

OPINION NO. 87-069**Syllabus:**

1. Except as otherwise provided by statute, the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. (1966 Op. Att'y Gen. No. 66-117 (modified, in part, on other grounds by 1979 Op. Att'y Gen. No. 79-034); 1965 Op. Att'y Gen. No. 65-126; 1964 Op. Att'y Gen. No. 1524, p. 2-428; 1959 Op. Att'y Gen. No. 451, p. 220; 1942 Op. Att'y Gen. No. 5184, p. 383; 1938 Op. Att'y Gen. No. 2491, vol. II, p. 1078, questioned.)
2. A contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided. (1940 Op. Att'y Gen. No. 1695, p. 9, questioned.)
3. A contract entered into on a per unit basis may be a continuing contract.
4. Pursuant to R.C. 5705.41(D), a continuing contract to be performed in whole or in part in an ensuing fiscal year may not be entered into unless the fiscal officer has certified that the

amount required to meet the obligation 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.

5. Pursuant to R.C. 5705.41(D), a contract may not be entered into on a per unit basis unless the fiscal officer has certified the availability of sufficient funds to satisfy the amount estimated as becoming due upon the contract in the current year. (1974 Op. Att'y Gen. No. 74-043, qualified. 1940 Op. Att'y Gen. No. 1695, p. 9, questioned.)
6. The words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. (1957 Op. Att'y Gen. No. 898, p. 372 and 1928 Op. Att'y Gen. No. 1678, vol. I, p. 316, overruled in part.)
7. Continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made.
8. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which delivery of the goods or services will not take place until the ensuing fiscal year and payment will not be due until delivery, the fiscal officer need not, under R.C. 5705.41(D), certify any amount as being available during the fiscal year in which the contract is made. Pursuant to R.C. 5705.44, the amount of the obligation remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.
9. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which it cannot, in good faith, be determined whether delivery of the goods or services and the corresponding obligation to make payment will take place in the current fiscal year or in an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available during the fiscal year in which the contract is made.
10. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which certain goods or services are to be delivered in the current fiscal year but payment is not to be made until

an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify as available during the year in which the contract is made the amount required to meet the obligation for goods or services delivered during that fiscal year.

11. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a contract that is not a continuing contract, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available when the contract is made, regardless of whether delivery of the goods or services and payment for such goods or services will take place during the fiscal year in which the contract is made or during a subsequent fiscal year. No certification of availability need be made in subsequent fiscal years.
12. Unless a contract is necessary for compliance with R.C. 3317.13(B) or comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41, no school district shall make the contract unless there is a certificate signed by the treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient to enable the district to operate an adequate educational program for the current fiscal year and the succeeding fiscal year, regardless of when goods or services are to be provided under the contract and regardless of when payment is to be made.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 25, 1987

I have before me your request for an opinion on a number of issues involving contracts that are not completely performed during the fiscal year in which they are made. Your questions relate to certain provisions of R.C. 5705.41, R.C. 5705.412, and R.C. 5705.44. Because your questions are general in nature and you have not indicated any particular factual situations with which you are concerned, I am providing you with a general discussion of relevant legal principles and a general interpretation of the statutory language about which you have inquired. I am unable, by means of an opinion, to address each of the numerous factual situations that this general analysis may cover.

R.C. 5705.41, the subject of your first three questions, states, in part:

No subdivision or taxing unit shall:

...
 (D) Except as otherwise provided in section 5705.413 of the Revised Code [relating to townships], 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 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, 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. This certificate need be signed only by the subdivision's fiscal officer. 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 no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating 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 drawing 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, that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

....
In any case in which a contract is entered into upon a per unit basis, the head of the department, board, or commission for the benefit of which 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.

..."Contract" as used in this section excludes current payrolls of regular employees and officers. (Emphasis added.)

Your first question asks: "What constitutes a 'continuing contract' as that term is used in [R.C. 5705.41(D)]?" The Revised Code contains no statutory definition of the term "continuing contract." It is, therefore, appropriate to consider the common meaning of that term, and also to examine the interpretation that it has been given in the past. See R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly").

Black's Law Dictionary 291 (5th ed. 1979) defines "continuing contract" as "[a] contract calling for periodic performances over a space of time." Certain opinions of my

predecessors have applied similar definitions. See 1965 Op. Att'y Gen. No. 65-30 at 2-72 ("[a] continuing contract is a present agreement intended to cover or apply to successive similar obligations, the payment to be made upon the performance of each successive obligation"). 1958 Op. Att'y Gen. No. 1604, p. 22, contains a comprehensive analysis of R.C. 5705.41(D) and its predecessor provisions and concludes, at 26, that the term "continuing contract" was intended to include the types of contracts and leases that had been mentioned previously in G.C. 5660--namely, contracts "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." 1958 Op. No. 1604 at 25 (emphasis omitted). See 1960 Op. Att'y Gen. No. 1304, p. 305 at 307-08 (discussing with approval the historical analysis of R.C. 5705.41 contained in 1958 Op. No. 1604); 1928 Op. Att'y Gen. No. 1678, vol. I, p. 316. 1958 Op. No. 1604 states, at 27-28:

Without attempting an exhaustive survey of the law of contracts, it is reasonably clear that the words "continuing contract" as used by the legislature and as interpreted by numerous of my predecessors, describe what is known as a 'divisible contract.' As briefly as possible, 3 Williston On Contracts, (Rev. Ed.) defines a divisible contract at page 2408 as:

"A contract is divisible when by its terms, 1, performance of each party is divided into two or more parts, and, 2 the number of parts due from each party is the same, and, 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party." (Emphasis added [by the author of 1958 Op. No. 1604.])

1958 Op. No. 1604 concludes that a lease for a period of years comes within this definition and, thus, is a "continuing contract" for purposes of R.C. 5705.41(D). This analysis is consistent with the analysis that has been applied by the courts and by prior Attorneys General. See Lee v. Brewster Village School District, 29 Ohio N.P. (n.s.) 134 (C.P. Stark County 1932) (a three-year employment contract is a continuing contract); 1966 Op. Att'y Gen. No. 66-117 (modified, in part, on other grounds by 1979 Op. Att'y Gen. No. 79-034) (a lease for years is a continuing contract); 1965 Op. Att'y Gen. No. 65-126 (a lease with an option to purchase is a continuing contract); 1960 Op. No. 1304 (a five-year irrevocable rental agreement for the acquisition of mechanical office equipment is a continuing contract); 1941 Op. Att'y Gen. No. 4006, p. 585 at 587 (a contract of insurance for a period of five years, under which county commissioners were obligated to pay premiums annually, would be a continuing contract); 1928 Op. Att'y Gen. No. 2355, vol. III, p. 1733 (a contract for the transportation of pupils is a continuing contract). I conclude, therefore, that, for purposes of R.C. 5705.41(D), a contract that comes within the common definition of a divisible contract is a "continuing contract."

1958 Op. No. 1604 also concludes that a contract for the purchase and sale of real estate cannot be considered a divisible or continuing contract since "[d]elivery of a deed begins and ends with the single act, and even though payments may be spread out over a number of installments there is no corresponding continuing performance on the part of the grantor." 1958 Op. No. 1604 at 28. Accord, 1928 Op. Att'y Gen. No. 2656, vol. III, p. 2235 (a contract for the purchase of a building with a portion of the purchase price payable upon the execution of the contract and the remainder payable at the end of two years is not a continuing contract). See also Op. No. 65-30; 1933 Op. Att'y Gen. No. 1041, vol. II, p. 1063. The conclusion that an installment purchase is not a divisible contract is consistent with the definition of a divisible contract that is discussed above.¹

The General Assembly has, by statutory enactment, designated as continuing contracts certain contracts that might not be categorized as divisible contracts. Clearly, any contract that has, by statute, been designated as a continuing contract must be considered a continuing contract for purposes of R.C. 5705.41(D). See, e.g., R.C. 154.06(D) (authorizing the Ohio Public Facilities Commission to enter into leases or other agreements with governmental agencies, authorizing such governmental agencies to enter into leases and agreements, and providing that any agreement of such an agency "to make rental, use, or other payments or payment of purchase price, in installments or otherwise, or repayments to or on account of the commission and the obligations issued by the commission, shall not be deemed to constitute indebtedness, bonded or otherwise...of such governmental agency for...any...purpose" and that "such leases and agreements requiring payments beyond the current year are continuing contracts for the purposes of" R.C. 5705.41 and 5705.44); R.C. 3313.37(B)(5) (authorizing a board of education to acquire office equipment "by purchase, by lease, by installment payments, by entering into lease-purchase agreements, or by lease with an option to purchase" and providing that, "[i]f the purchase price is to be paid over a period of time, the contract setting forth the terms of such purchase shall be considered a continuing contract pursuant to [R.C. 5705.41], and such payments shall not extend for a period

¹ In concluding that an installment purchase of real estate is not a continuing contract, 1958 Op. Att'y Gen. No. 1604, p. 22, considered also the fact that there was at that time no statutory authority for a board of education to undertake an installment purchase of real estate. Accord, 1958 Op. Att'y Gen. No. 1879, p. 181; 1957 Op. Att'y Gen. No. 398, p. 118. See also 1965 Op. Att'y Gen. No. 65-30; 1961 Op. Att'y Gen. No. 2456, p. 471; 1958 Op. Att'y Gen. No. 2820, p. 597. Authority for the board of education of a school district other than a county school district to purchase lands by installment payments was granted by 1961 Ohio Laws 463-64 (Am. S.B. 447, eff. Oct. 12, 1961) (amending R.C. 3313.37). R.C. 3313.37 as now in effect authorizes boards of education of school districts other than county school districts to make installment purchases of lands and of office equipment and specifies that certain purchases of office equipment are to be considered continuing contracts. See 1986 Op. Att'y Gen. No. 86-031. See also 1964 Op. Att'y Gen. No. 1522, p. 2-419.

of more than five years" and may be made from funds available for operating purposes); R.C. 3313.373 (stating that where a "shared-savings contract" for energy savings measures extends beyond the fiscal year, the contract is a continuing contract for purposes of R.C. 5705.41(D)).

I am aware that certain opinions of prior Attorneys General have found that contracts for installment purchases² or lease-purchases of real estate by a county pursuant to R.C. 307.02 (formerly G.C. 2433) are continuing contracts for purposes of R.C. 5705.41(D) (formerly G.C. 5625-33) on the basis that R.C. 307.02 authorizes such purchases, even though R.C. 307.02 contains no reference to the term "continuing

² I note that, in situations involving purchases by installment payments, it may be appropriate to consider Ohio Const. art. XII, §11, which provides that, when bonded indebtedness is created, the enabling legislation must provide for the levy of a tax for the liquidation of the debt. Ohio Const. art. XII, §11 states:

No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

See State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972) (holding that, since the lease agreement in question was an installment purchase, the entire contract price constituted a present indebtedness of the city under Ohio Const. art. XII, §11); 1986 Op. Att'y Gen. No. 86-031; 1985 Op. Att'y Gen. No. 85-008 at 2-31 n. 6; 1984 Op. Att'y Gen. No. 84-050; 1980 Op. Att'y Gen. No. 80-042 at 2-178 ("[i]t is likely that, upon entering the installment purchase contract..., the county would incur bonded indebtedness within the meaning of Ohio Const. art. XII, §11 in the amount of the total contract price"). Cf. R.C. 154.06(D); R.C. 3313.37(B)(2) (authorizing a board of education to purchase lands by, inter alia, installment payments and providing that "if the purchase price is to be paid over a period of time, such payments shall not extend for a period of more than five years, and a special tax levy shall be authorized by the voters of the school district in accordance with [R.C. 5705.21] to provide a special fund to meet the future time payments"); R.C. 3313.37(B)(5). See generally 1963 Op. Att'y Gen. No. 167, p. 273 at 275 ("[t]he use of the so-called continuing contract was made possible by the enactment of [R.C. 5705.41] in 1927 (112 Ohio Laws, 391 (406)). This was done to avoid any possibility of conflict with Section II, Article XII of the Constitution of Ohio"); 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").

contract" or to R.C. 5705.41. See 1964 Op. Att'y Gen. No. 1524, p. 2-428 (finding that an agreement for the installment purchase of real estate under R.C. 307.02 was a contract running beyond the termination of the fiscal year in which it was made for purposes of R.C. 5705.44, and, thus, that when the contract was made certification was required for only such amounts as were due during that fiscal year, in accordance with R.C. 5705.41(D)); 1959 Op. Att'y Gen. No. 451, p. 220 (indicating that a lease-purchase agreement under R.C. 307.02 was subject to the provision of R.C. 5705.41 that, in the case of contracts which are to be performed over a period of years, certification of the availability of funds for the first year is required); 1942 Op. Att'y Gen. No. 5184, p. 383 (finding that a contract for the installment purchase of real estate under G.C. 2433 (now R.C. 307.02) was a contract running beyond the termination of the fiscal year in which it was made for purposes of G.C. 5625-36, predecessor to R.C. 5705.44); 1938 Op. Att'y Gen. No. 2491, vol. II, p. 1078 (finding that a contract for the purchase of real estate by installment payments under G.C. 2433 (now R.C. 307.02) was a contract running beyond the fiscal year in which it was made for purposes of G.C. 5625-36, predecessor to R.C. 5705.44, and created an exception to G.C. 5625-33, predecessor to R.C. 5705.41). Such findings were discussed favorably in Op. No. 66-117 and Op. No. 65-126. On the basis of the analysis set forth above, I question these opinions. Contracts for installment purchases are not divisible contracts. See Op. No. 65-30 at 2-72 ("[a]n installment contract...is an agreement for present performance with payment to be made in the future at designated times"). Further, it does not appear to be clearly indicated by the language of R.C. 307.02 that contracts for installment purchases entered into pursuant to its provisions are to be treated as continuing contracts. Compare R.C. 307.02 with, e.g., R.C. 154.06(D) and R.C. 3313.37(B)(5). See also 1985 Op. Att'y Gen. No. 85-008 at 2-31 n. 6; note 2, supra.

In response to your first question, I conclude that the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. It is, of course, clear that a contract that would fit within one of these categories may, by appropriate statutory language, be excluded from the provisions of R.C. 5705.41(D). See, e.g., R.C. 307.04 ("[t]he board of county commissioners may...award contracts for supplying [any county] building with light, heat, or power for any period of time not exceeding ten years. Sections 5705.41 and 5705.44 of the Revised Code shall not apply to any such contracts"). The determination as to whether a particular contract is a continuing contract for purposes of R.C. 5705.41(D) must be made on a case-by-case basis.

Your second question asks: "What constitutes a ['per unit' contract] as that term is used in [R.C. 5705.41(D)]? In what respects, if any, does a ['per unit' contract] differ from a 'continuing contract'?" No definition of a "per unit" contract is provided by statute. The term is used in R.C. 5705.41(D) in the context of "a contract...entered into upon a per unit basis." In common understanding, see R.C. 1.42, this term refers to a contract that sets forth a price for each unit of a particular item and states that such a price will be paid for each unit of the item that is provided. The court in Northeastern Road Improvement Co. v. Chester Township Board of Trustees, No. 1254, slip op. at 3 (Ct. App. Geauga County Aug. 22, 1986) (unreported), found that the contract at issue in

that case was entered into on a per unit basis for purposes of R.C. 5705.41(D) and described the contract as follows: "the contract...was a unit price contract, meaning that while estimated quantities of materials served to fix the contract price, the actual amount of materials used were to be measured in determining final payment." See also McMichael v. Van Ho, 8 Ohio Misc. 281, 219 N.E.2d 831 (C.P. Paulding County 1966). See generally R.C. 6103.22 (discussing a contract that provides "in lieu of all other payments an agreed price per unit for water furnished"). I conclude, therefore, that a contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided. A per unit contract is a continuing contract for purposes of R.C. 5705.41(D) if it is a divisible contract or if it is designated by statute as a continuing contract. See note 4, infra.

Your third question inquires about the differences in the manner in which a continuing contract and a per unit contract are to be administered under R.C. 5705.41(D). The language of that statute calls for certain procedures. With respect to continuing contracts, R.C. 5705.41(D) states that no subdivision or taxing unit shall make a contract without a certificate of the fiscal officer that, "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, 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." With respect to per unit contracts, R.C. 5705.41(D) makes provision for estimating the total amount to become due, and states that such a contract may be entered into if the appropriation covers the amount estimated as becoming due during the current year. R.C. 5705.41(D) provides further that, in such circumstances, the certificate of the fiscal officer based upon the estimate constitutes sufficient compliance with the law requiring a certificate. Thus, in each of the cases with which you are concerned, the contract may be entered into if there is an appropriation covering the amount required, or estimated as necessary,³ to meet the obligation due during the current year.⁴

³ 1974 Op. Att'y Gen. No. 74-043 considered a contract under which a board of education was to pay a certain percentage of gross sales as operating costs of a food service program. Op. No. 74-043 stated that certification could not be made under R.C. 5705.41 and R.C. 5705.412 unless the contract contained a total maximum price that could become due under the contract. I note that the portion of R.C. 5704.41(D) that provides for an estimate of the amount that may become due under a per unit contract permits certification in circumstances in which the contract does not itself contain a maximum amount that may become due and, to this extent, qualify the analysis set forth in Op. No. 74-043.

⁴ In 1940 Op. Att'y Gen. No. 1695, vol. I, p. 9, my predecessor considered a "requirement contract" under which a city agreed to purchase all of the materials of designated types that it might need during the ensuing

Your fourth question asks: "When does a contract 'run beyond the termination of the fiscal year' in which it was made, in terms of [R.C. 5705.44]?" R.C. 5705.44 states:

When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease 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 the next year as a fixed charge.

The certificate required by section 5705.41 of the Revised Code as to money in the treasury shall not be required for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility, but in the case of any such contract made without such certification, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable, except out of such earnings.

On its face, R.C. 5705.44 appears to apply to all contracts or leases that "run beyond the termination of the fiscal year in which they are made"--that is, to any contract or lease that encompasses time periods from more than one fiscal year. R.C. 5705.44 is, however, in pari materia with R.C. 5705.41 and should be read together, and harmonized, with that section. See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956).

As discussed in 1958 Op. No. 1604, both R.C. 5705.41 (formerly G.C. 5625-33) and R.C. 5705.44 (formerly G.C. 5625-36) were derived from G.C. 5660, which stated, 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

year, at designated unit prices, to be delivered when and if requisitioned. 1940 Op. No. 1695 concluded that a certificate was required under G.C. 5625-33 (now R.C. 5705.41) for only the amount of the initial delivery requisitioned in the contract, and supported that conclusion by a finding that such a procedure had been established as a consistent administrative practice. The contract was not analyzed as a per unit contract. Without purporting to make a judgment as to the particular factual circumstances and local provisions involved in that opinion, I question that opinion and suggest that a requirement contract containing designated unit prices may be considered a "per unit" contract under R.C. 5705.41(D), so that certification is required of the amount estimated as becoming due upon the contract during the year in which it is made.

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.

1925 Ohio Laws 376. On the basis of this history, I conclude that the words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. The certification mentioned in the first sentence of R.C. 5705.44 is clearly the same as the certificate required by R.C. 5705.41(D). The second sentence of R.C. 5705.44 explains how funds for the following fiscal year are to be obtained. In order to harmonize R.C. 5705.41(D) and R.C. 5705.44, the reference in R.C. 5705.44 to "contracts or leases [that] run beyond the termination of the fiscal year in which they are made" must be construed as applying to "continuing contract[s] to be performed in whole or in part in an ensuing fiscal year," as that language is used in R.C. 5705.41(D).⁵

⁵ I am aware of the following language that appears in 1928 Op. Att'y Gen. No. 1678, vol. I, p. 316 at 317 and was quoted favorably in 1957 Op. Att'y Gen. No. 898, p. 372 at 375:

Reading...Sections 5625-36 and 5625-33, General Code [now R.C. 5705.44 and 5705.41], together, it seems clear that the words "contracts or leases running beyond the termination of the fiscal year in which they are made" [refer] 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.

As was discussed by my predecessor in 1980 Op. Att'y Gen. No. 80-060, at 2-237 through 2-238, efforts have been made to restrict the application of R.C. 5705.41(D) to tax revenue, and to exclude non-tax revenue from its provisions. Those efforts have, however, been rendered nugatory by the existence of certain statutory exceptions to the requirement of certification under R.C. 5705.41(D),

Your fifth question asks whether continuing contracts and per unit contracts are within the scope of R.C. 5705.44. It follows directly from the analysis set forth above that continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made. See 1985 Op. Att'y Gen. No. 85-043 at 2-153 n. 2 (stating that continuing contracts are subject to R.C. 5705.44).

Your sixth question asks:

If a political subdivision or taxing district subject to [R.C. 5705.41(D)] enters into a contract or places an order for goods or services where it is either expressly or implicitly provided that the delivery of the...goods or services will not take place [until] the ensuing fiscal year and that payment is not due and will not be paid until delivery, must the fiscal officer of the taxing authority certify the availability of any funds at any time?

Your eighth question⁶ asks, in connection with the circumstances described in question six, what actions must be taken by the fiscal officer or other representatives of the political subdivision or taxing district in an ensuing fiscal year.

It should be noted, first, that a contract is not considered to be a continuing contract simply because it carries over from one year to the next. See generally 1933 Op. No. 1041. A contract is a continuing contract for purposes of R.C. 5705.41(D) if it is a divisible contract or if it is designated by statute as a continuing contract. A contract that calls for a single order of goods or the performance of a single service is not a continuing contract unless it is so designated by statute.

If the contract under consideration in your sixth question is a continuing contract, then, under R.C. 5705.41(D), in the year in which the contract is made the fiscal officer need certify the availability of only such amount as is required to

such as the exception currently set forth in the second paragraph of R.C. 5705.44 "for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility," and by case law holding that the certification requirement of R.C. 5705.41(D) is applicable to any expenditure of public funds. See, e.g., Pincelli v. Ohio Bridge Company, 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966); State v. Kuhner & King, 107 Ohio St. 406, 140 N.E. 344 (1923). In accordance with Op. No. 80-060, I find that R.C. 5705.41(D) and R.C. 5705.44 may, in appropriate circumstances, be applicable to funds derived from sources other than taxation, and I overrule 1957 Op. No. 898 and 1928 Op. No. 1678 to the extent that they are inconsistent with this conclusion.

⁶ Your seventh question concerns R.C. 5705.412, which is applicable only to school districts. For ease of discussion, I shall first address the questions that relate generally to R.C. 5705.41(D) and shall then consider your seventh question.

meet the obligation in that fiscal year. If no goods or services are to be delivered during that year and no payments are due during that year, the fiscal officer need not certify any amount as being available that year. Pursuant to R.C. 5705.44, the amount of the obligation under such a contract remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.

From the phrasing of your sixth question it appears, however, that the contract in question is not a continuing contract, but is simply a contract to be performed in the following fiscal year. Such a contract is not subject to the exception applicable to continuing contracts. It comes, instead, within the general rule set forth in R.C. 5705.41: "No subdivision or taxing unit shall:...(D)...make any contract...unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation...has been lawfully appropriated for such purpose and is in the treasury or in process of collection...." Thus, the entire amount due under such a contract must be certified as available when the contract is entered into, even though such amount may not be due until the following fiscal year. See generally 1933 Op. No. 1041.

The procedure to be followed when making payment under a contract that is not a continuing contract during a year subsequent to the year in which the contract was made was discussed in Op. No. 85-043. R.C. 5705.41 sets forth a procedure for furnishing a certificate in a subsequent year, if none was furnished as required when the contract was made, and provides that such certificate must state that there was at the time of the making of the contract and at the time of the execution of the certificate a sufficient sum appropriated for the purpose of the contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.⁷ If a certificate was furnished as required, payment on the contract may be made in a subsequent year, since the amount so certified becomes encumbered and may not be used for other purposes. On this point, Op. No. 85-043 states, at 2-152 through 2-153:

When the availability of funds is certified under R.C. 5705.41(D) prior to the making of a contract or order for the expenditure of funds, the funds so certified are considered to be encumbered and remain available in subsequent years for the expenditure for which they have been certified. See generally City of Findlay v. Pendleton, 62 Ohio St. 80, 88, 56 N.E. 649, 650 (1900) ("[t]he filing of the proper certificate would have tied up the money in the treasury to be used only for the payment of those fees"); 1933 Op. Att'y Gen. No. 1041, vol. II, p. 1063 at 1064-65 ("the amount so certified becomes at once encumbered for the purpose of meeting the contract and cannot be spent or

⁷ Since you have inquired only about the actions that should be taken to certify available funds when a contract is entered into, I am not providing a detailed discussion of steps that may be taken in subsequent years if such certification was not properly furnished.

certified against for any other purpose"); 1928 Op. Att'y Gen. No. 2465, vol. III, p. 1964 at 1967 ("where a certificate has once been issued, the mere expiration of the fiscal year does not remove the encumbrance so as to make the funds so certified available for other purposes").

R.C. 5705.40 states, in part:

Any appropriation ordinance or measure may be amended or supplemented, provided that such amendment or supplement shall comply with all provisions of law governing the taxing authority in making an original appropriation and that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation. Transfers may be made by resolution or ordinance from one appropriation item to another. At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations; provided that funds unexpended at the end of such fiscal year previously appropriated for the payment of obligations unliquidated and outstanding need not be reappropriated, but such unexpended funds shall not be included by any budget making body or board or any county budget commission in estimating the balance available for the purpose of the next or any succeeding fiscal year. (Emphasis added.)

It is clear from this provision that, once an obligation has been certified against an appropriation, that appropriation may not be reduced below an amount sufficient to cover such obligation. At the close of a fiscal year, the unencumbered balance of each appropriation shall revert to the fund from which it was appropriated and shall be available for future appropriations. Encumbered funds do not so revert. They remain available for the obligations for which they have been certified. See 1951 Op. Att'y Gen. No. 640, p. 379 (syllabus, paragraph 2) ("[t]he unencumbered and unexpended balance remaining in the annual operating fund of a village fire department at the end of the fiscal year may not be retained in such fund but must revert to the general fund from which it was appropriated"); 1950 Op. Att'y Gen. No. 1554, p. 148; 1949 Op. Att'y Gen. No. 290, p. 67; 1928 Op. No. 2465.

Thus, once the funds have been certified as available, they need not be certified again in a subsequent year.

Your ninth question asks to what extent, if any, the answer to question six is altered "if the political subdivision or taxing district cannot, in good faith, determine whether the delivery of the goods or services and the corresponding

obligation to make payment will arise in the current or in an ensuing fiscal year." As discussed in connection with question six, it appears that the contract in question is not a continuing contract. As a result, the time of delivery and the time of payment make no difference. The amount due under such a contract must be certified as available when the contract is made.

If, however, the contract considered in the ninth question is a continuing contract, then it is necessary to consider whether it is a "continuing contract to be performed in whole or in part in an ensuing fiscal year," so as to come within the exception set forth in R.C. 5705.41(D). You have described a situation in which it cannot, in good faith, be determined whether the delivery of the goods or services and the obligation to make payment will arise in the current fiscal year or in an ensuing fiscal year. In such a situation, it is also impossible to determine, in good faith, whether the contract is to be performed in whole or in part in an ensuing fiscal year. By its terms, the provision of R.C. 5705.41(D) pertaining to continuing contracts applies only "in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year." Where there is uncertainty as to when a contract is to be performed, the contract does not fit within the category of contracts "to be performed in whole or in part in an ensuing fiscal year." Thus, the exception established by R.C. 5705.41(D) for continuing contracts that are to be performed in an ensuing fiscal year is not applicable. See generally State ex rel. Keller v. Forney, 108 Ohio St. 463, 467, 141 N.E. 16, 17 (1923) ("[t]he rule is well and wisely settled that exceptions to a general law must be strictly construed....[T]he presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law"). Rather, the fiscal officer must assume that the entire amount of the obligation will become due in the current fiscal year and must certify the entire amount due under the contract as available during the fiscal year in which the contract is made. See generally 1928 Op. Att'y Gen. No. 2708, vol. III, p. 2346.

Your tenth question asks:

What are the responsibilities of the fiscal officer and the taxing authority of a political subdivision or taxing district if a contract contemplates delivery of goods or services in the current fiscal year but expressly provides for payment of the corresponding obligation in an ensuing fiscal year?

As discussed above, where a contract is not a continuing contract, R.C. 5705.41(D) requires that the amount needed to meet the obligation be certified as available when the contract is made. The fact that payment will not be made until an ensuing fiscal year is irrelevant. My predecessor considered a contract of this sort in 1928 Op. No. 2708 and stated, at 2348:

I have not overlooked the portion of G.C. 5625-33(d) [now R.C. 5705.41(D)] which constitutes an exception where there is a continuing contract to be performed in whole, or in part, in an ensuing fiscal year to the effect that the fiscal officer need not certify as to the appropriation and availability of the funds except as to the amount required to meet the contract in the fiscal year in which it is made. In

this instance, however, the contract is to be immediately performed, except that it is proposed to withhold payment until after the end of the fiscal year of 1928. I do not believe that this kind of contract is contemplated by the exception above noted. The local authorities cannot, by an arrangement such as is contemplated here, actually have services performed during one fiscal year and postpone payment therefor until the succeeding fiscal year, thereby encumbering the available funds of such succeeding year for the purpose of providing for the expenses legitimately chargeable to the previous year. That is to say, I believe that it clearly is the intent of the provisions of [G.C. 5625-33(d)] to require an appropriation and certificate for all expenditures to be made for contracts to be performed within the fiscal year.

Where a contract is a continuing contract, R.C. 5705.41(D) requires that the fiscal officer certify the availability of the amount required to meet the obligation in the fiscal year in which the contract is made. Your question refers specifically to the obligation corresponding to the goods or services provided in the year in which the contract is made. Such obligation must be considered as having been incurred in the year in which the goods or services were delivered and the amount required to meet that obligation must be certified as available in that year.

Your eleventh question asks whether the answer to question ten is altered "if the contract is silent as to the time of payment but it is the intention of the political subdivision or taxing district to delay payment to an ensuing fiscal year." The answer is not altered. Where a contract is not a continuing contract, the entire amount due under the contract must be certified as available when the contract is made, regardless of when payment is to be made. Where a contract is a continuing contract, the amount required to meet the obligation incurred in the fiscal year in which the contract is made must be certified as available in that year.

I turn now to your seventh question, which asks whether R.C. 5705.412 has an impact on the answer to question six as far as school districts are concerned. R.C. 5705.412 states, in part:

Notwithstanding section 5705.41 of the Revised Code, no school district shall adopt any appropriation measure, 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 treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal 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 for all the days set forth in its adopted school calendars for the current fiscal year and for a number of days in the succeeding

fiscal year equal to the number of days instruction was held or is scheduled for the current fiscal year, except that a certificate attached to an appropriation measure under this section shall cover only the fiscal year in which the appropriation measure is effective and shall not consider the renewal of an existing levy as the authority to levy taxes that are subject to appropriation in the current fiscal year unless the renewal levy has been approved by the electors and is subject to appropriation in the current fiscal year....Every contract made, order given, or schedule adopted or put into effect without such a certificate shall be void, and no payment of any amount due thereon shall be made....

....
This section does not apply to any contract, order, or increase in any wage or salary schedule that is necessary in order to enable a board of education to comply with division (B) of section 3317.13 of the Revised Code, provided the contract, order, or increase does not exceed the amount required to be paid to be in compliance with such division.

....
This section does not require the attachment of an additional certificate beyond that required by section 5705.41 of the Revised Code for any purchase order, for current payrolls of, or contracts of employment with, regular employees or officers.
(Emphasis added.)

Your question is whether, if a school district enters into a contract or places an order for goods or services where it is either expressly or implicitly provided that the delivery of the goods or services will not take place until the ensuing fiscal year and that payment is not due and will not be made until delivery, the fiscal officer must certify the availability of funds at any time.

Pursuant to R.C. 5705.412, no school district may make any contract "unless there is attached thereto a certificate signed by the treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes...which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient" to enable the district to operate an adequate educational program for the current and succeeding fiscal years. An exception is made for contracts that are necessary to enable a board of education to comply with the minimum salary requirements imposed by R.C. 3317.13(B). Further, R.C. 5705.412 expressly provides that it "does not require the attachment of an additional certificate beyond that required by [R.C. 5705.41] for any purchase order, for current payrolls of, or contracts of employment with, regular employees or officers"; any contract that comes within this language is excepted from the requirement that a certificate be attached under R.C. 5705.412.⁸ No general exception is made, however, for

⁸ It is not clear precisely which contracts are excepted from the certification requirement of R.C. 5705.412 by virtue of this language, and I am not addressing that

continuing contracts. See generally R.C. 3313.37 (authorizing certain purchases by installment payments and specifying that some of such purchases are to be considered continuing contracts). Thus, R.C. 5705.412 provides that a school district may not enter into a contract without the certification required by the first paragraph of R.C. 5705.412 unless the contract is necessary for compliance with R.C. 3317.13(B) or unless the contract comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41. The certification requirement of R.C. 5705.412 applies in such instances regardless of when

issue. I note, however, that in Board of Education v. Maple Heights Teachers Association, 41 Ohio Misc. 27, 322 N.E.2d 154 (C.P. Cuyahoga County 1973), the court stated that the provisions of R.C. 5705.412 take precedence over those contained in R.C. 5705.41. The court construed the "additional certificate" language of R.C. 5705.412 as follows: "This must mean that as to any certificate specifically required by R.C. 5705.412, which is not required by R.C. 5705.41, the provisions of R.C. 5705.412 are mandatory and controlling. This certificate is the one required to be made by the clerk, president of the board, and superintendent, as set out in R.C. 5705.412." Id. at 33, 322 N.E.2d at 158. See also 1980 Op. Att'y Gen. No. 80-060 at 2-238 through 2-239. I note, further, that CADO Business Systems of Ohio, Inc. v. Board of Education, 8 Ohio App. 3d 385, 389, 457 N.E.2d 939, 943-44 (Cuyahoga County 1983), motion to certify overruled, No. 83-791 (Ohio Sup. Ct. Oct. 26, 1983), contains the following discussion:

To apply appellee's interpretation of the meaning of the language in R.C. 5705.412 [that no certificate is required under R.C. 5705.412 for any purchase order that comes within R.C. 5705.41(D)] would permit all purchase contracts by the board to be made under R.C. 5705.41 and would completely nullify the total force and effect of the lengthy statute spelling out the responsibilities of the [treasurer] and the president of the board of education and the superintendent of the district. Clearly, it was the legislative intent that R.C. 5705.412 should take precedence over R.C. 5705.41 and hold school officials to a higher degree of responsibility in expending public funds than other public officials. Confusion ensues and problems arise only because of the board's liberal interpretation of its powers and the questionable practice of using whichever of the two statutes suits its convenience.

....

It is the responsibility of the judiciary to place a strict construction on specific statutory provisions designed by the legislature to safeguard public funds. It is the responsibility of boards of education that if they intend to avail themselves of both the general provisions of R.C. 5705.41 as well as the specific provisions of R.C. 5705.412, that they clearly delineate the types of transactions to be handled under each statute respectively.

the goods or services are to be provided and regardless of when payment is to be made.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Except as otherwise provided by statute, the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. (1966 Op. Att'y Gen. No. 66-117 (modified, in part, on other grounds by 1979 Op. Att'y Gen. No. 79-034); 1965 Op. Att'y Gen. No. 65-126; 1964 Op. Att'y Gen. No. 1524, p. 2-428; 1959 Op. Att'y Gen. No. 451, p. 220; 1942 Op. Att'y Gen. No. 5184, p. 383; 1938 Op. Att'y Gen. No. 2491, vol. II, p. 1078, questioned.)
2. A contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided. (1940 Op. Att'y Gen. No. 1695, p. 9, questioned.)
3. A contract entered into on a per unit basis may be a continuing contract.
4. Pursuant to R.C. 5705.41(D), a continuing contract to be performed in whole or in part in an ensuing fiscal year may not be entered into unless the fiscal officer has certified that the amount required to meet the obligation 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.
5. Pursuant to R.C. 5705.41(D), a contract may not be entered into on a per unit basis unless the fiscal officer has certified the availability of sufficient funds to satisfy the amount estimated as becoming due upon the contract in the current year. (1974 Op. Att'y Gen. No. 74-043, qualified. 1940 Op. Att'y Gen. No. 1695, p. 9, questioned.)
6. The words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. (1957 Op. Att'y Gen. No. 898, p. 372 and 1928 Op. Att'y Gen. No. 1678, vol. I, p. 316, overruled in part.)
7. Continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made.

8. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which delivery of the goods or services will not take place until the ensuing fiscal year and payment will not be due until delivery, the fiscal officer need not, under R.C. 5705.41(D), certify any amount as being available during the fiscal year in which the contract is made. Pursuant to R.C. 5705.44, the amount of the obligation remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.
9. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which it cannot, in good faith, be determined whether delivery of the goods or services and the corresponding obligation to make payment will take place in the current fiscal year or in an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available during the fiscal year in which the contract is made.
10. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which certain goods or services are to be delivered in the current fiscal year but payment is not to be made until an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify as available during the year in which the contract is made the amount required to meet the obligation for goods or services delivered during that fiscal year.
11. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a contract that is not a continuing contract, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available when the contract is made, regardless of whether delivery of the goods or services and payment for such goods or services will take place during the fiscal year in which the contract is made or during a subsequent fiscal year. No certification of availability need be made in subsequent fiscal years.
12. Unless a contract is necessary for compliance with R.C. 3317.13(B) or comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41, no school district shall make the contract unless there is a certificate signed by the treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes which, when combined with the estimated revenue from all other sources available to the district at the time of

certification, are sufficient to enable the district to operate an adequate educational program for the current fiscal year and the succeeding fiscal year, regardless of when goods or services are to be provided under the contract and regardless of when payment is to be made.