

**Note from the Attorney General's Office:**

1940 Op. Att'y Gen. No. 40-1695 was questioned by  
1987 Op. Att'y Gen. No. 87-069.

1695.

“REQUIREMENT CONTRACT”—STATUS WHERE CITY OF CLEVELAND ENTERED INTO SUCH CONTRACT TO PURCHASE FROM CONTRACTOR ALL OF MATERIALS OF DESIGNATED TYPES IT MAY NEED DURING ENSUING YEAR—CONDITIONS “INVOLVING THE EXPENDITURE OF MONEY”—WHEN CITY BOUND UNDER SECTIONS 5625-33 G. C. AND 106 TO 109 CHARTER, CITY OF CLEVELAND—UNNECESSARY TO ATTACH TO CONTRACT, CERTIFICATE, DIRECTOR OF FINANCE—AVAILABILITY OF FUNDS IN EXCESS OF PURCHASE PRICE OF MATERIALS CITY OBLIGATED ITSELF TO ACCEPT UPON DELIVERY.

SYLLABUS:

1. *When the City of Cleveland enters into a “requirement contract” agreeing to purchase from a contractor all of the materials of designated types which it may need during the ensuing year, at designated unit prices, to be delivered when, as and if the city shall issue requisitions for materials as specified in such requisitions, which contract contains a requisition for an initial delivery of specified materials, such contract is one “involving the expenditure of money” only to the extent that it requisitions the delivery of a definite amount of materials and binds the city to accept delivery thereof, within the meaning of such clause as contained in Section 5625-33, General Code, and Sections 106 to 109, both inclusive, of the Charter of the City of Cleveland.*

2. *It is unnecessary to attach to such contract the certificate of the director of finance as to availability of funds in excess of the purchase price of the materials which the city obligates itself to accept upon delivery. (Section 5625-33, General Code; Section 106 of the Charter of the City of Cleveland.)*

Columbus, Ohio, January 8, 1940.

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

Gentlemen:

I am in receipt of your request for my opinion, containing enclosures which outline a course of conduct sought to be engaged in by the

City of Cleveland with reference to the letting of certain contracts, one of which is labeled "Requirement Contract." You inquire as follows:

"Will you kindly examine the inclosed form of bid for Requirement Contract and other data, and correspondence, and advise us in answer to the following question:

Question 1. Is such a Requirement Contract legal in your opinion, in view of the statutory and charter requirements as to certification of funds by the fiscal officer, since said officer is not required to certify to the full estimated cost of the contract, but only to each purchase order issued in connection with individual purchases on the contract?"

In one of the enclosures labeled "Standard Form of Bid Requirement Contract" there is a paragraph which defines the term.

"REQUIREMENT CONTRACT DEFINED. — Any award of contract made under this proposal will be termed a requirement contract.

A requirement contract shall be deemed to mean a contract under which the purveyor of commodities agrees to furnish all of the needs of the various divisions of the City for the commodities set forth in the proposal, during the period of the contract at the unit price bid and as required from time to time by the City, be such needs in excess of or less than the estimated quantities set forth in the invitation to bid. Such contract will provide that the City will purchase such commodities solely from such purveyor to whom the requirement contract is awarded and the initial amount to be ordered under the contract shall be certified to upon such contract. All subsequent orders shall be by requisition against such contract and separately certified."

You also enclose a copy of a completed form of contract with a bidder, whom we will designate as "B," pursuant to the terms of which B agrees to furnish "the requirements of the various departments of the City of Cleveland," for a period of one year, the following materials: Mortar sand in an estimated quantity of 4,000 tons; vitrified sewer pipe—estimated quantity, 117,000 feet; grout sand — estimated quantity, 4,000 tons; common brick—estimated quantity, 250,000; slag screenings — estimated quantity, 5,000 tons; and agricultural tile — estimated quantity, 24,100 feet, for the sum of \$58,820.56.

Such contract provides further that the unit prices shall vary dependent upon the fact of whether the delivery is f.o.b. city trucks at warehouse or the contractor makes delivery at designated places. The contract further

provides that the deliveries, other than the first consisting of one hundred tons of mortar sand and one hundred tons of grout sand, shall be made upon requisitions of the city from time to time during the year and paid for at the unit prices set forth in the specifications attached to and made a part of the contract.

In the solicitation for bids the city sets forth that during the year the amount of materials of the types designated would be approximately the amounts set forth in the second preceding paragraph. At the time of the execution of the contract and in the executed contract the city requisitioned for immediate delivery the quantities of sand mentioned in the next preceding paragraph hereof at a price, computed according to the unit prices, of two hundred forty-five dollars (\$245.00). Upon the contract form is contained a certificate of the Acting Director of Finance that "There is two hundred forty five & no/100 dollars unincumbered at this date in the City Treasury or in the process of collection to the credit of \_\_\_\_\_ funds unappropriated for any other purposes."

Section 106 of the Charter of the City of Cleveland reads as follows:

"No contract, agreement, or other obligation involving the expenditure of money, shall be entered into, nor shall any ordinance, resolution, or order for the expenditure of money be passed by the council, or be authorized by any officer of the city, unless the director of finance first certify to the council or to the proper officer, as the case may be, that the money required for such contract, agreement, obligation, or expenditure, is in the treasury, to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the city is discharged from the contract, agreement or obligation."

Section 107 of such Charter further provides:

"All moneys actually in the treasury to the credit of the fund from which they are to be drawn, and all moneys applicable to the payment of the obligations or appropriations involved, that are anticipated to come into the treasury before the maturity of such contract, agreement or obligation, from taxes or assessments, fees, charges, accounts and all bills receivable or other credits in process of collection; and all moneys applicable to the payment of such obligation or appropriation, which are to be paid into the treasury prior to the maturity thereof, arising from the sale or lease of lands or other property, and moneys applicable to the payment of such obligation or appropriation, which are to be paid into the treasury prior to the maturity thereof, arising from the sale or lease of lands or other property, and moneys to be derived from law-

fully authorized bonds sold and in process of delivery shall for the purposes of such certificate, be deemed in the treasury to the credit of the appropriate fund and subject to such certification."

Section 108 provides that:

"All contracts involving any expenditure in excess of five hundred (\$500.00) dollars shall first be authorized and directed by ordinance of council. When as authorized and directed, the director of the department involved shall make a written contract with the lowest responsible bidder, after advertisement once a week for two consecutive weeks in the City Record. There shall be no splitting of orders to avoid the effect of this section, and any contract made contrary to or in evasion of the foregoing provisions of this section, shall be illegal and void."

Section 109 provides:

"All contracts, agreements, or other obligations entered into and all ordinances passed, resolutions and orders adopted, contrary to the provisions of the preceding sections, shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall the council, or any officer of the city, waive or qualify the limits fixed by any ordinance, resolution or order, as provided in section 106, or fasten upon the city any liability whatever, in excess of such limits, or release or relieve any party from an exact compliance with his contract under such ordinance, resolution, or order."

You inform me that section one of each ordinance purporting to authorize the entering into a "requirement contract" contains the following language:

"That the director of finance be and he is hereby authorized and directed to enter into a requirement contract upon a unit basis with the lowest responsible bidder after advertisement once a week for two consecutive weeks in the City Record in accordance with section 108 of the city charter for the estimated requirements for the year 1937 for the various departments and divisions of the City of Cleveland, based upon the quantity consumed in 1936,  
\* \* \* ."

I am further advised that when the subsequent requisitions are made under the contract the city finance director makes a certificate on the back of the requisition as to the availability of funds sufficient to pay for the material requisitioned, but that it is not attached to the contract.

As held in the first paragraph of the syllabus of *Frisbie Company v. City of East Cleveland*, 98 O. S., 266:

"Where a statute prescribes the mode of exercise of the power

therein conferred upon a municipal body, the mode specified is likewise the measure of the power granted, and a contract made in disregard of the express requirements of such statute is not binding or obligatory upon the municipality."

See also *City of Lancaster v. Miller*, 58 O. S. 558; *McCloud & Geigle v. City of Columbus*, 54 O. S., 439; *Buchanan Bridge Company v. Campbell*, 60 O. S., 406; *City of Wellston v. Morgan*, 65 O. S., 219; *McCormick v. City of Niles*, 81 O. S., 246.

The contract under consideration is an "illusory contract" or a contract based upon an *illusory* consideration; that is, the City of Cleveland does not agree to purchase any of the commodities enumerated therein if it should need none. If within the year its needs require some of the materials, it agrees to purchase them from the contractor at the unit prices therein mentioned. It is for this reason that, in recent years, some text writers have come to refer to such type of contract as a "requirement contract." The validity of such contracts has been attacked on the ground of mutuality of obligation and as lacking consideration. It is generally held that where the buyer agrees to purchase all of his requirements of the commodity agreed upon and to pay therefor at the agreed unit price and the seller agrees to furnish such needs at such agreed price, there is both mutuality of obligation and consideration.

*Cincinnati, Sandusky & Cleveland R. Co. v. Consolidated Coal & Mining Co.*, 8 O. D. Rep., 365; *McLean County Coal Co. v. Bloomington*, 234 Ill., 90; *F. B. Holmes & Co. v. Detroit*, 158 Mich., 137.

In the *McLean County Coal Company* case, *supra*, the vendor agreed to supply the City of Bloomington all the coal that it should need during the ensuing year, when the city needed and directed it delivered. In *Holmes and Company* case, *supra*, the seller agreed to sell to the City of Detroit all the cement which the city required during the ensuing year, when requisitioned by the board of public works, which was estimated to be 5,000 barrels. It would seem that the contract in question is valid unless the certificate thereto attached renders it invalid as not being in conformity with the statutory requirements.

Section 5625-33, General Code, contains the following language:

"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. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, however, that if the amount involved is less than fifty dollars, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

Upon certification by the auditor or other chief fiscal officer that a certain sum of money, not in excess of five hundred (\$500) dollars has been lawfully appropriated or authorized or directed for a certain purpose and is in the treasury or in the process of collection to the credit of a certain fund free from previous and then outstanding obligations, or certifications, then for said purpose and from said fund, over a period not exceeding three months and not extending beyond the end of a fiscal year, expenditures may be made, orders for payment issued and contracts or obligations calling for or requiring the payment of money made and assumed, provided that the aggregate sum of money included in and called for by such expenditures, orders, contracts and obligations shall not exceed the sum so certified. An itemized statement of obligations incurred and expenditures made under such certificate shall be rendered to the auditor or other chief fiscal officer before another such certificate may be issued and not more than one such certificate shall be outstanding at a time.

In any case in which a contract is entered into upon a unit basis, the head of the department, board or commission for whose benefit the contract is made shall make an estimate of the total amount to become due upon such contract, which estimate shall be certified in writing to the fiscal officer of the subdivision. Such a contract may be entered into if the appropriation covers such estimate or so much thereof as may be due during the current year. In such a case the certificate of the fiscal officer based upon the estimate,

shall be a sufficient compliance with the law requiring a certificate.

Any certificate of the fiscal officer attached to a contract, shall be binding upon the political subdivision as to the facts set forth therein. Upon the request of any person, firm or corporation receiving an order or entering into a contract with any political subdivision the certificate of the fiscal officer shall be attached to such order or contract. The term 'contract' as used in this section, shall be construed as exclusive of current payrolls of regular employees and officers.

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. This section shall not apply to the investment of sinking funds by the trustees of such funds, nor to investments made under the authority of G. C. §§4296-1, 4296-2, 4296-3 and 4296-4."

Does the contract in question involve any expenditure of money? Or, is it merely an agreement to purchase on requisition during the ensuing year? That is to say, does the requirement contract itself amount to a "contract or order involving the expenditure of money" until a requisition has been issued by the city for a specific quantity of the materials described in the so-called contract?

The courts have many times had occasion to construe provisions of statute and ordinance similar to those contained in the statute, charter and ordinance in question, as to whether they were mandatory or directory. An examination of these decisions will disclose that the requirement as to the furnishing of the certificate by the officer is mandatory and is essential to the creation of an obligation on the part of the subdivision.

*Knowlton & Breinig v. Board of Education*, 13 O. App., 30; *Comstock v. Nelsonville*, 61 O. S., 288; *Carthage v. Diekmeier*, 79 O. S., 323; *Southern Surety Company v. Moores-Coney Company*, 29 O. App., 310.

You will note that in the sample contract there is contained a requisition for the initial delivery of materials, the purchase price of which amounts to \$245.00 according to the unit price bids. You will observe that to the contract there is attached a certificate of the director of finance that \$245.00 is available for the purpose. I am informed that when, as and if additional requisitions are made, a similar certificate is attached to the requisition. Such facts would make it appear to indicate that the City of Cleve-



land did not consider the "requirement contract" to be a contract involving the expenditure of money, except to the extent that requisitions have been issued thereunder. Neither the director of finance, the law director nor the city purchasing agent has done any act which would indicate that they were attempting to enter into any obligation for the expenditure of money in an amount in excess of \$245.00.

It is the apparent contention of the city that under the so-called "requirement contract" it does not become obligated to pay any money beyond the amount specified in the requisition indorsed on the contract, which in the sample contract was \$245.00; that if it should need no further materials of the types specified during the year it would not be required to issue further requisitions or orders and would not be obligated to pay any further sums to the contractor.

What is the meaning of the expression "involving the expenditure of money" as used in the first sentence of the language above quoted? The Century Dictionary defines the term "involve" as "To bring into a common relation or connection; thence, to include as a necessary or logical consequence; imply; compromise."

The term has been before the courts on many occasions and has been construed by them. Thus, the expression "involving the construction of a statute" has been construed to mean "necessitating or necessarily involving the construction of a statute."

*Wymore v. Markway*, 338 Mo., 46; *State, ex rel. Attorney General, v. Adkins*, 221 Mo., 112; *City of Cairo v. Bross*, 99 Ill., 521, 524; *Epoch Producing Company v. Schuettler*, 280 Ill., 390.

The word has been construed to mean "necessitating" or "requiring," (*Ruce v. McCrary*, 179 Ga., 812; *State, ex rel. Owen v. Barr*, 5 O. N. P., 435) and as being synonymous with "relating to" (*Monte Vista Canal Company v. Centennial Irrigating Ditch Company*, 22 Col. App., 364; *New York Foundling Hospital v. Gatti*, 203 U. S., 429), and with "necessarily affecting" (*Mercantile Bank of Louisiana v. Becker (Mo.)*, 40 S. W. (2d), 626; *Pinneo v. Knox*, 100 Ill., 471.)

In *State, ex rel. Owen, v. Barr*, 5 O. N. P., 435, the phrase "involving an expenditure of money" was before the court for interpretation. The question there presented was whether an ordinance fixing the salaries of the police force was an ordinance "involving an expenditure of money." Judge Williams, at page 436, said:

“What is meant by the clause ‘involving the expenditure of money’? The most reasonable definition of the word ‘involved’ as applied to this statute is this, given by Webster; ‘to connect with something as a natural or legal consequent or effect; to include necessarily; to imply.’ Supplying this meaning to the word for the word itself we have these expressions,—‘having as a natural consequent or effect an expenditure of money,’ or ‘implying an expenditure of money.’”

In the contract under question, the natural or legal consequence or effect was to require the city to expend only the sum of \$245.00, and that only by reason of the fact that the contract contained a requisition for materials having a contract price equal to such sum. The only obligation created by the contract against the city was that if it should need any of the materials mentioned therein during the ensuing year it would requisition them from the contractor. To such requisitions I am informed that the finance director’s certificate in an amount equal to the purchase value of the material requisitioned, is attached. If no additional requisitions were to be issued by the city there would be no obligation on the part of the city to pay any further sum of money. It therefore seems to me that the contract in question is not one involving the expenditure of money other than to the extent specified in the requisition therein contained and that the sample contract attached to your request is not in violation of Section 5625-33, General Code. For similar reasons, it would not violate the provisions of Sections 106, 107, 108 and 109 of the Charter of the City of Cleveland.

I am advised that contracts similar in nature to that under consideration have been in use for a number of years; that continuously since the year 1925 one city in this state has been using “requirement contracts” similarly executed; that when it was adopted the plan was submitted to the Auditor of State for approval as to the legality of its use and was approved by such office; that some years later a state examiner questioned its validity and submitted the question to the office of the Auditor of State, at which time such office again approved its use and held that such manner of execution and certification was authorized by Section 5625-33, General Code. I am further informed that such manner of entering into “requirement contracts” was adopted by another city and has been in use by it for a period of nearly ten years. I have been further informed that the City of Cleveland has been executing the “requirement contract” in a similar manner to that submitted, with at least the tacit approval of state examiners or without any question from such examiners.

While administrative practice, however long continued, may not render legal that which is illegal, yet courts have repeatedly held that a consistent administrative interpretation given to a statute by those officers having the duty of its enforcement if continued for a long period of time must not be disturbed except for the most cogent reasons. *Congress Cigar Company, Inc., v. Herring*, 61 Fed. (2d), 186; *State v. Brown*, 121 O. S., 73; *United States v. Healey*, 160 U. S. 136. When I examine the statute in question in view of the administrative interpretation that has been consistently observed by your department ever since the enactment of the so-called "Uniform Tax Levy Law," I do not find that such interpretation does violence to the express language of the act, at least to the extent that would warrant a court to disturb it.

Specifically answering your inquiry, it is my opinion that:

1. When the City of Cleveland enters into a "requirement contract" agreeing to purchase from a contractor all of the materials of designated types which it may need during the ensuing year, at designated unit prices, to be delivered when, as and if the city shall issue requisitions for materials as specified in such requisitions, which contract contains a requisition for an initial delivery of specified materials, such contract is one "involving the expenditure of money" only to the extent that it requisitions the delivery of a definite amount of materials and binds the city to accept delivery thereof, within the meaning of such clause as contained in Section 5625-33, General Code, and Sections 106 to 109, both inclusive, of the Charter of the City of Cleveland.

2. It is unnecessary to attach to such contract the certificate of the director of finance as to availability of funds in excess of the purchase price of the materials which the city obligates itself to accept upon delivery. (Section 5625-33, General Code; Section 106 of the Charter of the City of Cleveland.)

Respectfully,

THOMAS J. HERBERT,  
Attorney General.