July 27, 2005

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
160 High Street N.W. 4th Floor
Warren, Ohio 44481-1092

SYLLABUS: 2005-029

1. A board of county commissioners or other county contracting authority may not make personal contact with individual vendors to notify them of specific bidding opportunities, where the contract at issue is statutorily required to be competitively bid or the county is voluntarily using a competitive bidding process.

2. A board of county commissioners or other county contracting authority may develop a vendor notification list to publicize bidding opportunities, so long as the county also complies with all statutory notice requirements.

3. A board of county commissioners has no authority to adopt a system of preferences for county products and contractors.

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OPINION NO. 2005-029

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
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Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have asked whether a board of county commissioners that has issued, or intends to issue, an invitation to bid on a county contract may make personal contact (directly or through an agent) with individual vendors to notify them of the opportunity to bid. Such contact would be made with vendors that previously had expressed an interest, verbally or in writing, in a specific contract or bid, or where the board believed that a vendor might be interested in bidding based upon its prior contracts with the county. You have asked us to consider this question with regard to contracts that are statutorily required to be competitively bid, as well as those where the county voluntarily uses competitive bidding. You have also asked whether a board of county commissioners has the authority, in awarding a competitively bid contract, to grant a percentage preference to contractors that are located within the county.

In light of the following, we conclude that a county official may not make personal contact with individual vendors to notify them of a bidding opportunity, regardless of whether the contract is statutorily required to be competitively bid or the county voluntarily implements competitive bidding. The county may, however, maintain a vendor notification list as a means of providing notice to potential bidders, in addition to complying with statutory notice requirements. Lastly, the county has no authority to adopt a system of preferences for county vendors and products. To provide the proper context for analysis of your questions, we will first summarize the relevant statutory competitive bidding requirements, and explain how competitive bidding serves the public interest.

**County Bidding Requirements**

A county is required to obtain through competitively bidding "[a]nything to be purchased, leased, leased with an option or agreement to purchase, or constructed … by or on

behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code,[1] at a cost in excess of twenty-five thousand dollars," except as otherwise provided (footnote added). R.C. 307.86.[2] In order to comply with this requirement, a county must, *inter alia*, provide notice of the proposed project and available bidding opportunities, as specifically described in R.C. 307.87. The notice must be published "once a week for not less than two consecutive weeks preceding the day of the opening of bids in a newspaper of general circulation within the county." R.C. 307.87(A). The county may also place notice "in trade papers or other publications designated by it" or distribute notice "by electronic means, including posting the notice on the contracting authority's internet site on the world wide web." *Id.* (If the county posts notice on the world wide web, it need not publish the newspaper notice for a second week if the first week's notice meets certain requirements. *Id.*) The county must also "maintain in a public place in its office or other suitable public place a bulletin board upon which it shall post and maintain a copy of such notice for at least two weeks preceding the day of the opening of the bids." R.C. 307.87(C).

The county's notice must include certain statutorily prescribed information, such as a description of the subject of the proposed contract, the time and place for filing bids and for opening bids, the location where specifications can be obtained, and the existence of any system of preferences for products mined and produced in Ohio and the United States. R.C. 307.87(B). Award of a contract is made to the "lowest and best" bidder, although the county "may reject all bids." R.C. 307.90(A).[3]

**The Importance of Competitive Bidding**

Competitive bidding serves the public interest in a number of ways: "among the purposes of competitive bidding legislation are the protection of the taxpayer; prevention of

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[1] R.C. 307.92 defines "contracting authority," for purposes of R.C. 307.86-.91, as "any board, department, commission, authority, trustee, official, administrator, agent, or individual which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office, or board thereof." For ease of reference, we will use the term "county" to mean the board of county commissioners and other county contracting authorities.

[2] Counties are also subject to R.C. Chapter 153, which governs contracts for the construction of public improvements and taking bids therefor.

[3] *See State ex rel. Executone of Northwest Ohio, Inc. v. Commissioners of Lucas County*, 12 Ohio St. 3d 60, 61, 465 N.E.2d 416 (1984) (describing the "lowest and best bid" standard); *Rein Construction Co. v. Trumbull County Bd. of Commissioners*, 138 Ohio App. 3d 622, 629, 741 N.E.2d 979 (Trumbull County 2000) (same). *See also* R.C. 9.312(C) (a county or other political subdivision "required by law to award contracts by competitive bidding may by ordinance or resolution adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder," as described in that section).

excessive costs and corrupt practices; and the assurance of open and honest competition in bidding for public contracts so as to save the public harmless, as well as bidders themselves, from any kind of favoritism, fraud or collusion." *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management District*, 73 Ohio St. 3d 590, 602, 653 N.E.2d 646 (1995). Although these purposes ultimately may be inseparable, your questions lead us to focus on the value of competitive bidding in providing a fair process and level playing field for bidders and prospective bidders. *See Abel Converting, Inc. v. United States*, 679 F. Supp. 1133, 1138 (D.D.C. 1988) ("[w]hile Congress recognized the benefits to the government derived from competitive procurement, it commented that 'possibly the most important … benefit of competition is its inherent appeal of fair play'" (citation and internal quotation marks omitted)); *Rein Construction Co. v. Trumbull County Bd. of Commissioners*, 138 Ohio App. 3d 622, 629-30, 741 N.E.2d 979 (Trumbull County 2000) ("[t]he purpose of competitive bidding is to provide a fair and honest process for the awarding of public contracts").[4]

We are also guided in our analysis by the courts' recognition that the appearance of a fair and impartial bidding process may be as important as the reality of one. For example, in *NKF Engineering, Inc. v. United States*, 805 F.2d 372, 377-78 (Fed. Cir. 1986), the court held that a contracting agency did not abuse its discretion by disqualifying plaintiff's bid based on an appearance of impropriety in the bidding process, noting that sensitivity to the integrity of the bidding process was not irrational, and that plaintiff's disqualification from the process "focused on the integrity of the bidding system, and was part of an effort to keep the perception of it pure in the minds of the public." And, as explained in *Rein Construction Co. v. Trumbull County Bd. of Commissioners*, "[t]he real issue in this genre of cases goes beyond the specific merits of each bid. Instead the issue is one of public policy. Will the public's perception of the bidding process be positive or negative? *No amount of post-bidding explanation regarding the harmlessness of the deviation will cure the appearance of some sort of impropriety*" (emphasis added). *Id.*, 138 Ohio App. 3d at 630. *See also State ex rel. First National Bank v. Board of Education*, 103 Ohio St. 54, 57, 133 N.E. 482 (1921) ("[t]o insure full publicity [of proceedings in connection with competitive bidding] is to repel the inference of collusion or fraud, *or the appearance or suspicion of such*" (emphasis added)). Because of the significant interests served by competitively bidding public contracts, and the value in having the process *appear* fair, as well as *be* fair, courts have held that statutory requirements governing the bidding process are

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[4] Other authorities view protection and maximization of the public's tax dollars as the most important aspect of competitive bidding. *See, e.g., 60 Key Centre Inc. v. Administrator of General Services Administration*, 47 F.3d 55, 60 (2d Cir. 1995) ("the statutes and regulations that govern federal procurement policies 'are not designed to establish private entitlements to public business, but rather to produce the best possible contracts for the government in the majority of cases'" (internal quotation marks omitted)); 1939 Op. Att'y Gen. No. 115, vol. I, p. 138, 139 ("[i]t is generally recognized that statutes dealing with competitive bidding in connection with the letting of public contracts are enacted for the benefit and protection of the public and not in the interest of the bidders").

mandatory. *State ex rel. Schaefer v. Board of County Commissioners*, 11 Ohio App. 2d 132, 141, 229 N.E.2d 88 (Montgomery County 1967) ("[t]he Legislature must have believed that in the long run the public interest would best be served by the enactment of statutes requiring competitive bidding on public improvements. The Supreme Court has expressed the same opinion by making strict adherence thereto mandatory"). *See State ex rel. First National Bank v. Board of Education*, 103 Ohio St. at 58; *CommuniCare, Inc. v. Wood County Bd. of Commissioners*, 161 Ohio App. 3d 84, 2005-Ohio-2348, 829 N.E.2d 706 (Wood County), at ¶ 64 ("the statutory requirements for competitive bidding for county contracts are mandatory and cannot be waived").[5]

**Personal Contact with Individual Vendors**

We turn now to your question whether county officials may make personal contact with individual vendors about an invitation to bid. Notice is an essential component of any competitive bidding process. Obviously, the more vendors who know of a project and bid on it, the more competitive the process will be—hence, the strict notice requirements of R.C. 307.87.[6] For the reasons discussed above, however, the integrity of the process, and the appearance of integrity, must be kept intact. The precept that prospective bidders must have the same opportunity to learn of a proposal and secure the bid is crucial to a process that is fair in both actuality and perception. *Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Authority*, 67 Ohio App. 3d 812, 819, 588 N.E.2d 920 (Cuyahoga County 1990) ("[i]nvitations to bid and specifications present a common basis for bidding and require competition, wherein each individual shall be free to act and have an equal opportunity to secure the bid"). More specifically, vendors must be given access to the same information and they must be given access to information at the same point in time. *Boger Contracting Corp. v. Board of Commissioners*, 60 Ohio App. 2d 195, 200, 396 N.E.2d 1059 (Stark County 1978) ("[w]here mandatory competitive bidding is required, it is axiomatic that every prospective bidder should have identical information upon which to submit a proposal"); 1991 Op. Att'y Gen. No. 91-002 at 2-12 ("an essential element of competitive bidding is that any system adopted 'invite competition and … prevent favoritism and fraud; to attain that object it is essential that the bidders, so far as possible, be placed on equal footing, and be permitted to bid on substantially

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[5] *See also State v. Freeman*, 20 Ohio St. 3d 55, 485 N.E.2d 1043 (1985) (upholding a county commissioner's conviction for dereliction of duty for knowingly voting to approve insurance contracts without competitive bidding, as (then) required by law, even though, according to the dissent, use of competitive bidding in that instance would have led to a lapse in the county's insurance coverage).

[6] *See Abel Converting, Inc. v. United States*, 679 F. Supp. 1133, 1141 (D.D.C. 1988) ("the absence of even one responsible bidder significantly diminishes the level of competition," especially when few bidders participate in a solicitation, or "when the absent bidder is the incumbent contractor since that contractor previously submitted the lowest bids").

the same proposition and on the same terms'" (citation omitted)). *Cf., e.g.*, R.C. 153.67(A) (public announcements soliciting statements of qualifications for professional design services must "[b]e made in a uniform and consistent manner"); 48 C.F.R. § 14.211(a) (2004) (prior to the solicitation of bids, "[r]eleases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another").

Nothing in statute explicitly prohibits county officials from making personal contact with individual vendors to inform them of bidding opportunities. However, such contact could, at the least, create the appearance of impropriety. Although such efforts might serve, in the absence of fraud or collusion, to enhance competition, they would also raise questions about the integrity of the bidding process since, by their very nature, such communications would not be open to public scrutiny or the scrutiny of competing vendors. We assume, of course, that the county would intend to treat all vendors equally. Within the context of a specific conversation, however, it is not difficult to imagine that a county official might inadvertently provide more information, insight, or other advantage to one contractor than to others. Since personal contact would be involved, some contractors presumably would be informed of the opportunities before others. Or, a vendor might misconstrue the county's contact as preferential treatment or as an implied promise—conversely, a vendor who was not contacted could charge favoritism.

We recognize that there are a limited number of instances where personal contact with vendors (either individually or in a group setting) has been deemed beneficial to the bidding process and sanctioned by agency rule.[7] Personal notice of the opportunity to bid is not one of them, however, and in light of the risks to the integrity of the process associated therewith, we

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[7] *See, e.g.* 2 Ohio Admin. Code 123:5-1-07(A)(2) (an invitation to bid issued by the state Department of Administrative Services (DAS) must include "instructions governing communications, including but not limited to, the name, title and telephone number of the person(s) to whom questions concerning the response should be directed"); rule 123:5-1-07(C) (DAS may hold conferences prior to the issuance of an invitation to bid (ITB) "to discuss proposed bid specifications," and conferences after issuance of the ITB "to explain the procurement requirements"); rule 123:5-1-07(G) (if DAS believes a bid response contains a mistake, it "will request the bidder to confirm the bid response"). *Cf.* 2 Ohio Admin. Code 153:1-1-05(D) (with regard to selection of professional design firms, after firms are determined to be qualified, but prior to deciding which is the "most qualified," a "scope clarification meeting shall be conducted with the firms listed [as qualified].… Any questions must be resolved at this meeting and shared with all participants, precluding any further contact with the committee" that is reviewing and evaluating the statements of qualifications). *See also Cedar Bay Construction, Inc. v. City of Fremont*, 50 Ohio St. 3d 19, 552 N.E.2d 202 (1990) (city did not abuse its discretion by holding a meeting with a bidder, after all bids had been received but before the contract was awarded, to clarify that the bidder's proposal met the contract requirements).

decline to conclude that a county has the discretion to make personal contact with potential bidders.

**Vendor Notification List**

This does not mean, however, that the county cannot take steps, in addition to those mandated by R.C. 307.86 and R.C. 307.87, to more fully advertise bidding opportunities. You have mentioned that R.C. 307.86(F) and (I) explicitly authorize a contracting authority to keep a special notification list for issuers of insurance policies and health care plans, and for prospective lessors of real property, and you wish to know whether the county is precluded from using a similar system for other types of contracts.

By way of background, purchases of insurance policies or contracts and health care plans, and leases for real property are exempt from competitive bidding under R.C. 307.86—the General Assembly has determined that a different process, where the county seeks proposals and negotiates with those who respond, is more appropriate for these types of transactions. Although a county is not required to competitively bid these types of contracts, and thus need not comply with the publication and posting provisions of R.C. 307.87, the General Assembly has provided for the county to maintain a vendor notification list as a suitable alternative for providing notice.[8] Specifically, any issuer of an insurance policy or health care plan, and any prospective lessor of real property, may have its "name and address, or the name and address of an agent, placed on a special notification list to be kept by the contracting authority, by sending the contracting authority that name and address." R.C. 307.86. The contracting authority is then required to "send notice to all persons listed on the special notification list," and such notices must "state the deadline and place for submitting proposals." *Id.* The notices must be mailed at least six weeks prior to the deadline for submitting proposals. *Id.* Every five years the contracting authority may review the list and remove any person's name after mailing the person notification of his removal. *Id.*

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[8] Under the exception for insurance policies and contracts and health care plans, the county requests issuers to submit proposals setting forth the coverage and costs, and negotiates with the issuers to purchase the policies, contracts, or plans "at the best and lowest price reasonably possible." R.C. 307.86(F). Under the exception for leases for real property, the county develops requests for proposals, gives notice "in a manner substantially similar" as the procedure described in R.C. 307.87, and negotiates with the prospective lessors "to obtain a lease at the best and lowest price reasonably possible considering the fair market value of the property and any relocation and operational costs that may be incurred during the period the lease is in effect." R.C. 307.86(I).

There is no reason to conclude that the express provision of this type of notification system for certain types of no-bid contracts acts to constrain the county from using the same or a similar type of notification list for contracts that are required to be bid, *so long as the county also complies with the notice requirements of R.C. 307.86 and R.C. 307.87.* Such additional efforts would promote competition while providing an open process, subject to scrutiny by the public and competing vendors, and a standardized, uniform system for providing the same information to vendors at the same time. Again, we emphasize, however, that adoption of a notification list would not excuse the county from complying in full with all applicable requirements of R.C. 307.86 and R.C. 307.87.

We note that the county would have the discretion to develop and maintain a vendor notification list as it deemed most appropriate, and would not be bound by the specifics of R.C. 307.86 if dealing with matters other than the procurement of insurance coverage or a lease for real property. (In addition to R.C. 307.86, the county may wish to review other statutory schemes for vendor notification lists such as R.C. 125.08, providing for the "competitive selection notification list" maintained by the state Department of Administrative Services.) Furthermore, outside the context of a particular invitation to bid, the county could be more active in developing an inclusive and comprehensive list by soliciting vendors to have their names included and using other means to build a list, such as the suggestions you originally proposed—automatically including the name of the last successful bidder, bidders that responded to recent notices for similar products or work, and other vendors that have expressed an interest in doing business with the county. It is incumbent upon the county, however, to act reasonably and objectively in developing and administering a list. The board of county commissioners or other contracting authority should adopt a resolution or other formal written policy setting forth the details of the notification system, and then comply with that resolution or policy. *See Abel Converting, Inc. v. United States* (requiring re-solicitation of bids where agency failed to comply with its own regulations requiring that previously successful bidders be added to its bidder mailing list). Furthermore, the county should be prepared to justify its methods and decision-making and to defend against possible charges of bias brought by vendors not included on the list.

**No-Bid Contracts and Voluntary Bidding**

You have also asked about soliciting potential bidders for contracts that are not required to be competitively bid. Under the terms of R.C. 307.86, contracts that are $25,000 or less in cost are not subject to competitive bidding; also, R.C. 307.86 provides various exceptions to the competitive bidding requirements, including the notice requirements of R.C. 307.87, for certain types of contracts over $25,000. You have stated that you advise the county to bid contracts that are less than $25,000, but over a certain threshold, such as $10,000 or $15,000, even though statute does not require it.

If the county chooses to use "competitive bidding" for a contract that is not statutorily required to be bid, it has the discretion to incorporate statutory requirements or develop other

reasonable bidding processes. As noted in 1983 Op. Att'y Gen. No. 83-034 at 2-133, "[w]hether a particular competitive bidding procedure is reasonable is a determination which must be made in light of the particular facts involved in each situation," and whether a particular method "may be found to constitute a reasonable manner of competitive bidding is dependent upon many factors." *See also Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash*, 106 Ohio App. 3d 608, 614, 666 N.E.2d 654 (Hamilton County 1995) (the use of "design-build" bidding constitutes competitive bidding since contractors "compete with each other in terms of price and design[,] [f]actors such as quality, service, performance and record are also part of the competitive process," and the "city's discretion in awarding a contract to the best design and cost is similar to the discretion provided under general state law to accept the 'lowest and best bidder'"). Regardless of the details, however, the process must be fair and perceived as fair. As explained above, personal contact by county officials with individual vendors prior to the submission of bids jeopardizes the appearance of fairness, if not the integrity of the process itself. These principles of competitive bidding are no less applicable to a process that is voluntarily adopted than to one mandated by statute.[9] Again, however, there is nothing to prevent the county from establishing a vendor notification list in keeping with the discussion above.

In some instances, a contract is not statutorily required to be competitively bid because of the nature of the procurement rather than the amount of the contract. If the county decides that it would be appropriate to use a more open selection process for such a no-bid contract, such as a request for proposals or a negotiated contract, it would obviously be required to comply with any statutory scheme applicable to that particular type of contract. *See, e.g.,* R.C. 9.33-.333 (contract for construction manager services); R.C. 153.65-.71 (acquisition of professional design services); R.C. 307.021 and .022 (lease of correctional facilities). In the absence of statutory parameters, the county must determine the type of process—including notification of its intent to seek proposals or other submissions—that is most appropriate for securing the type of goods or services involved—considering the importance of an observably fair process and the need for a more flexible process to secure qualified contractors and a suitable level of competition. *See, e.g.,* R.C. 125.071 (authorizing the state Department of Administrative Services (DAS) to "make

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[9] And, once adopted, the process must be adhered to as if it were a statutory mandate. *See Abel Converting, Inc. v. United States* (incumbent contractor entitled to preliminary injunction against award of contract to another company where GSA failed to comply with the mandatory duty it imposed upon itself to mail solicitations to incumbent contractors and to add previously successful bidders to its bidder mailing list); *Forest City Land Group v. Ohio Department of Mental Health*, C.A. Nos. 19079, 19080, 1999 Ohio App. LEXIS 1580 (Summit County March 31, 1999) (failure of the state department to follow its own request for proposals (RFP) constituted an abuse of discretion, and the trial court did not err in ordering injunctive relief to prevent the department from rejecting all proposals and issuing a second request for proposals, and to require the department to continue its negotiations with plaintiff in accordance with the first RFP).

purchases by competitive sealed proposal whenever the director determines that the use of competitive sealed bidding is not possible or not advantageous to the state" and setting forth the process therefor); 2 Ohio Admin. Code 123:5-1-08(C) (public notice of a request for proposals (RFP) will be provided to all prospective vendors registered with DAS pursuant to R.C. 125.08 "and/or any vendor known to the department to provide the requested supplies and/or services; or [t]o vendors who are known to the department to provide specialized services and/or supplies that are being requested in the RFP, whether or not such vendors are registered" pursuant to R.C. 125.08). *See also Forest City Land Group v. Ohio Department of Mental Health*, C.A. Nos. 19079, 19080, 1999 Ohio App. LEXIS 1580 (Summit County March 31, 1999); *Ohio Association of Consulting Engineers v. Voinovich*, 83 Ohio App. 3d 601, 615 N.E.2d 635 (Franklin County 1992); 1983 Op. Att'y Gen. No. 83-034. Again, the county should formally memorialize the process it intends to use, and then abide by its terms.

**Bid Preference for Local Vendors**

Your last question is whether a board of county commissioners may grant a preference to contractors who are located within the county.

By way of background, a board of county commissioners has the authority to adopt, if it chooses, the model system of preferences for U.S. and Ohio products and Ohio-based contractors that has been promulgated by DAS. R.C. 307.90(B).[10] *See* R.C. 125.11(E) (the director of DAS "shall publish in the form of a model act for use by counties, townships, municipal corporations, or any other political subdivision … a system of preferences for products mined and produced in this state and in the United States and for Ohio-based contractors"); 2 Ohio Admin. Code 123:5-1-11 (and appendix) (setting forth DAS' model system of preferences, "which may be used voluntarily by counties, townships, and municipalities for purchasing and public improvement

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[10] R.C. 307.90(B) reads:

> With respect to any contract for the purchase of equipment, materials, supplies, insurance, services, or a public improvement into which a county or its officers may enter, a board of county commissioners, by resolution, may adopt the model system of preferences for products mined or produced in Ohio and the United States and for Ohio-based contractors promulgated pursuant to division (E) of section 125.11 of the Revised Code. The resolution shall specify the class or classes of contracts to which the system of preferences apply, and once adopted, *operates to modify the awarding of such contracts accordingly*. While the system of preferences is in effect, no county officer or employee with the responsibility for doing so shall award a contract to which the system applies in violation of the preference system. (Emphasis added.)

contracts").[11] If a county adopts the model system of preferences, it must so state in its published bidding notices. R.C. 307.87(B)(6). Your question is whether the county may go beyond the state's model system of preferences and adopt a system of preferences for county products and contractors. We conclude that it may not.

As a creature of statute, the board of county commissioners has only those powers conferred by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). No statute expressly gives the board of county commissioners authority to adopt a system of preferences for county products and contractors. And, even though the board clearly has the implied authority to adopt reasonable qualifications for the vendors with whom it will do business,[12] any efforts the county might undertake to adopt a system of preferences for county vendors is problematic in two respects.

First, a basic principle of competitive bidding is that vendor qualifications adopted in the absence of express statutory authority may not unduly restrict competition, and unlike the county's other suggestions for promoting competition in this instance, a local preference system would undermine competition by narrowing the pool of potential bidders and limiting the county's discretion to award its contracts to the "lowest and best" bidder. As explained in 1997 Op. Att'y Gen No. 97-006, a county contracting authority "should make an effort to select types or categories of specifications that will encourage the submission of bids from a large pool of potential bidders, which will foster competition among the bidders to submit the best and lowest bid …. [o]therwise, the contracting authority may find itself open to the charge that it has acted unreasonably should it select types or categories of specifications that have the opposite effect, such that competition to submit the best and lowest bid is virtually eliminated because the pool of potential bidders has been narrowed to only a few suppliers of the equipment or apparatus in question." *Id.* at 2-38. *See also State ex rel. Davies Manufacturing Co. v. Donahey*, 94 Ohio St. 382, 386, 114 N.E. 1037 (1916) (where competitive bidding is required, the competition must "be open to everyone, as it was evidently the policy of the statute to require that current

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[11] Although use of the model system by political subdivisions is voluntary, R.C. 125.11(E), 2 Ohio Admin. Code 123:5-1-11, state agencies are required to give preference to Ohio and U.S. products and contractors. R.C. 125.09(C); R.C. 125.11; R.C. 153.012. *See also* R.C. 153.011 (use of domestic steel).

[12] For example, where a county is required to award contracts by competitive bidding, it may adopt a policy of "requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder" in accordance with R.C. 9.312. R.C. 9.312(C). The factors that a county may consider in determining whether a bidder is "responsible" include "the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly." R.C. 9.312(A).

requirements should be obtained at the lowest and best price for the same quality of work and materials"); *Natmar, Inc. v. State of Ohio*, No. 73AP-390, 1974 Ohio App. LEXIS 3510, at *4 (Franklin County May 17, 1974) ("when there is tailoring of [specifications] so as to unduly restrict and limit competition, there is a violation of the requirement that competitive bids be taken"). *Cf.* R.C. 125.09(A) (DAS may prescribe the terms of a competitively bid purchase, provided that all conditions and terms "shall be reasonable and shall not unreasonably restrict competition"). The reasonableness of a local preference policy may be especially questionable where the county is otherwise finding it difficult to attract qualified bidders.

Second, the statutory model system of preferences for U.S. and Ohio contractors acts as constricting authority upon any implied power the board of county commissioners might have to establish its own system of preferences. Typically, the enactment of a carefully constructed statutory scheme governing the manner in which an agency may act in a particular area will be deemed to constrict any implied authority the agency would otherwise have to carry out those express duties, and to limit the agency to operating only within the parameters of that statutory scheme. *See Perkins v. Bright*, 109 Ohio St. 14, 141 N.E. 689 (1923). As explained above, the General Assembly has provided a highly structured statutory scheme under which a county or other political subdivision may adopt a system of preferences based upon the geopolitical location of the product or contractor. Any county that wishes to implement a system of preferences for U.S. and Ohio contractors must adopt the model system that DAS is required by statute to develop—a county is not free to tailor a system of preferences for U.S. and Ohio contractors and products to meet its own priorities. If a county is not free to adopt its own system of preferences for U.S. and Ohio products and Ohio contractors—preferences that have the imprimatur of the General Assembly—certainly it would be unreasonable to conclude that a county may go beyond the model system to implement a system of preferences for county products and contractors.[13]

We are aware that courts have upheld the ability of municipalities to adopt a local preference or "residency" program under their constitutional home rule powers. In *J.A. Croson Co. v. City of Zanesville*, 88 Ohio App. 3d 100, 102, 623 N.E.2d 152 (Muskingum County 1993), the court of appeals upheld, as within the municipality's home rule power, a city ordinance giving a preference to bidders whose principal place of business was within the city, stating that,

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[13] The statutory establishment of a system of preferences for U.S. and Ohio businesses clearly demonstrates that, if the General Assembly had intended to authorize political subdivisions to adopt local preferences, it easily could have found the language to do so. *See also, e.g.*, R.C. 5119.31 (preference shall be given to bidders in localities where a mental health institution is located, "if the price is fair and reasonable and not greater than the usual price; but bids not meeting the specifications shall be rejected"). *See generally Lake Shore Electric Railway Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections).

"we view the local preference provision in the Zanesville local government bidding ordinance to be but a local application of the same state public policy inherent in R.C. 153.012 regarding preference to Ohio contractors in bidding for contracts which are in whole or in part funded by state funds." And, in *City of Dayton ex rel. Scandrick v. McGee*, 67 Ohio St. 2d 356, 360, 423 N.E.2d 1095 (1981), the court found that the city had abused its discretion in awarding a construction contract to the next-to-the lowest bidder on the basis that the bidder was a city company, since the criterion of residency was unannounced and applied only after the bids were opened, but opined that that the "evil here is not necessarily that 'resident' bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how 'many percentages' a bid may exceed the lowest bid and yet still qualify as the 'lowest and best' bid." *See also Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash*, 106 Ohio App. 3d at 613-14 ("the city, as a charter municipality, in the exercise of its powers of local self-government under Section 3, Article XVIII, Ohio Constitution, may, pursuant to its charter, enact a bidding process for improvements to public property which differs from the bidding process contained in the Ohio Revised Code").

Unlike municipalities, however, counties do not have the power to disregard state statute and provide for their own self-government.[14] While a municipality may, pursuant to its home rule powers, enact a bidding process that differs from that contained in statute, counties must abide by state statute. *See* 1983 Op. Att'y Gen. No. 83-042 at 2-162 ("[u]nlike the legislative authority of a city, a board of county commissioners is a creature of statute and, therefore, has only those powers expressly conferred by statute or necessarily implied therefrom"). Adoption of a system giving preference to products and contractors originating from a particular locale is clearly an exercise of authority that is dependent upon enabling legislation enacted by the General Assembly, or by a municipality pursuant to its constitutional home rule power.

Because a local preference system would restrict rather than enhance competition, and because the General Assembly has limited political subdivisions to the model system adopted by DAS giving preferences to U.S. and Ohio products and Ohio-based contractors, we conclude that the county has no authority to implement a system of preferences for county products and contractors.

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

1. A board of county commissioners or other county contracting authority may not make personal contact with individual vendors to notify them of specific bidding opportunities, where the contract at issue is statutorily

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[14] Counties are constitutionally empowered to adopt a charter through which they may exercise home rule authority. Ohio Const. art. X, §§ 3, 4. To date, only Summit County has chosen to do so.

required to be competitively bid or the county is voluntarily using a competitive bidding process.

2. A board of county commissioners or other county contracting authority may develop a vendor notification list to publicize bidding opportunities, so long as the county also complies with all statutory notice requirements.

3. A board of county commissioners has no authority to adopt a system of preferences for county products and contractors.

Respectfully,

JIM PETRO
Attorney General