OPINION NO. 2005-007

Syllabus:

1. If a contract entered into by a board of county commissioners on behalf of the county includes a clause under which the county agrees to indemnify another party to the contract, that indemnification clause is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. (1999 Op. Att'y Gen. No. 99-049, approved and followed.)
2. An indemnification clause that does not meet the requirements set forth in paragraph 1 is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable.
3. An indemnification clause that meets the requirements set forth in paragraph

1 is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes the clause void and unenforceable if it is not approved as to form.

To: Martin P. Votel, Preble County Prosecuting Attorney, Eaton, Ohio
By: Jim Petro, Attorney General, March 1, 2005

We have received your predecessor's request for an opinion concerning the ability of a county to include indemnification clauses in its contracts with the state or with private parties, and also to include particular phrases designed to ensure that the county's execution of the contracts are in conformity with Ohio law. The request asks specifically about the inclusion of the phrase "to the extent allowable by law" and the phrase "approved as to form except as to the indemnification clause in paragraph [as designated]."

For the reasons discussed below, we conclude, in accordance with 1999 Op. Att'y Gen. No. 99-049, that an indemnification clause in a county contract is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. An indemnification clause that does not meet these requirements is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable. An indemnification clause that meets these requirements is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes the clause void and unenforceable if it is not approved as to form.

Background

The questions regarding the legality and acceptable phrasing of an indemnity clause pertain to contracts between the county and a state agency and also to contracts between the county and private parties. The example given involves a contract including a clause under which the county would indemnify the State of Ohio for any damage or liability arising from a particular transaction.

It is important to note initially that statutory and constitutional provisions governing state agency contracts differ in some respects from those governing the contracts of counties. Accordingly, the principles governing the State of Ohio's authority to include an indemnification clause in a contract are not identical to the principles governing a county's authority to

include a similar clause. *See* 1999 Op. Att'y Gen. No. 99-049; 1996 Op. Att'y Gen. No. 96-060. This opinion addresses the county's authority.[1]

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[1] To understand the significance of this opinion, it is helpful also to be familiar with the general principles governing the authority of a state agency or entity to include an indemnification clause in a contract. Those principles are discussed in 1996 Op. Att'y Gen. No. 96-060. Like a county contract, a state contract is subject to the requirement that an indemnification clause specify a maximum dollar amount of obligation to avoid creating debt in violation of the Ohio Constitution, and to the requirement that the amount specified be appropriated and certified as required by law. On the state level, the money is appropriated to the Treasurer of State and certified as available by the Director of Budget and Management. *See* Ohio Const. art. II, § 22 (''[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law''); R.C. 126.07 (no contract involving the expenditure of money chargeable to an appropriation is valid and enforceable unless the Director of Budget and Management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations in an amount at least equal to the portion of the contract to be performed in the current fiscal year, and any written agreement entered into by the state must specify that the obligations of the state are subject to this section); R.C. 131.33 (''[n]o state agency shall incur an obligation which exceeds the agency's current appropriation authority''). Constitutional provisions restricting the debt of the state appear in Ohio Const. art. VIII, §§ 1 to 3 and 17, setting limits on the amounts of debt that may be created by or on behalf of the state for various purposes. *See also* Ohio Const. art. XII, § 4 (''[t]he General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt''); Ohio Const. art. XII, § 11 (prohibiting the state or a political subdivision from incurring bonded indebtedness without making provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and provide a sinking fund for their redemption). In addition, state contracts are subject to the limitation that ''no appropriation shall be made for a longer period than two years.'' Ohio Const. art. II, § 22. Therefore, an indemnification clause may not bind the state for any length of time beyond the duration of the biennium in which the contract is executed. 1996 Op. Att'y Gen. No. 96-060 at 2-241.

The constitutional debt restrictions prevent the state from incurring any debt except as permitted by the Ohio Constitution, including debt incurred by contract. A prohibited debt is created if the state incurs a financial obligation for which the General Assembly has not already provided an appropriation within the current biennium or if the state incurs a financial obligation that extends beyond the current biennium and attempts to bind successive General Assemblies. *See State v. Medbery*, 7 Ohio St. 522 (1857); 1996 Op. Att'y Gen. No. 96-060 at 2-239; *see also State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St. 3d 1, 561 N.E.2d 927 (1990); *Sorrentino v Ohio Nat'l Guard,* 53 Ohio St. 3d 214, 560 N.E.2d 186 (1990). Like a county contract, a state contract is also subject to the lending credit prohibition (appearing in Ohio Const. art. VIII § 4, *see* note 7, *infra*), which requires that the state receive

Authority of a county to include an indemnification clause in a contract

An indemnification clause is a contractual provision that imposes a financial obliga-

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consideration sufficient to support the financial obligation that it assumes under the indemnification clause.

1996 Op. Att'y Gen. No. 96-060 reaches the following conclusions:

1. The inclusion of a hold harmless or indemnification clause in a contract to which the Treasurer of State is a party and that imposes a financial obligation upon the Treasurer of State or the State of Ohio for the benefit of another party to the contract must comply with the state debt and appropriation provisions of Ohio Const. art. II, § 22, art. VIII, §§ 1-3, R.C. 126.07, and R.C. 131.33. In order to comply with those provisions, the hold harmless or indemnification clause may obligate the Treasurer of State or the State of Ohio only for the duration of the biennium in which the contract is executed, and may not impose a financial obligation for any period beyond that biennium. The clause also must specify a maximum dollar amount for which the Treasurer of State or the State of Ohio is thus obligated, and the amount specified must be appropriated to the Treasurer of State and certified by the Director of Budget and Management as available for payment prior to the contract's execution.
2. The inclusion of a hold harmless or indemnification clause in a contract to which the Treasurer of State is a party and that imposes a financial obligation upon the Treasurer of State or the State of Ohio for the benefit of another party to the contract must comply with the prohibition in Ohio Const. art. VIII, § 4 against the state lending its credit. In order to comply with that prohibition, under the terms of the contract the other party to the contract must provide the Treasurer of State consideration sufficient to support the financial obligation the Treasurer assumes under the hold harmless or indemnification clause.

1996 Op. Att'y Gen. No. 96-060 (syllabus). These conclusions permit the state to include indemnification clauses in its contracts, provided that the clauses comply with relevant constitutional and statutory provisions. State contracts may provide for renewal in a subsequent biennium, conditioned upon the appropriation of money for that purpose by the General Assembly. *See, e.g., State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 456-59, 166 N.E.2d 365 (1960) (no debt is created when a contract, or any renewal contract, does not extend beyond two years and appropriations are made and revenue provided for each two-year obligation; renewal for the next biennium is conditioned upon there being a balance in the appropriation to meet the obligation incurred by the election to renew); *State ex rel. Ross v. Donahey*, 93 Ohio St. 414, 113 N.E. 263 (1916) (no debt is incurred where lease is made subject to the appropriation by the state legislature of the necessary funds); *Butler County Transp. Improvement Dist. v. Tracy,* 120 Ohio App. 3d 346, 355-56, 697 N.E.2d 1089 (Butler County 1997) (no unconstitutional debt is created where lease is conditioned upon the appropriation of funds); *see also* 1979 Op. Att'y Gen. No. 79-103.

tion upon one party to a contract for the benefit of another party to the contract, providing that one party will indemnify the other party, or keep the other party free from loss, if a legal dispute should ensue. Under an indemnification clause, one party may assume financial obligations that have the potential of being substantial if injured third parties assert negligence claims. *See Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St. 3d 238, 513 N.E.2d 253 (1987); *Black's Law Dictionary* 772 (7th ed. 1999) (''indemnify'' means to reimburse or promise to reimburse another for a loss suffered because of a third party's act or default); 1999 Op. Att'y Gen. No. 99-049; 1996 Op. Att'y Gen. No. 96-060.[2]

The question whether a board of county commissioners, acting on behalf of the county, may include an indemnification clause in a contract with a private entity is addressed in 1999 Op. Att'y Gen. No. 99-049. This opinion discusses the question in detail and reaches the following conclusions:

1. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract specifies a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1).

2. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract complies with the provisions of Ohio Const. art. VIII, § 6 that prohibit a county from lending its credit to a private entity. Such compliance is achieved if the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless the private entity.

1999 Op. Att'y Gen. No. 99-049 (syllabus); *see also* 2003 Op. Att'y Gen. No. 2003-035 at 2-292 to 2-293; 2003 Op. Att'y Gen. No. 2003-008 at 2-56 to 2-57. We affirm the conclusion reached in this opinion, and provide the following summary of the applicable analysis. We find, further, that this analysis is applicable also to contracts with public entities unless specific statutes provide to the contrary.

The conclusions reached in 1999 Op. Att'y Gen. No. 99-049 are based on the statutes governing boards of county commissioners. A board of county commissioners is authorized to enter into various contracts, as provided by statute. *See, e.g.,* R.C. 307.02; R.C. 307.04; R.C. 307.15; R.C. 307.69. In exercising its authority to contract, a board of county commissioners has discretion to agree upon any contractual terms, including an indemnification clause, provided that the terms come within the board's statutory authority and do not conflict with constitutional provisions. *See* 1999 Op. Att'y Gen. No. 99-049 at 2-303; 1983 Op. Att'y Gen. No. 83-069 at 2-287 (where no statutes prescribe contractual terms, a board of township

[2] Indemnification clauses are sometimes linked with or referred to as ''hold harmless'' clauses, which serve similar purposes. *See* 1996 Op. Att'y Gen. No. 96-060 at 2-234 to 2-235. This opinion uses only the term ''indemnification clauses.''

trustees may agree to the terms and conditions it deems appropriate, subject to the standard of abuse of discretion); 1977 Op. Att'y Gen. No. 77-048 at 2-170 (the power to contract implies the power to set contractual terms); *see also* 1988 Op. Att'y Gen. No. 88-076 (except as provided by law, contracts of a governmental entity are governed by the same principles applicable to contracts between private persons).[3]

The statutes of greatest importance in determining a county's authority to include an indemnification clause in a contract are those governing the expenditure of county funds. In particular, R.C. 5705.41(D)(1) prevents a county from entering into a contract (subject to certain exceptions[4]) unless there is attached to the contract a certificate of the county auditor that the amount required to meet the obligation (or in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made[5]) has been lawfully appropriated for that purpose and is in the treasury or in the process of collection to the credit of an ap-

[3] Ohio law prohibits certain types of indemnity agreements. *See, e.g.*, R.C. 2305.31; R.C. 4123.82. If no prohibition applies, indemnification agreements are generally enforceable. *See Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St. 3d 238, 241, 513 N.E.2d 253 (1987); *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.*, 121 Ohio App. 3d 147, 699 N.E.2d 127 (Cuyahoga County 1997); 1999 Op. Att'y Gen. No. 99-049 at 2-303 n.1. There are, however, questions concerning the wisdom and efficacy of including an indemnification clause in a public contract. *See, e.g.*, 1999 Op. Att'y Gen. 99-049 at 2-303 n.1; 1996 Op. Att'y Gen. 96-060 at 2-244 (''a state agency ... should consider whether agreeing to include such clauses in its contracts is prudent or advisable as a matter of public fiscal policy.... An obligation of that character may have unforeseeable and undesirable consequences for the state agency at some time in the future.... [A] state agency should make a close and careful examination of the nature and probability of that risk, and then determine whether that risk is worth whatever benefit, if any, the agency receives by having the clause in the contract'' (citations omitted)).

[4] Exceptions are allowed for purchases of $1000 or less made pursuant to resolution of the board of county commissioners, for contracts or leases running beyond the termination of the fiscal year, for contracts on which payments are made from the earnings of a publicly operated water works or public utility, and in certain circumstances involving a county board of mental retardation and developmental disabilities. R.C. 5705.41(D)(2); R.C. 5705.44; 1987 Op. Att'y Gen. No. 87-069. Specific provisions govern particular types of expenditures, including contracts entered into upon a per unit basis and current payrolls. R.C. 305.17; R.C. 307.04; R.C. 5705.41(D)(3); R.C. 5705.46.

[5] A continuing contract is a divisible contract that provides for periodic performances over a course of time, or any contract designated by statute as a continuing contract. *See* 1987 Op. Att'y Gen. No. 87-069. Contracts for rent or insurance payments are commonly continuing contracts. *Id.* at 2-425 to 2-428; *see* 1999 Op. Att'y Gen. No. 99-049 at 2-304 to 2-305. A typical indemnification clause is not a continuing contract. *See* 1999 Op. Att'y Gen. No. 99-049 at 2-305 (an indemnification clause ''is a present obligation to pay such liability as might accrue in the future, whenever it might accrue, rather than an obligation to pay for portions of a product or service on a periodic basis'').

propriate fund free from any previous encumbrances. A contract without the required certificate is void. R.C. 5705.41(D)(1); *see State v. Kuhner & King*, 107 Ohio St. 406, 413, 140 N.E. 344 (1923) (the purpose of the certificate requirement is to prevent fraud and reckless expenditures "but particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose"); *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N.E. 372 (1899) (a contract made in violation of governing statutes is void, and the courts will leave the parties where they have placed themselves); 2004 Op. Att'y Gen. No. 2004-031 at 2-277 to 2-278.

As was stated in 1999 Op. Att'y Gen. No. 99-049 at 2-304, "[i]f it is not known when liability may be incurred under a contract, the funds necessary to cover the liability must be presumed due and payable in the first fiscal year and appropriated and certified accordingly." Funds that are certified pursuant to R.C. 5705.41(D)(1) are encumbered funds that remain available in subsequent years for the purposes for which they were certified. 1999 Op. Att'y Gen. No. 99-049 at 2-304.

Compliance with R.C. 5705.41(D)(1) is required to avoid the creation of debt in violation of Ohio Const. art. XII, § 11. Section 11 prohibits the state or a political subdivision from incurring bonded indebtedness without making provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and to provide a sinking fund for their redemption. *Id.* A contract that provides for future payments without providing a source of funds for those payments may create bonded indebtedness in violation of Ohio Const. art. XII, § 11. *See* 2003 Op. Att'y Gen. No. 2003-035 at 2-292 to 2-293; 1999 Op. Att'y Gen. No. 99-049 at 2-305 to 2-306; 1996 Op. Att'y Gen. No. 96-060; *see also State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St. 3d 1, 561 N.E.2d 927 (1990); *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972); *State v. Medbery*, 7 Ohio St. 522 (1857); 1939 Op. Att'y Gen. No. 1087, vol. II, p. 1565 at 1569 ("[t]he very obvious purpose of the people in adopting [Ohio Const. art. XII, § 11] was to put an end to the then too prevalent practice on the part of political subdivisions of incurring indebtedness with little more than a hope that such indebtedness might some day and in some manner be paid"). The certification requirements of R.C. 5705.41(D)(1) prevent a county from entering into a contract without assurance that there will be sufficient funds to meet the obligations assumed under the contract. [6]

[6] In certain circumstances, the failure to assure that the moneys required to pay the obligations assumed under a public contract are currently available may result in personal liability. In this regard, R.C. 3.12 states:

> An officer or agent of the state or of any county, township, or municipal corporation who is charged or entrusted with the construction, improvement, or keeping in repair of a building or work of any kind, or with the management of or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township, or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he is

A typical indemnification clause is open ended, providing simply that one party to a contract agrees to indemnify another party from any demands, judgments, liabilities, costs or other damages that may result from activities related to the contracted matter. A county is not permitted to enter into an indemnification clause of this type because the clause does not comply with the requirements of R.C. 5705.41(D)(1). In particular, an open-ended indemnification clause does not specify the maximum obligation that the county may incur under the clause and does not have a certificate stating that the amount required to meet that obligation has been lawfully appropriated for that purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances. *See* 1999 Op. Att'y Gen. No. 99-049 at 2-304 ("[a]n indemnification or hold harmless clause commits the contracting party to financial obligations that are generally unknown at the time the contract is made. A county has no statutory authority to promise that, at some time in the future, it will secure funds to pay whatever liability may occur under a contract"); *see also* 2003 Op. Att'y Gen. No. 2003-035 at 2-292 ("[w]hile a public agency is not absolutely prohibited from agreeing to an indemnification or hold harmless clause, it must meet certain constitutional and statutory requirements").

Another provision that must be considered in determining the validity and enforceability of an indemnification clause in a county contract is Ohio Const. art. VIII, § 6, which prohibits a county from becoming a stockholder in a private enterprise and from raising money for, or loaning its credit to or in aid of, a private enterprise.[7] Ohio Const. art. VIII, § 6 does not prevent a county from entering into contracts with private persons for the purchase or sale of goods or services, provided that the contracts do not create a joint enterprise between the county and a private entity or require the county to raise money for, or lend its credit to, a private entity. Transactions with public entities, or with private nonprofit entities serving a public purpose, are permitted, and certain constitutional provisions create exceptions to the lending credit prohibition. *See* Ohio Const. art. VIII, §§ 13-16; 1996 Op. Att'y Gen. No. 96-060.

As discussed in 1999 Op. Att'y Gen. No. 99-049, an indemnification clause in a county contract will not violate Ohio Const. art. VIII, § 6, if the contract complies with R.C. 5705.41(D)(1) by setting a maximum amount of the county's obligation and if "the consideration received is equal in value to the obligations undertaken, so that there is no gratuitous transfer of public moneys." 1999 Op. Att'y Gen. No. 99-049 at 2-307. Thus, an issue arises under Ohio Const. art. VIII, § 6 only if the obligations that the county undertakes are disproportionate to the benefits received. *Id.*; *see also* 2003 Op. Att'y Gen. No. 2003-035 at 2-293; 2003 Op. Att'y Gen. No. 2003-008 at 2-57; 1996 Op. Att'y Gen. No. 96-060 at 2-242 to 2-244; 1989 Op. Att'y Gen. No. 89-010 at 2-41.

Inclusion of language "to the extent allowable by law"

The questions before us assume that, in proceeding with the normal operations of

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personally liable thereon, and the state, county, township, or municipal corporation in whose name or behalf the contract was made shall not be liable thereon.

[7] Similar provisions pertaining to the State of Ohio appear in Ohio Const. art. VIII, § 4, and the same construction has been applied to both § 4 and § 6. *See State ex rel. Eichenberger v. Neff*, 42 Ohio App. 2d 69, 74-75, 330 N.E.2d 454 (Franklin County 1974); 1999 Op. Att'y Gen. No. 99-049 at 2-306 n.4.

government, the county has been presented with a contract including an indemnification clause providing that the county shall indemnify another party to the contract for any damage or liability arising from the transaction. As discussed above, if the indemnification clause is for an undefined amount and no certification under R.C. 5705.41(D)(1) provides funds to meet the obligation, the contract is void and unenforceable.[8] *See* 2003 Op. Att'y Gen. No. 2003-017 at 2-129 (''a contract that is void is a nullity, of no legal effect whatsoever''). If the language ''to the extent allowable by law'' is inserted into this open-ended indemnification clause, the clause remains void and unenforceable.[9] The ''extent allowable by law'' is the extent of funds certified under R.C. 5705.41(D)(1) to meet the obligations of a contract. Without the required certification, the provision is not enforceable regardless of whether it says ''to the extent allowable by law.'' *See generally George H. Dingledy Lumber Co. v. Erie R.R. Co.*, 102 Ohio St. 236, 131 N.E. 723 (1921) (syllabus, paragraph 1) (''[p]ublic policy requires that contracts of indemnity purporting to relieve one from the results of his failure to exercise ordinary care shall be strictly construed, and will not be held to provide such indemnification unless so expressed in clear and unequivocal terms''); *Vannoy v. Capital Lincoln-Mercury Sales, Inc.*, 88 Ohio App. 3d 138, 144, 623 N.E.2d 177 (Ross County 1993) (phrase ''where permitted by law'' in clause providing for payment of attorney fees upon default of note refers to the law of each jurisdiction; where the provision is void, it is excluded from the contract).[10]

If, on the other hand, the indemnification clause meets the requirements set forth in

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[8] R.C. 5705.41(D)(1) states: ''Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon.'' If a contract containing an indemnification clause is in compliance with R.C. 5705.41(D)(1) with regard to matters other than the indemnification clause, it seems likely that a court would treat the indemnification clause as a separate contract and find that clause alone void under R.C. 5705.41(D)(1). *See generally George H. Dingledy Lumber Co. v. Erie R.R. Co.*, 102 Ohio St. 236, 241, 131 N.E. 723 (1921) (agreement referred to as ''contract of indemnification'' is part of a lease); *Vannoy v. Capital Lincoln-Mercury Sales, Inc.*, 88 Ohio App. 3d 138, 143, 623 N.E.2d 177 (Ross County 1993) (''it is one thing to hold that a single provision in an instrument is void and it is quite another to hold that the entire instrument is unenforceable''); 1999 Op. Att'y Gen. 99-049 at 2-305 (''[a]lthough an indemnification or hold harmless clause might be included in a continuing or per unit contract, that clause itself would not constitute a continuing or per unit contract'').

[9] Although our research finds an open-ended indemnification clause in a county contract to be void and unenforceable, there remains the possibility that a court might find the indemnification clause valid to the extent of moneys appropriated and certified as available for other purposes of the contract. Thus, moneys appropriated for the purchase of goods or services might be expended instead for indemnification purposes, creating a deficiency in moneys available for goods or services and raising issues of the unconstitutional creation of debt in violation of the Ohio Constitution.

[10] Were the language ''to the extent allowable by law'' construed to mean ''to the extent that funds are subsequently properly appropriated and certified for this purpose,'' the purpose of the indemnification clause could be accomplished, but that would result not from the

1999 Op. Att'y Gen. No. 99-049 – that is, it specifies a maximum dollar amount for which the county is obligated, has funds certified as available under R.C. 5705.41(D)(1), and provides consideration sufficient for the obligations that the county assumes – then the indemnification clause is valid and enforceable. Inserting the language "to the extent allowable by law" does not change this result.

Inclusion of language "approved as to form except as to the indemnification clause"

The second question asks about the effect of including in the contract language stating "approved as to form except as to the indemnification clause." To address this question, it is helpful to consider the prosecuting attorney's responsibility to approve county contracts "as to form."

The county prosecuting attorney has various statutory responsibilities to review or certify certain types of documents. For example, with regard to public improvements under R.C. Chapter 153, the board of county commissioners is required to submit all contracts over $1,000 to the county prosecuting attorney before work is done or material furnished. "If found by [the prosecuting attorney] to be in accordance with [R.C. 153.01 to R.C. 153.60], and [the county prosecuting attorney's] certificate to that effect is indorsed thereon, such contracts shall have full effect, otherwise they shall be void." R.C. 153.44. Under this provision, the prosecutor is required to provide certification of compliance with the substantive requirements set forth in R.C. 153.01 to R.C. 153.60, and not merely approval as to form. *State ex rel. Fornoff v. Nash,* 23 Ohio St. 568, 574 (1873) ("in determining whether the contract is in accordance with the 'provisions' of the act, the prosecuting attorney, in discharging his duty, is not limited to the form of the contract, but is to ascertain whether the preceding steps required by the statute have been followed"); 1954 Op. Att'y Gen. No. 3743, p. 207 at 212 (the statutory prerequisites, including the endorsement of the prosecuting attorney, "are of the essence of the contract, and without them no legal obligation is created and the purported agreement will be treated as a nullity"). Similarly, at the request of the county board of mental retardation and developmental disabilities, the prosecuting attorney must "prepare a legal review" of certain direct services contracts and determine whether they are in compliance with state law. R.C. 5126.032(B). Again, it appears that the required review contemplates a substantive review and not merely approval as to form. *See also* R.C. 307.02 (the board of county commissioners may not enter into a lease agreement "until the agreement is submitted to the county prosecutor and the county prosecutor's approval certified thereon"); R.C. 309.11 (the prosecuting attorney must prepare the official bonds for all county officers and see that the acceptance by the proper authorities, the signing, and the indorsements "are in conformity to law"; no bond may be accepted or approved for a county officer until the prosecuting attorney has inspected it and certified it as sufficient). *See generally Kelly v. State*, 25 Ohio St. 567 (1874) (syllabus, paragraph 2) ("[t]he provision of the statute requiring the indorsement of the certificate of the prosecuting attorney upon the bond of the treasurer is merely directory, and the want of such indorsement does not invalidate the bond").

One statute that expressly requires the prosecuting attorney to approve the form of

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operation of the phrase "to the extent allowable by law" but from the subsequent action of the public body. If this is the intent of the contract, the better practice would be to state so directly.

legal documents is R.C. 5155.31, which states, with regard to the lease of a county home or county nursing home that the board of county commissioners has closed, that the "form ... shall be approved by the prosecuting attorney." *See generally* 2004 Op. Att'y Gen. No. 2004-031 (syllabus) ("[t]here must ... be compliance in each instance with the statutory requirements that apply to a particular contract"). Apart from statutes providing expressly for approval as to form, the county prosecutor's general duties to provide legal counsel and services to county officers and boards clearly permit the prosecutor to establish a policy or procedure for reviewing county contracts and approving them as to form. *See* R.C. 309.09(A); 2004 Op. Att'y Gen. No. 2004-032; 2000 Op. Att'y Gen. No. 2000-008 at 2-41 ("[i]n the absence of ... statutory mandates, ... the nature and extent of advice the prosecuting attorney renders to county officers and entities under R.C. 309.09(A) is a matter to be determined by the prosecuting attorney in a reasonable exercise of discretion" (footnote and citations omitted)).[11]

In determining the effect of including in a county contract the language "approved as to form except as to the indemnification clause," it is clear that the provisions of applicable statutes prevail. If a statute requires that a particular contract be approved as to form by the prosecuting attorney, the absence of the required approval will result in such consequences as the statute provides, and may render the contract void. In the absence of a statute requiring the county prosecutor's approval as to form, it appears that, if an indemnification clause is included in a county contract, that clause is part of the contract and is given the legal significance appropriate to its language, regardless of whether the language was approved as to form by the prosecuting attorney.

Therefore, if an indemnification clause is void and unenforceable because it does not contain the provisions required by law, it will remain void and unenforceable if the contract states that the indemnification clause was not approved as to form. If an indemnification clause complies with the requirements needed to be valid and enforceable, it remains valid and enforceable even if the contract asserts that the indemnification clause was not approved as to form, unless a statute conditions the validity and enforceability of the clause upon its approval as to form. Of course, if the lack of approval results in the language being deleted from the contract before the contract is executed, then the deleted language is of no legal effect. *See, e.g.*, R.C. 5126.032(B) (following review by the prosecuting attorney, the county board of mental retardation and developmental disabilities "shall enter into only those contracts submitted for review that are determined by the prosecuting attorney to be in compliance with state law"); note 11, *supra*.

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[11] Our research has disclosed no general statute that attaches a particular legal significance to the failure of the county prosecuting attorney to approve the form of a county contract. By way of comparison, R.C. 705.11 expressly imposes upon the village solicitor or city director of law the duty to prepare all contracts, bonds, and other instruments in writing in which the municipal corporation is concerned, and to "indorse on each his approval of the form and the correctness thereof." The statute specifies: "No contract with the municipal corporation shall take effect until the approval of the village solicitor or city director of law is endorsed thereon." R.C. 705.11; *see, e.g., State ex rel. City Asphalt & Paving Co. v. City of Campbell*, 76 Ohio L. Abs. 58, 60-61, 145 N.E.2d 234 (Ct. App. Mahoning County 1954) (city solicitor approved form and legality of contract).

Retaining an indemnification clause in a county contract

We have been asked to consider a situation in which a public or private party asks a county to enter into a contract that contains an indemnification clause. If, as discussed above, the indemnification clause meets the requirements needed to be valid and enforceable, then it may clearly be retained in the contract. However, if the indemnification clause is deemed void and unenforceable because it is an open-ended clause that does not specify a maximum dollar amount for which the county is obligated and include a certification that funds have been appropriated and are available, as required by R.C. 5705.41(D)(1), or because it does not provide the county with consideration sufficient to support the obligation that the county assumes under the contract, we cannot recommend that the indemnification clause be retained in the contract. *See* 2003 Op. Att'y Gen. No. 2003-035 at 2-293 (an indemnification clause that does not set a maximum amount "is not a term to which a township may constitutionally or statutorily agree").

Including contractual language that is acknowledged to be of no legal effect does not promote the goal of expressing the agreement of the parties. *See, e.g., Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio St. 3d 353, 363, 678 N.E.2d 519 (1997) (in construing a contract, the court "must attempt to give effect to each and every part of it"); *Kelly v. Medical Life Ins. Co.*, 31 Ohio St. 3d 130, 509 N.E.2d 411 (1987) (syllabus, paragraph 1) ("[t]he intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement"); *Farmers Nat'l Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 330, 94 N.E. 834 (1911) ("[t]he terms and conditions are written into a contract for the purpose of being observed by the parties thereto"). The presence of an open-ended indemnification clause believed to have no legal effect may be misleading and may be the cause of unnecessary litigation. *See generally Johnson v. Lincoln Nat'l Life Ins. Co.*, 69 Ohio App. 3d 249, 590 N.E.2d 761 (Montgomery County 1990); *Warren Educ. Ass'n v. Warren City Bd. of Educ.*, 18 Ohio St. 3d 170, 175, 480 N.E.2d 456 (1985) ("[p]ublic agencies should be aware that their agreements are as sacrosanct as those made between strictly private parties. Public agencies, like those in the private sector, are bound by the agreements made by those who negotiate on their behalf"). Indeed, the presence of an open-ended indemnification clause may result in the personal liability of an individual who makes or participates in making a public contract. *See* note 6, *supra*.

Further, if an open-ended indemnification clause is retained in a contract in the belief that it is void and unenforceable, there is a possibility that a court may ascribe an unintended meaning to the language. *See* note 9, *supra*; *see also, e.g., Sys. Automation Corp. v. Ohio Dep't of Admin. Servs.*, 2004-Ohio-5544, ¶ 26 (Ct. App. Franklin County) (determining that a public contract had been renewed when the actions of the parties reflected that understanding and stating: "Government contracts are not exempt from the requirement of good faith and fair dealing, and where evidence suggests that the parties were in mutual understanding about the contents and performance of a contract, government may not take advantage of an 'ultratechnical construction' of a statutory requirement"); *LaConte Enters. v. Cuyahoga County*, 145 Ohio App. 3d 806, 764 N.E.2d 1051 (Cuyahoga County 2001). Instead of retaining contractual language that is intended to be meaningless, the better options are to rephrase the clause to give it meaning, to delete the clause, or to refuse to enter into the contract. *See* note 10, *supra*.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. If a contract entered into by a board of county commissioners on behalf of the county includes a clause under which the county agrees to indemnify another party to the contract, that indemnification clause is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. (1999 Op. Att'y Gen. No. 99-049, approved and followed.)

2. An indemnification clause that does not meet the requirements set forth in paragraph 1 is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable.

3. An indemnification clause that meets the requirements set forth in paragraph 1 is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes the clause void and unenforceable if it is not approved as to form.