

Note from the Attorney General's Office:

1928 Op. Att'y Gen. No. 28-1678 was overruled in part by 1987 Op. Att'y Gen. No. 87-069.

The attorneys have also suggested a rather technical objection to the claim of the state in this instance. They say that, because Sections 183 and 184 of the Code were expressly repealed by the last Legislature and re-enacted in amended form, technically speaking the corporation has not "filed its statement and paid the fee prescribed by the preceding two sections" within the language of Section 185 as it appears in the new act. I do not feel that any court would have difficulty in construing this language to be applicable to payments under the sections as they existed prior to amendment by the last Legislature. The identity of the sections in question was not lost by reason of the fact that they were, pursuant to constitutional requirement, repealed and re-enacted in changed form in order to accomplish their amendment. In my opinion the application of Section 185 of the Code is not affected merely because the payments were made by the corporation in question under the provisions of Section 183 and 184, General Code, prior to their amendment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1678.

CERTIFICATE—FISCAL OFFICER—CONTRACT OR LEASE RUNNING
BEYOND FISCAL YEAR—CITY COUNCIL—MAY NOT ISSUE BONDS
IN INSTALLMENTS.

SYLLABUS:

1. *The provisions of Section 5625-36, General Code, (112 O. L. 391, 408), relative to certificates of fiscal officers in cases of contracts or leases running beyond the termination of the fiscal year in which they are made, have no application to contracts for the construction of improvements to be paid for out of bond issues.*

2. *A city council is not authorized under Section 2293-26, General Code, to issue bonds in installments as funds are needed to meet contractor's estimates as the same fall due.*

COLUMBUS, OHIO, February 6, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your recent communication requesting my opinion upon the following:

"When bonds are authorized for the purpose of providing funds for the construction of a city building which will not be completed for several years, and council desires to issue such bonds in series as funds are needed to meet the contractor's estimates, may the fiscal officer, by virtue of the provisions of Section 5625-36 (112 O. L. 408), legally limit the amount of his certificates on such contracts to the amount that will be available and expended during the fiscal year in which the certificates are made?"

The portion of Section 5625-36, General Code, to which you refer in your communication, reads:

"In the case of contracts or leases running beyond the termination of the fiscal year in which they are made, the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge. * * * "

The certificate of the fiscal officer referred to in the above section is the certificate prescribed by paragraph (d) of Section 5625-33 of the General Code, which reads:

"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. * * * "

Reading the above quoted portions of Sections 5625-36 and 5625-33, General Code, together, it seems clear that the words "contracts or leases running beyond the termination of the fiscal year in which they are made" refers to continuing contracts or leases which by their terms extend beyond the fiscal year in which they are made, for which payment is made out of funds raised by taxation and which require annual appropriations to meet the obligations thereof. This conclusion is strengthened by an examination of paragraph (a) of Section 5625-33, General Code, which provides:

"No subdivision or taxing unit shall:

(a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority.

* * * "

Inasmuch as by the terms of paragraph (a), supra, the authorization of a bond issue is deemed an appropriation of the proceeds of the same for the purpose for which such bonds were issued, it follows that no further or other appropriation is necessary. The appropriation having been made by virtue of the authorization of the bond issue, there is no need for any further appropriation, regardless of the length of time required in the construction of the improvement.

The conclusion reached above is further strengthened by the fact that Sections 5625-33 and 5625-36 of the General Code were enacted to take the place of Sections 3809 and 5660, General Code, which were repealed at the same time. Section 3809, General Code, provided:

“The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated.”

Section 5660 provided in part :

“* * * In the case of contracts running beyond the termination of the fiscal year in which they are made for salaries of educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made, the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent to the making of such contract or lease shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year in which such contract or lease be made, provided further that in each subsequent fiscal year in which such contract or lease is in effect the auditor or fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases, the amount of the obligation remaining unfulfilled at the end of a fiscal year and which will become payable during the next fiscal year shall be included in the appropriations for such next year * * * ”

The fact that Sections 3809 and 5660, General Code, were repealed and Sections 5625-33 and 5625-36 were enacted in place thereof, seems clearly to indicate the class of contracts the Legislature had in mind in the enactment of Section 5625-36 of the General Code.

In view of what has been said above, it is my opinion that the provisions of Section 5625-36, relative to the certificate of fiscal officers in cases where contracts run beyond the termination of the fiscal year in which they have been made, do not apply to an improvement the cost of which is covered by a bond issue.

You state in your communication that the council desires to issue bonds in series as funds are needed to meet the contractor's estimates. The issue of bonds in installments or series is authorized by Section 2293-26, General Code (112 O. L. 364, 375). That section provides in part as follows :

“If the taxing authority decides not to issue such anticipatory notes, or, if such notes are issued, when they are about to fall due, the taxing authority

shall adopt a resolution or ordinance determining whether the bonds are to be issued in one lot or in installments, and fixing the amount of the bonds to be presently issued which shall not be greater than the amount authorized; fixing their purpose in accordance with the prior resolution or ordinance of the taxing authority; and fixing the date, rate of interest and maturity which, however, need not be the same as those fixed in the prior resolution or ordinance. If it is determined to issue bonds in installments, then a similar resolution or ordinance shall be adopted whenever a new installment of such bonds is to be issued. * * * ”

While Section 2293-26 apparently contains general authority for the issuance of bonds in installments, that authority is limited to cases where the taxing authority has undertaken a number of improvements, each of which is complete in itself, in which case bonds may be issued in installments as the various steps in the improvement program are taken. It may also apply to cases where the construction of an improvement may be split up or divided into a series of contracts. In other words, where the improvement consists of a building and contracts are let at different times for the various parts of the building, bonds may be issued in installments to provide funds for the payment of each of the contracts as such contracts are entered into. However, Section 2293-26, General Code, does not authorize the issuance of bonds in installments where a single contract is entered into or where all of the contracts for an improvement are entered into at the same time, as funds are needed to meet the contractor's estimates.

The above conclusion is based upon the language of paragraph (d) of Section 5625-33, General Code, which requires a certificate of the fiscal officer that the amount required to meet any contract or any order involving the expenditure of money is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances before such contract can be entered into or the order made. Obviously, where a contract for the construction of an improvement is to be paid for by an issue of bonds, it will be impossible for a fiscal officer to make a certificate that all the funds for the payment of the contract are in the treasury or in process of collection unless all of the bonds have been issued. If, for instance, a municipality desires to erect a building costing \$100,000 and to issue bonds to cover the cost of said building, the language of paragraph (d) of Section 5625-33, General Code, would prevent the entering into of a contract for the entire cost of the construction if bonds in the sum of \$25,000 only had been issued.

The word "issued" is used advisedly above for the reason that until the bonds have been sold and are in process of delivery there can be no certification that the proceeds of the bonds are in the treasury or in process of collection. The last paragraph of Section 5625-33, General Code, provides in part as follows:

“Taxes and other revenue in process of collection, or the proceeds to be derived from lawfully authorized bonds, notes or certificates of indebtedness sold and in process of delivery, shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund.”

Until, therefore, bonds have been sold and are in process of delivery, the certificate of the fiscal officer, to the effect that the proceeds thereof are in the treasury or in process of collection, cannot be made. In view of the above it follows that if the council of the city referred to in your communication desires at the present time to enter into contracts covering the entire construction of the city building referred to, it will be necessary to issue all of the bonds for the construction of the improvement before the contracts can be entered into.

Answering your question specifically, it is my opinion that :

1. The provisions of Section 5625-36, General Code, (112 O. L. 391, 408), relative to certificates of fiscal officers in cases of contracts or leases running beyond the termination of the fiscal year in which they are made, have no application to contracts for the construction of improvements to be paid for out of bond issues.

2. A city council is not authorized under Section 2293-26, General Code, to issue bonds in installments as funds are needed to meet contractor's estimates as the same fall due.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1679.

TAX AND TAXATION—DELINQUENT TAXES—5% PENALTY UNDER SECTION 2656, GENERAL CODE, APPLIES TO BOTH PERSONAL AND REAL ESTATE TAXES—WHEN CHARGEABLE—ACCRUAL DATE OF 10% PENALTY UNDER SECTION 5678, GENERAL CODE.

SYLLABUS:

1. *The penalty of five per cent provided by Section 2656, General Code, applies to both personal and real estate taxes; but said penalty may not legally be charged in instances in which taxes are voluntarily paid between the twentieth day of January, to which date the collecting period has been extended by the county commissioners, and the time of the February settlement. In order legally to charge said five per cent penalty the county treasurer must proceed by distress or otherwise, as provided by statute, to collect said delinquent tax.*

2. *The penalty of ten per cent provided in Section 5678, General Code, may not legally be charged by the treasurer when payment of the tax on real estate is made before the time of the February settlement between the county auditor and county treasurer.*

COLUMBUS, OHIO, February 6, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows :

“We are in receipt of the following inquiries from Mr. F. H. Doyle, our State Examiner located at Cincinnati, and we are respectfully requesting your written opinion upon the same :

Question 1. Does the penalty of 5% provided by Section 2656, G. C., apply to both personal and real tax, and may the penalty be legally charged in instances in which taxes are voluntarily paid between the 20th day of January, when the tax collecting period has been extended to this time by the county commissioners, and the time of the February settlement? If not, to what extent must the county treasurer exert himself in urging the collections in order that this penalty may be attached?