

From: Thigpen, Helen  
Sent: Wednesday, March 17, 2010 11:09 AM  
To: Lake (Rep.), Bob  
Subject: RE: Local Government Grants

Representative Lake,

You are correct that the State may be in a breach of contract situation if it fails to distribute the remaining 10% of the funds that are owed to recipients of the Local Government Infrastructure Grant Program, provided the contract was properly executed and that all other contractual obligations were met. The contract that was used for these grants states clearly that 90% of the award amount will be available upon execution of the contract and that the remaining 10% of the award will be available for payment when the project is completed, the required reports are received, and a request for final payment has been made. Under the contract, the State has 30 working days to process a request for final payment. After reviewing the document, it appears to me that the only exception whereby the State could avoid distributing the remaining 10% of the funds under this program would be if a grant recipient failed to satisfactorily carry out its responsibilities under the contract. In this case, the Department of Commerce could withhold final payment until the parties agreed on a plan to remedy the deficiency.

The Department of Commerce has stated that the funds are contingent upon their availability. The contract does include language to this effect. However, it is my opinion that this language does not allow the State to withhold funds when there is an existing contract in place and funding has been appropriated. In this case, there is no question that the funds are "available." The Department stated that they are "holding" the funds to preserve cash. Unless the funds are not expended by September 30, 2010, these funds cannot be diverted to other programs or withheld when there is a specific statutory appropriation for the funds under HB 645. While the Governor certainly has the authority to reduce agency expenditures, any breach of these contracts may give rise to a cause of action.

There may also be an issue with the September 30, 2010, deadline for fund expenditures. The contract's principle of anticipatory repudiation describes a situation where a party to a contractual agreement indicates that he or she does not intend to complete the terms of the agreement. The State may find itself in an anticipatory breach situation if it holds the funds and prevents grant recipients from completing projects by the September 30, 2010, deadline.

I do not have the ability to get a ruling from the budget office on this issue, but I hope this has clarified some of your questions. Grant recipients who do not receive the remaining balance of the award would have a number of options for seeking relief.

Please let me know if I can be of further assistance.

Thank you,

Helen