Room 741A
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0592

Dear Mr. Jones:

I am writing in response to your recent request regarding the legislative audit report prepared by your staff in December 1995. Two recommendations were specifically directed to the SBA in the report. The other two were directed to the legislature for consideration of statutory revision to the open meetings statute. We have responded to the agency's recommendations in the following manner:

Recommendation #1.

- a. That the SBA goes into an executive session only after the presiding officer has identified the specific statutory authorization for doing so, and after the governing board has given its approval by a majority affirmative vote of the members.
- b. That the exceptions to the open meetings law be invoked only in cases clearly warranted in the statutes.

Response to Recommendation #1.

- a. In March 1996, the SBA developed and adopted Section 12 as a revision to their bylaws specifically addressing the restrictive use of executive sessions; and
- b. From an application perspective, the SBA has not invoked an exception to the open meetings law since receiving the legislative audit report in December 1995.

Antonio Jones
December 5, 1996
Page 2

Recommendation #2.

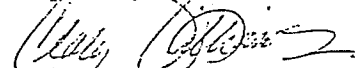
That the SBA use greater diligence in keeping minutes of any executive sessions. That recorded minutes contain specific information and be maintained by the Authority.

Response to Recommendation #2.

During their March 1996 meeting, the Authority directed staff to generate minutes of any and all executive sessions, as well as minutes of any and all meetings of Authority sub-committees.

I hope this letter provides you with the information you need. We extend to you our appreciation for the opportunity to improve the operations of our agency through your recommendations. If additional questions arise or further information is needed, please do not hesitate to give me a call.

Respectfully,



Dr. Clacy Williams
Executive Director

CW:ks
Attachment

legaudit.ltr

APPENDIX B
BY-LAWS OF THE SCHOOL BUILDING AUTHORITY
(Included as attachment to agency response to update request)

BY-LAWS OF THE SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA

ARTICLE I
OFFICE

The principal office of the School Building Authority of West Virginia (the "Authority") shall be in the City of Charleston, County of Kanawha, State of West Virginia. Other offices or places of business may be established whenever in the judgment of the Authority it may be deemed advisable.

ARTICLE II
SEAL

The corporate seal of the Authority shall be circular in form and shall have inscribed thereon the name of the Authority and the year of its creation. Said seal may be used by causing it or a facsimile thereof to be impressed on, affixed to or otherwise reproduced on any document, instrument or other writing.

ARTICLE III
THE AUTHORITY

Section 1. Powers, Qualifications, Number and Term of Office. The Authority shall be controlled, managed and operated by the ten persons provided for in Chapter 18, Article 9D of the Code of West Virginia, 1931, as amended, (the "Code") who shall constitute the board of the School Building Authority of West Virginia (the "Board"). The Board shall consist of the State Superintendent of Schools, ex officio, three members of the State Board of Education, elected by the State Board of Education, and six citizens of the State of West Virginia, appointed by the Governor of the State by and with the advice and consent of the Senate. Two of the initial appointments shall be for two-year terms and two shall be for four-year terms, with all successive appointments being for four-year terms.

Section 2. Quorum. Six (6) members of the Board shall constitute a quorum, and the affirmative vote of a majority of the voting members shall be necessary for any action taken by vote of the Board.

Section 3. Vacancies on the Board. In case of a vacancy on the Board, such vacancy shall be filled (i) by appointment by the Governor, by and with the advice and consent of the Senate in accordance with Chapter 18, Article 9D of the Code, with respect to any citizen appointment; and (ii) by appointment by the State Board of Education, with respect to any member of the Board required to be elected thereby. Any member appointed to fill a vacancy occurring prior to the expiration of a term shall serve for the remainder of said term. No vacancy in the membership of the Board shall impair the rights of a quorum to exercise all the rights and perform all of the duties of the Board and the Authority.

Section 4. Regular Meetings. Regular meetings of the Board shall be held on the last Monday of the months of March, June, September and December, at 9:00 a.m., at the principal office of the Authority or at such other location as determined by the Authority.

Section 5. Special Meetings. Special meetings of the Board may be called at any time by the President, the Executive Director or by any two members of the Board.

Section 6. Notice of Meetings. The Secretary of the Board shall give notice of any regular or special meeting to each member of the Board of each meeting by mailing a notice at least five days before the meeting or by delivering the same on the day before the meeting, but such notice may be waived by any member of the Board. Notice shall be considered waived if a Board member shall attend in person or if each Board member shall file with the records of the meeting, either before or after the holding of the meeting, a written waiver of notice. Attendance shall not constitute a waiver

of notice if a Board member attends for the express purpose of objecting to the transaction of business at a meeting because it is not lawfully called or convened. Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting.

Section 7. Adjournment of Meetings. Any regular or special meeting of the Board may be adjourned without further notice to such date, hour and place as may at such meeting be determined by the Board. In the event that a quorum is not present at such meeting and cannot be obtained within a reasonable time, such regular or special meeting shall be adjourned to such date, hour and place as shall then be determined and announced by the President and notice of such adjourned meeting shall be given to those members not present.

Section 8. Manner of Voting. The voting on all questions at meetings of the Board shall be by voice vote and the yeas and nays shall be entered upon the minutes of such meeting.

Section 9. Passage of Resolutions. Any action taken by the Authority may be authorized by resolution approved as provided in Section 2 hereof.

Section 10. Procedure at Meetings. At all regular and special meetings of the Board the following shall be the order of business:

- (a) Roll call
- (b) Approval of minutes of previous meeting
- (c) Report of President
- (d) Report of Executive Director
- (e) Unfinished business
- (f) New business
- (g) Adjournment

In all other respects not otherwise provided for in these By-Laws, Robert's Rules of Order shall govern the conduct of all meetings of the Board.

Section 11. Journal. All final action of the Board shall be journalized, and such journal shall be open to the inspection of the public at all reasonable times.

Section 12. Open Meetings and Public Notice of Meetings. Except as otherwise provide by operations of law, whether heretofore or hereafter enacted, and except as provided in Chapter 6, Article 9A, Section 4 of the Code, all meetings of the Board shall be open to the public. Executive Sessions of the School Building Authority shall be entered into only after:

- (i) advisement of counsel as to appropriateness of the issue to be considered under the provisions of WV Code 6-9A-4
- (ii) the presiding officer has announced the specific statutory authority for doing so for both members of the Authority and the public, and
- (iii) the Authority approves of an executive session by a majority affirmative vote of the members present.

Executive Sessions shall be limited to discussions or that portion of a discussion directly related to the exemptions provided in 6-9A-4.

Except as aforesaid, notice of the time and place of regularly scheduled meetings of the Board, and the time, place and purpose of all special meetings of the Board, shall be made available, in advance, to the public and news media by filing with the Secretary of State for publication in the State Register in a manner to allow each notice to appear in the State Register at least five days prior to the date of such meeting notice of the time, place and purpose of such meeting. If a particular scheduled meeting is canceled or postponed, a notice of such cancellation or postponement shall be posted at the front door of the meeting place as soon as feasible after such cancellation or postponement has been determined.

ARTICLE IV OFFICERS

Section 1. Executive Officers. The executive officers of the Board shall be a President, Vice President, Executive Director, Secretary and Treasurer. All shall be members of the Board except the Executive Director, the Secretary and the Treasurer, who need not be members of the Board.

Section 2. President. The State Superintendent of Schools shall be the President of the Board, shall preside at all meetings of the Board and shall have such additional duties and authorities as the Board shall prescribe. The President shall sign all rules and regulations, contracts and other documents of the Authority.

Section 3. Vice President. Annually, the Board shall elect one of its appointed members as Vice President of the Board. In the absence or disability of the President, whether temporary or otherwise, the Vice President shall assume the duties of the President.

Section 4. Executive Director. The Board shall appoint an Executive Director. The Executive Director shall be the chief administrative officer and shall have such duties and authority, receive such compensation and serve for such time as the Board shall prescribe. The Executive Director shall give any bond required by law.

Section 5. Secretary. The Board shall appoint a Secretary. The Secretary shall keep the minutes of all meetings of the Board, give notice of meetings of the Board, certify, when necessary, the records, proceedings, documents and resolutions of the Board, attest the seal of the Board and shall perform such other duties as shall be prescribed by the Board. The Secretary shall give any bond required by law.

Section 6. Treasurer. The Board shall appoint a Treasurer. The Treasurer shall be the custodian of all funds and securities of the Authority and shall keep full and accurate records and accounts of all receipts, disbursements, credits, assets, liabilities and general financial transactions of the Authority, shall endorse for collection or deposit to the credit of the Authority all bills, notes, checks and other negotiable instruments of the Authority and deposit the same in such accounts in such depositories and safe deposits as may be designated by the Board. The Treasurer shall disburse the funds of the Authority as may be ordered by the general or specific instructions of the Board, shall report all receipts and expenditures to the Board monthly and at such other times as the Board may require, shall annually prepare and submit to the Authority at the close of each fiscal year a full and complete report or statement of all monies received and expended and of the existing condition of the funds and assets of the Authority for such year. The Treasurer's books, accounts and records shall be subject to inspection by the Board at any time and to audit by an independent certified public accountant or accountants selected by the Board, which audit shall be made annually at the close of each fiscal year and at such other times and for such other periods as the Board may determine. The Treasurer shall give any bond required by law.

Section 7. Other Officers, Agents and Employees. The Board shall appoint such assistant directors, administrative assistants, officers, employees, attorneys and agents as necessary to transact the business of the Authority. The Board shall define their duties and fix their compensation in accordance with the laws of the State of West Virginia. Any such appointee may be removed in the discretion of the Board. The Board may require as a condition of such appointment that the appointee be bonded for the faithful performance of his duties, in such amounts and by such surety companies as the Board may determine.

ARTICLE V MISCELLANEOUS

Section 1. Fiscal Year. The fiscal year of the Authority shall commence on the 1st day of July and shall end on the 30th day of June the following year.

Section 2. Books and Records. Except with respect to certain categories of information specifically exempted from disclosure by operation of law, including, but not limited to, the provisions of Chapter 29B, Article 1 of the Code, the records of the Authority shall be open to public inspection at all reasonable times. All final actions of the Authority shall be journalized, and such journal shall also be open to the inspection of the public at all reasonable times.

Section 3. Contracts. All contracts and obligations of the Authority shall be signed by the President and if such contracts are required to be under seal, the seal of the Authority shall be affixed and attested by the Secretary unless, by resolution of the Board, other officers or employees of the Authority are authorized to execute contracts or other obligations of the Authority.

Section 4. Indemnification. The Authority shall, to the fullest extent allowed by law, indemnify and reimburse each present and future member, officer, employee or agent of the Authority against, and each such member, officer, employee or agent shall be entitled without further action on his or her part to indemnity from the Authority for, the following:

All expenses, including without limitation attorneys fees, judgments, fines, taxes and penalties and interest thereon, and if the Board determines that a settlement of any action, suit or proceeding is in the best interest of the Authority, all amounts paid in effecting such settlement, other than amounts paid to the Authority itself, reasonably incurred by him or her in connection with or arising out of any action, suit or proceeding in which he or she may be involved by reason of his or her being or having been a member, officer, employee or agent of the Authority or of any other firm, corporation, association, company or organization which he or she serves or has served as a member, officer, employee or agent at the request of the Authority; provided, however, that such indemnity shall not include any expenses incurred by any member, officer, employee or agent with respect to matters as to which he or she shall be finally adjudged in any such action, suit or proceeding to have been guilty of or liable for gross negligence, willful misconduct or criminal acts in the performance of his or her duties for the Authority. The foregoing right of indemnification shall inure to the benefit of the heirs, executors or administrators of each such member, officer, employee or agent and shall be in addition to all other rights to which such member, officer, employee or agent may be entitled as a matter of law.

Section 5. Conflict of Interest. The Authority shall maintain constant vigilance against conflicts of interest, or the mere appearance of conflicts of interest. No member, officer, employee or agent of the Board of the Authority shall be financially interested, directly or indirectly, in any contract of any person with the Authority, or in any sale of any property, real or personal, to or from the Authority. Provided, this provision shall not apply to contracts or purchases of property, either real or personal, between the Authority and any governmental agency.

ARTICLE VI AMENDMENTS

The Board shall have the power to make, alter, amend, suspend and repeal the By-Laws of the Authority by a vote of not less than six (6) of its members at any meeting of the Board without previous notice of such purpose

Adopted the 4th day of January, 1990.

Revised the 24th day of June, 1991.

Revised the 25th day of March, 1995.

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