

# ALASKA STATE LEGISLATURE



SENATOR JOE THOMAS

March 8, 2011

Attorney General John Burns  
Department of Law  
1031 W 4th Ave #200  
Anchorage, AK 99501

Dear Attorney General Burns,

I am writing to you in your capacity as legal counsel to the Knik Arm Bridge and Toll Authority under AS 19.75.081.

In testimony to the Senate Transportation Committee, representatives of the Authority stated that Senate Bills 79 and 80 do not create any legal obligation for the state, and that the legislation creates only a non-binding "moral obligation" to ensure payment of an annual "availability payment" to the developer to cover the cost of construction, bridge maintenance, toll collection and a reasonable profit.

If that is accurate, I am unclear about the meaning of the language added to the statute on page 2, line 16 of SB 80 which states, "The monetary obligations incurred by the authority under the partnerships or contracts are obligations of the state, and satisfaction of those obligations from funds other than authority funds is subject to appropriation."

I would appreciate confirmation from the Department of Law that the state has no financial responsibility or legal obligation under the current statute or the proposed SB 79 and SB 80, for any costs associated with the Authority, with the construction, operation or maintenance of the bridge, or as a result of failure to complete and operate the bridge.

Thank you for your assistance.

Regards,

A handwritten signature in black ink, appearing to read "Joe J. Thomas".

Senator Joe Thomas

Cc: Knik Arm Bridge and Toll Authority Chairman Michael Foster and Members,  
Knik Arm Bridge and Toll Authority Executive Director Andrew Niemiec,  
Senate Finance Committee

**STATE OF ALASKA**  
**DEPARTMENT OF LAW**  
*OFFICE OF THE ATTORNEY GENERAL*  
*TRANSPORTATION SECTION*

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April 5, 2011

Hon. Joe Thomas  
Senator  
Alaska State Legislature  
State Capitol Room 514  
Juneau, AK 99801

Re: March 8, 2011 letter re: Knik Arm Bridge and Toll Authority  
Our file: 661-04-0122

Dear Senator Thomas:

Attorney General Burns asked that I respond to your letter, dated March 8, 2011, regarding the Knik Arm Bridge and Toll Authority (KABATA).

In your letter you ask whether SB 79 and SB 80, if enacted, would create a legal obligation for the state, or just a “moral obligation” to pay certain obligations of the KABATA. The short answer is that these bills create both legal and moral obligations; of the two, the moral obligation is more significant.

**A. Legal Obligation**

KABATA is a public corporation and an instrumentality of the state within the Department of Transportation and Public Facilities, but the corporation has a separate and independent legal existence from the state. As such, the state is not legally required to pay KABATA’s contractual obligations. If KABATA were to default on its obligations under a public-private partnership agreement, the current law, AS 19.75.111(a)(5)(B), would require the private partner to look solely to KABATA, rather than the state, for compensation.

Section 1 of SB 80 would amend AS 19.75.111(a)(5)(B) to provide that KABATA’s monetary obligations under a public-private partnership agreement – which would include an annual payment to the private partner – would be obligations of the state, subject to appropriation by the legislature. By its express terms, Section 1 would allow KABATA to obligate state funds, subject to appropriation. The legislature would retain the power to withhold appropriations and, therefore, not pay an obligation (under

the Alaska constitution the legislature always retains the power to withhold appropriations even without an express provision). Thus, from a strictly legal standpoint, Section 1 would not necessarily require future appropriations.

#### B. Moral Obligation

The expression “moral obligation” is a term of art in the investment community, and I understand the Department of Revenue sent you a letter explaining the differences between a moral obligation and a state supported obligation, as those terms attach to specific types of bonds. The term “moral obligation” also connotes the practical impact of the state’s failure to pay obligations that are subject to appropriation by the legislature. In the case of SB 79 and 80, the practical impact will be significant.

By express statement of law, Section 1 of SB 80 makes certain obligations of KABATA obligations of the state. This express statement creates a “moral obligation” to pay KABATA’s monetary obligations arising under a public-private partnership agreement even though the legislature retains the power to withhold appropriations.

KABATA has proposed SB 79 and SB 80 because a “moral obligation” to back the payments identified in SB 79 and SB 80 might place KABATA in a better position to attract private developers considering a public-private partnership arrangement. Additionally, investors might offer a more attractive interest rate on a project backed by the state’s “moral obligation.” This could assist a project as large as the Knik Arm Crossing because even a small decrease in the interest rate payable on project financing could potentially result in substantial savings for the state.

The price of these savings would be the state’s “moral obligation” to back those obligations of KABATA specified in Section 1. Although the legislature controls payment of “moral obligations,” credit markets will surely note any failure by the legislature to appropriate funds to pay a state “moral obligation.” The refusal to appropriate funds to pay a “moral obligation” would adversely affect the state’s credit rating, and the state’s ability to enter into other large contractual obligations. Additionally, anyone considering entering into a future contractual obligation with the state would have to be concerned by such an action by the legislature.

Sincerely,

JOHN J. BURNS  
ATTORNEY GENERAL

By:

Sean P. Lynch  
Assistant Attorney General