Note from the Attorney General's Office:

1974 Op. Att'y Gen. No. 74-043 was qualified by
1987 Op. Att'y Gen. No. 87-069.

OPINION NO. 74-043

Syllabus:

1. Proceeds from the sales of meals by a food service management company which contracts with a board of education to provide food service must be deposited pursuant to R.C. 3313.81 within twenty-four hours of receipt.

2. If agreed upon by the board of education and the food service management company the company may pay for supplies for the school food service program and seek reimbursement from the school food service fund.

3. A properly supported statement of expenditures of purchases for a school food service program by a food service management company would meet the requirements of the National School Lunch Program Agreement.

4. A food service management company may not make purchases in the name of the board of education with which it contracts.

5. Whether a food service management company may make purchases exclusively with its national director of purchasing and regional purchasing coordinators depends upon the agreement between the company and the school board of education.

6. The employees of a board of education may be supervised by a food service management company with which the board contracts for food service; however, ultimate supervisory responsibility remains with the board. (Opinion No. 70-084, Opinions of the Attorney General for 1970, approved and followed)

7. A food service management company may include the cost of bodily injury and property damage liability insurance as a cost of operation of the school food service program, if the contract so provides. (Reasoning of Opinion No. 1214, Opinions of the Attorney General for 1952, page 187, approved and followed)

8. The contract price of the food service may be a percentage of gross sales, but the total price must have a maximum limit for the contract to comply with R.C. 5705.41 and 5704.412. (Opinion No. 501, Opinions of the Attorney General for 1929, page 755, modified) Moneys supplied to the food service fund from the general revenue fund and from federal programs may be considered part of "gross sales".

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 30, 1974

Your request for my opinion states the facts and poses the questions as follows:

> "At the present time several food service management companies are seeking contracts with school districts in Ohio. Copies of the contracts have been furnished the Bureau of Inspection and Supervision of Public Offices as well as the Chief of Food Services, State Department of Education, for review. (See enclosures)
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> "While making the review Sections 3313.81, 3313.811, 3313.812, Revised Code and Opinions of the Attorneys General No. 1285, dated 1964, and No. 70-084, dated July 15, 1970, have been considered.
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> "In Opinion No. 70-084, it was stated that 'a board that contracts with a food service management company to operate the school feeding program still must meet all applicable standards, and none of the board's responsibility is contracted away by such an action. To hire an outside contractor to run the school lunch program does not, per se, remove the program from the control and management of the board as prohibited by Section 3313.81.'
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> "In reviewing Opinion No. 1285, it was stated in (3) of the Syllabus that: 'Proceeds derived from vending machines installed by a board of education under authority of Section 3313.81, Revised Code,

that serve and dispense lunches and other meals or refreshments must be deposited into the school lunch fund as provided by this section.'

"Based upon the foregoing, several questions have been raised which we are presenting for your consideration and written opinion:

"1. Even though a food service management company manages the lunch room program, must proceeds from the sales be deposited daily with the clerk-treasurer as provided in Sections 117.17, 3313.51, and 3313.81, Revised Code?

"2. Must all obligations whether incurred by the food service management company or the board of education be paid through the lunch room fund or may the food service management company pay its obligations and seek reimbursement from the lunch room fund?

"3. If the food service management company may seek reimbursement from the lunch room fund, would a statement of expenditures be sufficient to meet the requirements of Sections 3313.81 and 5705.41, Revised Code, and the National School Lunch Program Agreeement entered into between the board of education and the Ohio Department of Education?

"4. May a food service company make purchases in the name of the board of education, and may such purchases be made exclusively with its national director of purchasing and regional purchasing co-ordinators?

"5. May a food service management company procure and maintain comprehensive bodily injury and property damage liability insurance, including product liability, for the protection of the food service management company and the school system in the operation of the facilities, and may the cost of same be charged as a direct or indirect cost of operation to the school district?

"6. The term 'supervision' is referred to many times within the various attached contracts. May a board of education subject its employees to the management, supervision, and control of a person(s) who are on the payroll of a third party food service management company? Does the law require that this management, supervision, and control be limited to consultant service only?

"7. Are there any limitations on contract fees which a board of education may enter into with a food service management company for food service management, such as, a percentage of gross sales?

"8. May the total average daily membership of the school district be used as a basis for determining the fee of a food service management company when only a part of the total pupil enrollment will use the food facilities?

"9. When the contracted rate is based upon a percentage of income, may monies from (1) a transfer from the general fund to cover free lunches for needy children, or (2) state and/or federal reimbursement to a lunch program be counted as income?"

R.C. 3313.81 provides as follows:

"The board of education of any city, exempted village, or local school district may establish food service, provide facilities and equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, and other meals or refreshments to the pupils, employees of the board of education employed therein, and to other persons taking part in or patronizing any activity in connection with the schools. Restrictions or limitations upon the privileges or use of facilities by any pupil, employee, or person taking part in or patronizing a school-related activity must be applied equally to all pupils, all employees, or all persons taking part in or patronizing a school-related activity, respectively.

"Such facilities shall be under the management and control of the board and the operation of such facilities for educational food service purposes shall not be for profit. In the operation of such facilities for school food service purposes there shall be established a food service fund in the clerk's cash journal, which shall be separate from all other funds of the board. All receipts and disbursements in connection with the operation of food service for school purposes and the maintenance, improvement, and purchase of equipment for food service shall be paid directly into and disbursed from the food service fund which shall be kept in a legally designated depository of the board. Revenues for the operation, maintenance, improvement, and purchase of equipment shall be provided by the food service fund, appropriations transferred from the general fund, federal funds, and from other proper sources.

"The board may also make provision by appropriations transferred from the general fund of the district or otherwise for serving free lunches to such children as it determines are in need thereof.

"The enforcement of this section shall be under jurisdiction of the state board of education.

"The state board of education is designated as the state educational agency responsible for carrying out the "National School Lunch Act," 82 Stat. 117 (1946), 42 U.S.C. 1751, as amended and the "Child Nutrition Act of 1966," 80 Stat. 890, 42 U.S.C. 1771, as amended."

In the syllabus of Opinion No. 70-084, Opinions of the Attorney General for 1970, my predecessor advised "[a] school board may contract with a caterer to provide food service to a school within the district. * * *" This Opinion overruled a previous one, on the basis of a change in federal regulations which permitted such a contract in federally-assisted school lunch programs. Subsequent to Opinion No. 70-084, supra, the General Assembly enacted R.C. 3313.812 (134 Ohio Laws 1846, 1847-1848, effective April 28, 1972), which authorizes boards of education to contract with each other for food service. While this statute provides an alternative method, I see in it no indication of a legislative intent to disapprove the result of Opinion No. 70-084, supra.

Your first question is whether the revenues from sales from the lunch room program must be deposited daily with the clerk-treasurer of the school district.

R.C. 3313.51 provides in part as follows:

> "All moneys received by the clerk of a school district from any source whatsoever shall be immediately placed by him in a depository designated by the board of education of such school district, as provided by sections 135.01 to 135.12, inclusive, of the Revised Code."

R.C. 117.17 provides in part as follows:

> "A public officer or employee who collects or receives payments due the public shall deposit all public moneys received by him with the treasurer of the taxing district once every twenty-four consecutive hours."

It has been held that moneys in the food service funds are subject to the requirements of the predecessor of R.C. 3313.51. Opinion No. 2682, Opinions of the Attorney General for 1928, page 2288; Opinion No. 3102, Opinions of the Attorney General for 1926, page 49. Therefore, proceeds from the sale of lunches must be deposited immediately in the designated depository. R.C. 117.17 imposes the requirement that proceeds must be deposited once every twenty-four consecutive hours. While this statute expressly requires deposits with the treasurer of the taxing district, in the absence of such an office, the statutes may fairly be construed together to require deposits pursuant to R.C. 3313.51.

R.C. 3313.81 provides that "all receipts and disbursements" in connection with the school lunch program "shall be paid directly into and disbursed from the food service fund * * *". Opinion No. 70-084, supra, construed this statute to authorize a contract between a board of education and a private corporation for the provision of food service. Under R.C. 3313.81, the corporation would be paid for furnishing this service from the food service fund. That Section further requires all receipts to be paid into the food service fund. Therefore, even if the employees of the food service management company actually collect the proceeds, they do so only as agents of the board of education, and must turn such proceeds over to the clerk of the board forthwith. The fact that these employees may not be public employees is unimportant, because the plain terms of R.C. 3313.81 require all proceeds to be paid to the food service fund. Moreover, the

Ohio Supreme Court has held that the provisions of R.C. 117.17 are comprehensive enough to warrant actions against private persons who receive public funds. State, ex rel. Smith v. Maharay, 97 Ohio St. 272 (1918). Consequently, all proceeds from the food service must be deposited immediately in the food service fund, and may then be paid out to the food service management company according to the terms of the contract.

In response to your second question, I can see no reason why the food service management company could not provide food service at its own expense and seek reimbursement from the board of education if the contract so provided.

Your third inquiry is whether a statement of expenditures by the food service management company would meet the requirements of R.C. 3313.81, R.C. 5705.41, and the National School Lunch Agreement.

R.C. 3313.81 does not speak to such requirements, because it does not expressly contemplate a contract between a board of education and a private corporation for the provision of food service. R.C. 5705.41 imposes certain requirements which must be met before such agreement is made, which requirements are discussed subsequently in this opinion. However, it does not speak to the formal requirements for reimbursement pursuant to the agreement.

The National School Lunch Agreement entered into between a board of education and the Ohio Department of Education requires program expenditures to be evidenced by invoices, receipts, or other proof. Therefore, a mere statement of expenditures would be insufficient for purposes of federal funding. Aside from this requirement, others imposed by your office to justify the expenditure of moneys under a public contract for goods and services are also applicable.

In response to your fourth question, I know of no authority for the food service management company to act as agent of a board of education and contract in the board's name. On the contrary, Opinion No. 70-084, supra, clearly contemplates a contract between the company and the board under which the company provides food service and applies to the board for payment. However, there does not appear to be any general prohibition against such company's making purchases exclusively through its national and regional officers. Whether the specific situation will involve a violation of some state or federal law, such as those dealing with antitrust, is a question which cannot be answered on the basis of the facts before me.

You ask next whether the food service company may procure comprehensive bodily injury and property damage liability insurance, including product liability, for the protection of the company and the school system, and whether the cost may be charged as a direct or indirect cost of operation of the school district. It follows, from the previous answer, that the company may not purchase insurance for the school district. But the company may purchase such insurance to cover itself, and the cost of such liability insurance may be provided for in the board's payment to the food service management company for food service, if the contract between them so provided. In a closely analogous situation, my predecessor reached this conclusion in Opinion No. 1214, Opinions of the Attorney General

for 1952, page 187. At that time, boards of education had no authority to purchase automobile liability insurance. My predecessor concluded that a board of education could pay, as part of the cost of renting an automobile for use in a driver's education course, an amount to be used as a liability insurance premium. He states at pages 194-195 as follows:

> "If in the exercise of its discretion, a board of education should choose to rent or lease equipment necessary and proper for use in a particular course of instruction, lawfully prescribed by the board, I perceive no reason why the cost of insurance on such equipment, of whatever kind, if insisted upon by the owner or lessor as a condition of the agreement, should not be considered a proper item in the rental price and so paid from public funds. In such a case there can be no objection to the expenditure on the ground that there is an absence of consideration received by the board, as is the case ordinarily where liability insurance is involved. Rather, in such a case, the use of the equipment for a purpose beneficial to the educational program prescribed by the board is a consideration sufficient in law to support such expenditure.
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> "Nor can there be any objection to an expenditure of this kind on the ground that the board is thereby indirectly assuming an expense which it would not be authorized directly to incur. We have only to recall that the board, itself exempt, as a public agency, from taxation in many respects, nevertheless pays such exactions indirectly in the scores of 'hidden' taxes which are incorporated in the price of supplies, equipment, and services which the board must procure through the expenditure of public funds in order to operate the public schools. Accordingly, I conclude that the cost of liability and other insurance on equipment rented or leased to a board of education for use in a course of instruction prescribed by the board may, if included in the rental price by the owner or lessor, be paid by such board from public funds."

On the basis of Opinion No. 1214, supra, I conclude that the contract price can include an amount intended to cover the cost of liability insurance, provided the total cost is reasonable. However, please note that this reimbursement is part of the cost of the food service, and not a general "cost of operation of the school district", in the words of your question.

Your sixth question concerns the amount of supervision the food service management company may exert over employees of the board. No statute proscribes supervision of school employees by an independent contractor. It may be necessary for the food service management company to exercise some control over school employees in the daily operation of the food services program. However, such supervision of the daily operation of the program would not remove the ultimate control over the total operation of the food service program from the school board. As my predecessor stated in Opinion No. 70-084:

> "A board that contracts with a food service management company to operate the school feeding program still must meet all applicable standards, and none of the board's responsibility is contracted away by such an action. To hire an outside contractor to run the school lunch program does not, per se, remove the program from the control and management of the board as prohibited by Section 3313.81, supra.

See also Opinion No. 66-087, Opinions of the Attorney General for 1966.

Questions seven and eight pertain to whether certain methods may be used for determining the fee of the food service management company.

R.C. 3313.81 authorizes a board of education to "pay operating costs" of a food service program. If a board contracts with a food service management company, the cost of operating the food service program will be the fee agreed upon by the parties.

In Opinion No. 1066, Opinions of the Attorney General for 1964, one of my predecessors was presented an analogous situation. The then Attorney General found that a board of education had the authority to hire an architect, and the board also had discretionary power in setting a fee with the architect. My predecessor mentioned some of the numerous methods in which an architect's fee could be computed. In summarizing he stated that "it becomes evident that good judgment and discretion on the part of a board of education are the key elements in the negotiation of a contract." He stated a general rule as follows:

> "It is well established that in the absence of fraud or a gross abuse of discretion the courts cannot control the discretionary powers vested in a board of education by statute. Board of Education v. Minor, 23 Ohio St., 211; City of Cleveland v. Public Library Board, 94 Ohio St., 311. Or, as it is phrased in the headnote of Lurie v. Board of Education, 12 O.O., 358, 'The award of a contract is a matter exclusively within the discretion of a municipal board of education, and the court will not substitute its judgment for that of the board unless the plaintiff proves an abuse of discretion by a preponderance of the evidence.'"

Thus any method agreed upon by the school board and the food service management company must be reasonable. See also Opinion No. 70-081, Opinions of the Attorney General for 1970.

However, the requirements of R.C. 5705.41 and R.C. 5705.412, which pertain to the certificate to be attached to a contract, must be met. R.C. 5705.41 reads in part as follows:

> "No subdivision or taxing unit shall:
>
> "* * * * * * * * *
>
> "(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal

officer of the subdivision that the amount required to meet the same, 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 same in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. * * *"

R.C. 5705.412 provides as follows:

"Notwithstanding section 5705.41 of the Revised Code, no school district shall make any contract, give any order involving the expenditure of money, or increase during any school year any wage or salary schedule unless there is attached thereto a certificate signed by the clerk and president of the board of education and the superintendent that the school district has in effect for the remainder of the school year and the first six months of the succeeding school year the authorization to levy taxes including the renewal of existing levies which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient to provide the operating revenues necessary to enable the district to operate an adequate educational program * * *."

If the contract price is determined by a percentage of gross sales, the board of education must ascertain at the time of contracting the maximum estimated revenues which may be realized from the food service operation in order to determine whether the amount which will be paid is within the anticipated revenues of the school district. Otherwise it would be impossible for the proper school authorities to certify that the requirement in R.C. 5705.412 has been met. Thus the contract between a school district board of education and a food service management company must contain a figure which represents a maximum fee, or ceiling, a food service management company may receive. Such a figure is also necessary for purposes of the certification required by R.C. 5705.41. Therefore, while the board has discretion to contract to pay a percentage of gross sales, the total price must have a stated maximum, which is considered the contract price for purposes of R.C. 5705.41 and R.C. 5705.412.

There is some authority for the proposition that a price based on percentage of gross sales, without a specified maximum in dollars, is sufficiently precise for a public contract. Opinion No. 501, Opinions of the Attorney General for 1929, page 755, approved an engineering contract which calculated the price on a "cost plus" basis. This conclusion was based on Portsmouth v. Building Co. 106 Ohio St. 550 (1922), which allowed recovery under a construction contract which provided for extra work in case of unforeseen contingencies, at an agreed price,

and which was accompanied by an auditor's certificate for that amount of money should extra work prove necessary.

Subsequent to the decision in Portsmouth v. Building Co. supra, the General Assembly enacted G.C. 5625-33, the forerunner of R.C. 5705.41. 112 Ohio Laws 391, 406 (1927). This statute too had its predecessors, but it was the first to apply the auditor's certificate requirement to the contracts of all political sub divisions. See State, ex rel. McGraw v. Smith, 129 Ohio St. 246 (1935). This statute was not mentioned in Opinion No. 501, supra.

Portsmouth v. Building Co., supra, was approved and followed in the recent case of Lathrop Co. v. Toledo, 5 Ohio St. 2d 165 (1966). This decision allowed recovery under a contract which obligated the City to enter into a supplemental agreement should unforeseen work prove necessary. The City refused to do so, but the Court held that it was obligated to make reasonable efforts to comply with all the formal requirements for a supplementary contract, and to enter into such a contract. The Court distinguished a line of cases which had denied recovery under contracts which were void ab initio for failure to comply with statutory requirements.

I do not find in these two Ohio Supreme Court cases sufficient justification for the holding of Opinion No. 501, supra. The contracts involved are easily distinguishable from a "cost plus" contract. Moreover, my predecessor's failure to discuss G.C. 5625-33, the predecessor of R.C. 5705.41, indicates that he did not express an opinion about the effect of that statute on a "cost plus" contract, which is the central issue here.

However, as mentioned previously, such a contract may comply with the requirements of R.C. 5705.41 if it contains a ceiling price, which is the amount the auditor must certify. Therefore, I modify my predecessor's conclusion only to the extent of adding the requirement of such a ceiling price.

In response to your ninth question, I can see no reason why "gross sales" for purposes of the contract cannot include moneys provided by the general fund, or the federal school lunch program, to defray the cost of food service. R.C. 3313.81 authorizes the use of such moneys in the food service fund. Since fees paid by students and others cover only a part of the total cost of the food served, it would be reasonable for the contract to define "gross sales" to include money from all sources. Certainly, the board of education has discretion to enter into such a contract, provided that the requirements discussed previously in this opinion are met.

It should be noted, however, that those funds made available to a school board to meet costs which are not incurred by a food service management company but rather by the school board (such as maintenance costs of the lunchroom), should not be included in revenue for the purpose of determining the fee of the food service management company (for examples of such funds see 42 U.S.C. §§1754, 1774).

In specific answer to your questions, it is my opinion and you are so advised, that:

1. Proceeds from the sales of meals by a food service management company which contracts with a board of education to

provide food service must be deposited pursuant to R.C. 3313.81 within twenty-four hours of receipt.

2. If agreed upon by the board of education and the food service management company the company may pay for supplies for the school food service program and seek reimbursement from the school food service fund.

3. A properly supported statement of expenditures of purchases for a school food service program by a food service management company would meet the requirements of the National School Lunch Program Agreement.

4. A food service management company may not make purchases in the name of the board of education with which it contracts.

5. Whether a food service management company may make purchases exclusively with its national director of purchasing and regional purchasing coordinators depends upon the agreement between the company and the board of education.

6. The employees of a board of education may be supervised by a food service management company with which the board contracts for food service; however, ultimate supervisory responsibility remains with the board. (Opinion No. 70-084, Opinions of the Attorney General for 1970, approved and followed)

7. A food service management company may include the cost of bodily injury and property damage liability insurance as a cost of operation of the school food service program, if the contract so provides. (Reasoning of Opinion No. 1214, Opinions of the Attorney General for 1952, page 187, approved and followed)

8. The contract price of the food service may be a percentage of gross sales, but the total price must have a maximum limit for the contract to comply with R.C. 5705.41 and 5705.412. (Opinion No. 501, Opinions of the Attorney General for 1929, page 755, modified) Moneys supplied to the food service fund from the general revenue fund and from federal programs may be considered part of "gross sales".