April 3, 2012

The Honorable Michael T. Gmoser
Butler County Prosecuting Attorney
Government Services Center, 11th Floor
P.O. Box 515
315 High Street
Hamilton, Ohio 45012-0515

SYLLABUS: 2012-011

1. A county board of elections may lease a ballots on demand printer in implementing a ballots on demand voting system authorized by R.C. 3506.20.

2. Pursuant to R.C. 307.01(A) and R.C. 307.02, a board of county commissioners may lease equipment for use by a board of elections.

3. A board of elections is a "contracting authority" for purposes of R.C. 307.92.

4. R.C. 3501.301 authorizes a board of elections to contract for printing and furnishing supplies, other than the official ballots, required in R.C. 3501.30. R.C. 3501.301 is an exception to R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

5. R.C. 3505.13 sets forth requirements that a board of elections must follow when it contracts for the printing of official ballots. R.C. 3505.13 is a special provision that prevails over R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

MIKE DEWINE
★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2012-011

The Honorable Michael T. Gmoser
Butler County Prosecuting Attorney
Government Services Center, 11th Floor
P.O. Box 515
315 High Street
Hamilton, Ohio 45012-0515

Dear Prosecutor Gmoser:

You have requested an opinion about the authority of a board of elections and a board of county commissioners to lease equipment used in elections. You explain that the county board of elections wants to acquire a ballots on demand printer that the board will use to produce individual absentee ballots. You further explain that the ballots on demand printer is engineered to access a board of elections' county voter database, thereby making it possible to print a ballot that is specific to a named voter. You also ask us to address general questions about a board of county commissioners' authority to lease equipment for use by a board of elections, and competitive bidding requirements under R.C. Chapters 307 and 3501 governing the award of contracts by a county board of elections for printing services and supplies. Your specific questions are as follows:[1]

1. Does a board of elections have authority to lease a ballots on demand printer?

2. Does R.C. 307.01(A) authorize a board of county commissioners to lease election equipment for use by a board of elections?

3. Is a board of elections a "contracting authority," as that term is defined in R.C. 307.92?

4. If a board of elections is a contracting authority under R.C. 307.92,

    a. Do the bidding requirements for contracts for printing and furnishing supplies as set forth in R.C. 3501.301 supersede the bidding requirements in R.C. 307.86?

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[1] We have rephrased your questions for ease of discussion.

b. If a board of elections is required to comply with the bidding requirements of R.C. 3501.301, does the exclusion from those bidding requirements for a contract involving the printing of official ballots authorize a board of elections to let a contract for the printing official ballots without competitive bidding or, is such a contract still subject to the bidding requirements of R.C. 307.86?

A Board of Elections May Lease a Ballots on Demand Printer

In your first question you ask whether a board of elections has authority to lease a ballots on demand printer. A board of elections is a creature of statute and may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted. R.C. 3501.06 ("[t]here shall be in each county of the state a board of elections"); *Whitman v. Hamilton County Bd. of Elections*, 97 Ohio St. 3d 216, 2002-Ohio-5923, 778 N.E.2d 32, at ¶12; *State ex rel. Babcock v. Perkins*, 165 Ohio St. 185, 187, 134 N.E.2d 839 (1956); 2003 Op. Att'y Gen. No. 2003-036, at 2-297. A board of elections has a statutory duty to provide official ballots to a county's electors. *See* R.C. 3501.30(A) (requiring a board of elections to provide official ballots for each polling place); R.C. 3505.17 (requiring a board of elections to supply ballots as speedily as possible to a polling place if by accident or casualty ballots are lost, destroyed, or not delivered at the polling place, or additional ballots are required at the time the polls are open); *see also* R.C. 3501.11(F) (requiring a board of elections to contract for the printing of all ballots used in elections).

In 2006 the General Assembly enacted R.C. 3506.20 as part of comprehensive legislation intended, *inter alia*, to bring Ohio elections law into compliance with the federal Help America Vote Act of 2002, 42 U.S.C. §§ 15301, *et seq.* *See* 2005-2006 Ohio Laws, Part III 5551 (Am. Sub. H.B. 3, eff. May 2, 2006, with certain provisions eff. June 1, 2006, and Jan. 1, 2009). R.C. 3506.20 provides as follows:

> (A) As used in this section, "ballots on demand voting system" means a system that utilizes ballots printed as needed by election officials at the board of elections for distribution to electors, either in person or by mail.
>
> (B) No board of elections shall use a ballots on demand voting system unless each ballot printed by the system includes a tracking number.

The import of division (B) of R.C. 3506.20, albeit styled as a prohibition, is that a county board of elections is authorized to use a ballots on demand voting system. Nothing in the language of either R.C. 3506.20 or any other section in R.C. Chapter 3506 (voting and tabulating equipment), however, requires a county board of elections to use a ballots on demand voting system. Rather, the General Assembly has left to each county board of elections, in the reasonable exercise of its discretion, whether it will use a ballots on demand voting system within the county. *Cf.* R.C. 3505.11(B)(1) ("[a] board of elections may choose to provide ballots on demand"). A county of board of elections that does decide to use a ballots on demand voting system must ensure that each ballot printed by the system includes a tracking number. R.C. 3506.20(B).

Apart from defining a ballots on demand voting system, R.C. 3506.20(A), and requiring that a ballots on demand voting system employ ballot tracking number technology, R.C. 3506.20(B), the General Assembly has not instructed the county boards of elections on other aspects of a ballots on demand voting system. As in the case of the initial decision to use a ballots on demand voting system, the General Assembly expects each county board of elections to use its expertise and judgment in implementing that type of voting system, perhaps in recognition of the fact that elections in Ohio are conducted at the county level of government under the supervision of 88 county boards of elections. Implementation of a ballots on demand voting system will include decisions about the selection of a ballots on demand system and its component parts from among competing vendors, the manner of acquiring a ballots on demand voting system, and the extent to which a ballots on demand voting system will be situated and operated at polling places in designated voting precincts of the county. These decisions will, in turn, be influenced by any number of factors that will vary by county—whether there exists a genuine need for a ballots on demand voting system in a particular county, whether a county board of elections has the fiscal resources sufficient to acquire and operate a ballots on demand voting system, and whether the purposes served by a ballots on demand voting system may be accomplished by a more cost-effective voting system.

A ballots on demand printer may be an integral and essential component of a ballots on demand voting system. *See* EAC [United States Election Assistance Commission] Research Areas for the TGDC [Technical Guidelines Development Committee] VVSG [Voluntary Voting System Guidelines] Recommendations, National Institute of Standards and Technology (NIST) (Jan. 2009), available at http://www.eac.gov/assets/1/Page/NIST%20Response%20to%20Resolutions%20Adopted%20by%20EAC%20Boards.pdf (last visited March 12, 2012);[2] *Merriam-Webster's*

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[2] The United States Election Assistance Commission (EAC), 42 U.S.C. § 15321, was established by the Help America Vote Act of 2002 (HAVA) for the purpose of, *inter alia*, adopting voluntary voting system guidelines, serving as a national clearinghouse of information on federal election administration, and conducting studies and carrying out other activities to promote the effective administration of federal elections. 42 U.S.C. § 15322; *see* http://www.eac.gov (last visited March 12, 2012). The Technical Guidelines Development Committee (TGDC) was established by HAVA to assist the EAC in developing voluntary voting system guidelines. 42 U.S.C. § 15361(b)(1). If requested to do so by the TGDC, the Director of the National Institute of Standards and Technology (NIST), an agency within the United States Department of Commerce, 15 U.S.C. § 272, is required to provide the TGDC with technical support necessary for the TGDC to carry out its duties. 42 U.S.C. § 15361(e)(1).

In August 2007 the NIST delivered to the EAC voluntary voting system guidelines prepared by the TGDC. *EAC Research Areas for the TGDC VVSG* [Voluntary Voting System Guidelines] *Recommendations*, at 1, available at http://www.eac.gov/assets/1/Page/NIST%20Response%20to%20Resolutions%20Adopted%20by%20EAC%20Boards.pdf (last visited March 12, 2012). The EAC commenced a public comment period and conducted meetings with the EAC's Board of Advisors and Standards Board. *Id. See generally* 42 U.S.C. §§ 15341 *et seq.* (establishment, duties, and powers of

Collegiate Dictionary 342 and 1269 (11th ed. 2005) (the term "system" means "a group of devices … forming a network esp. for distributing something or serving a common purpose," and the term "device" means "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function"). A county board of elections that implements a ballots on demand voting system may thus find it necessary to acquire a ballots on demand printer as part of the ballots on demand voting system it decides to implement. And R.C. 3506.20 permits a county board of elections to determine the most appropriate means of acquiring a ballots on demand printer. *Fed. Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 541, 118 N.E. 103 (1917) ("[w]hen a statute clearly confers a grant of power to do a certain a thing, without placing any limitations as to the manner or means of doing it, certainly the grantee of such power is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly in the grantee's interests"), *appeal dismissed*, 248 U.S. 547 (1919); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) ("[w]here an officer is directed by the constitution or a statute of the state to

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Board of Advisors and Standards Board). In response to resolutions prepared by the EAC's Board of Advisors and Standards Board, the EAC identified six areas of research related to the TGDC's voluntary voting system guidelines and asked the NIST to conduct research on the feasibility and scope of impact in these six areas. *EAC Research Areas for the TGDC VVSG Recommendations*, at 1.

One of the six areas identified by the EAC was possible standards for ballots on demand systems. *Id.* In *EAC Research Areas for the TGDC VVSG Recommendations*, which was prepared in response to the EAC's request, the NIST found that no consensus exists about specifics of the term "ballots on demand," what it integrates with, how it works, and what problems it solves. *Id.* at 11; *see* David Flater, Ballot on Demand Requirements (2009) (PowerPoint presentation), http://www.nist.gov/itl/vote/dec-2009-tgdc-meeting.cfm (last visited March 2, 2012).

Apart from a point of commonality that ballots in a ballots on demand voting system are not produced in advance, specific details of a ballots on demand voting system vary. *EAC Research Areas for the TGDC VVSG Recommendations*, at 12. For example, the term "ballots on demand" may refer to a dedicated election management system application that produces additional ballots in the event that ballots prepared in advance are depleted, as a back-up voting mechanism if a direct recording electronic voting machine malfunctions, or as an accommodation for voters who may want a paper ballot. *Id.* at 11. "Ballots on demand" also may refer to a dedicated application, possibly integrated with an electronic pollbook, that prints a ballot when a voter is checked in based on a voter's registration information, or an electronically-assisted ballot marker that activates a correct style of ballot, collects the votes, and prints the completed ballot onto blank paper with no electronic record of the vote retained by the device. *Id.* at 12. The term "ballots on demand" also refers to a direct recording electronic voting machine with a ballot on demand feature that has the capability to send an activated ballot to a printer instead of displaying it on a touchscreen. *Id.* Likewise, the term "ballots on demand" includes ballots that are produced on demand by trained staff at remote locations for overseas voters, as well as legal absentee ballots printed by voters on their personal computers at home. *Id.*

do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

Purchasing, leasing, leasing with an option to purchase, renting, and borrowing are just several ways by which a county board elections may acquire a ballots on demand printer in order to implement a ballots on demand voting system. *Black's Law Dictionary* 26 (9th ed. 2009) ("acquisition" is "the gaining of possession or control over something"). A county board of elections thus may decide among several methods of acquiring a ballots on demand printer. As explained previously, that decision by the county board of elections will be informed by factors such as cost, availability, practicality, suitability, time constraints, and necessity.

Here you have asked about the board's lease of a ballots on demand printer. A lease is a method of acquiring a ballots on demand printer. 1997 Op. Att'y Gen. No. 97-009, at 2-54 (a board of county hospital trustees that has the authority under R.C. 339.03 to "acquire" real estate in order to obtain office space that will be leased to private physicians may "acquire" the real estate by means of a lease: "[r]ather than requiring the General Assembly to specifically consider and name each permissible means of obtaining property, it is appropriate to construe 'acquire' in its general sense to encompass the acquisition of facilities through the lease of real estate"); *Black's Law Dictionary* 970 (9th ed. 2009) (a "lease" is a "contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration"). Consequently, a county board of elections may lease a ballots on demand printer to implement a ballots on demand voting system authorized by R.C. 3506.20.

A Board of County Commissioners May Lease Election Equipment for Use by a Board of Elections

In your second question you ask whether R.C. 307.01(A) authorizes a board of county commissioners to lease election equipment for use by a board of elections. A board of county commissioners is a creature of statute with only those powers granted by statute or necessarily implied by those powers that are expressly granted. R.C. 305.01; *Elder v. Smith*, 103 Ohio St. 369, 370, 133 N.E. 791 (1921); 2010 Op. Att'y Gen. No. 2010-030, at 2-221. With regard to the expenditure of public moneys, a board of county commissioners "is permitted by law to expend public money only within the scope of its statutory authority and for a proper public purpose, within the reasonable exercise of the entity's discretion." 1997 Op. Att'y Gen. No. 97-043, at 2-268.

Pursuant to R.C. 307.01(A), a board of county commissioners "shall … provide equipment, stationery, and postage, as it considers reasonably necessary for the proper and convenient conduct of county offices." *See* 1996 Op. Att'y Gen. No. 96-015, at 2-60 ("[t]he language of R.C. 307.01 … grants the board of county commissioners a certain discretion in determining what equipment is necessary for county offices"); *see also Campanella v. Cuyahoga County*, 57 Ohio Misc. 20, 23, 387 N.E.2d 254 (C.P. Cuyahoga County 1977) ("R.C. 307.01 places a mandatory obligation on the board of county commissioners to provide equipment and facilities as it deems necessary for the proper and convenient conduct of county offices and as will result in expeditious and economical administration

of such offices"). Your question thus requires that we determine whether a board of elections is a county office for purposes of R.C. 307.01(A) and, if so, whether a board of county commissioners has discretion to lease equipment it considers reasonably necessary for the convenient conduct of a board of elections.

1981 Op. Att'y Gen. No. 81-015, at 2-56 to 2-57 (qualified on other grounds by 1990 Op. Att'y Gen. No. 90-074) offers us guidance regarding the status of a board of elections as a county office for purposes of R.C. 307.01(A). In that opinion the Attorney General discussed the relationship between a board of elections and a county as follows:

> R.C. 3501.06 establishes a board of elections in each county of the state. While each board of elections derives its authority from the state itself, R.C. 3501.11, it is empowered to exercise that authority only within the county where situated, and its expenses are paid from appropriations by the board of commissioners of that county. R.C. 3501.17. Thus, although the members of the board of elections, and the employees thereof, are subject to dismissal by the Secretary of State, see R.C. 3501.16, in all other respects the board of elections, as an entity, is operated and funded like any other county office or board.

Accord R.C. 309.09(A) (a county prosecuting attorney is the legal adviser of all county boards, including a board of elections); *see* 1999 Op. Att'y Gen. No. 99-028, at 2-186 (factors to consider when determining whether an entity is a county board: "(1) whether the boundaries of the entity are coextensive with the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and, (3) whether the entity is funded by or through the county"). Insofar as the expenses of a board of elections are paid from appropriations by a board of county commissioners from the county treasury, R.C. 3501.17(A), the authority of a board of elections is coterminous with the county where situated, *see* R.C. 3501.06; 1981 Op. Att'y Gen. No. 81-015, at 2-56, and in many respects a board of elections, as an entity, is operated and funded like any other county office or board, 1981 Op. Att'y Gen. No. 81-015, at 2-57, it reasonably follows that for purposes of R.C. 307.01(A) a board of elections, as an entity, is a county office.[3]

Whether the language, "shall … provide equipment," as used in R.C. 307.01(A), permits a board of county commissioners to lease equipment for purposes of R.C. 307.01(A), 1967 Op. Att'y Gen. No. 67-091 offers us guidance. In that opinion, the Attorney General examined R.C. 307.01 in

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[3] While in many respects a board of elections is operated and funded like any other county office, 1981 Op. Att'y Gen. No. 81-015, at 2-57, the Ohio Supreme Court and other authorities have determined that members of a board of elections are not county officers for purposes unrelated to R.C. 307.01(A). *See State ex rel. Dreamer v. Mason*, 129 Ohio St. 3d 94, 2011-Ohio-2318, 950 N.E.2d 519, at ¶25; *State ex rel. Columbus Blank Book Mfg. Co. v. Ayres*, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (syllabus, paragraphs 1 and 2); *State ex rel. Vail v. Craig*, 8 Ohio N.P. 148, 151, 10 Ohio Dec. 577 (C.P. Cuyahoga County 1900); 1930 Op. Att'y Gen. No. 1961, vol. II, p. 887, at 889; 1925 Op. Att'y Gen. No. 2844, p. 656, at 658-659.

tandem with R.C. 307.02 when he considered whether a county may enter into an agreement providing for the lease or lease purchase of personal property. Discussing the relationship between R.C. 307.01 and R.C. 307.02, the Attorney General explained:

> The word "provide" which appears in many Ohio statutes including [R.C. 307.01] has been officially defined by the court in [*In re Estate of Neff*, 6 Ohio Op. 2d 287, 289, 154 N.E.2d 30 (Probate Ct. Hamilton County 1958)] by the meaning given in Webster's New International Dictionary, Second Edition, i.e., "'to look out for in advance, to procure beforehand, to prepare for the future, to supply what is needed for sustenance or support.'"
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> ….
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> The fact that the Ohio Legislature selected the phrases "provide equipment" in [R.C. 307.01], and "equip and furnish * * * county offices" in [R.C. 307.02], rather than "purchase or buy equipment for county offices" is significant. Inasmuch as the words appear in provisions which grant the county commissioners affirmative powers, to prohibit them from entering into a lease or lease purchase agreement for the necessary office equipment … seems to be unwarranted and narrow statutory construction.

1967 Op. Att'y Gen. No. 67-091, at 2-150. The Attorney General thus advised that a board of county commissioners "is permitted to enter into an agreement providing for the lease or lease purchase of such personal property as authorized by [R.C. 307.01 and R.C. 307.02]." 1967 Op. Att'y Gen. No. 67-091 (syllabus).

The reasoning of 1967 Op. Att'y Gen. No. 67-091 applies with equal vigor here. Under R.C. 307.02, in addition to its other powers, a board of county commissioners "may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish … county offices." R.C. 307.02 thus expressly grants authority to a board of county commissioners to enter into lease agreements and "equip, and furnish" county offices. Insofar as the General Assembly through R.C. 307.02 expressly grants authority to a board of county commissioners to enter into lease agreements and "equip, and furnish" county offices, and insofar as a board of elections is a county office for purposes of R.C. 307.01(A), *see* 1981 Op. Att'y Gen. No. 81-015, at 2-56 to 2-57, we find that "shall … provide equipment" in R.C. 307.01(A), when read *in pari materia* with R.C. 307.02, authorizes a board of county commissioners to lease equipment for use by a board of elections.[4] *See State ex rel. Pratt v.*

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[4] Since the term "equipment" "comprehends a numerous variety of machines," 1967 Op. Att'y Gen. No. 67-091, at 2-150, and the term "equipment," in common usage means, *inter alia*, "the implements used in an operation or activity … [or] all the fixed assets other than land and buildings of a business enterprise," *Merriam-Webster's Collegiate Dictionary* 423 (11th ed. 2005), for purposes of R.C. 307.01(A) a ballots on demand printer is "equipment" that a board of county commissioners may provide to a board of elections for the proper and convenient conduct of the board of elections.

Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph 2); 1992 Op. Att'y Gen. No. 92-042, at 2-167.

Accordingly, pursuant to R.C. 307.01(A) and R.C. 307.02, a board of county commissioners may lease equipment for use by a board of elections.[5]

A Board of Elections Is a "Contracting Authority"

Your third question asks whether a board of elections is a "contracting authority" for purposes of R.C. 307.92. As used in R.C. 307.86-.91, the term "'contracting authority' means 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." R.C. 307.92. Thus, if a board of elections has authority to contract for or on behalf of the county or, if a board of elections is a county board, then a board of elections is a "contracting authority," as used in R.C. 307.86-.92.

A board of elections, in many respects, "is operated and funded like any other county office or board," 1981 Op. Att'y Gen. No. 81-015, at 2-57; the expenses of a board of elections are paid from appropriations by a board of county commissioners from the county treasury, R.C. 3501.17(A); and the authority of a board of elections is coterminous with a county, R.C. 3501.06, 1981 Op. Att'y Gen. No. 81-015, at 2-56. Additionally, a board of elections has express and implied authority to enter into contracts on its own behalf. *See, e.g.*, R.C. 3501.11(F) (a board of elections may "contract for the printing of all ballots and other supplies used in registrations and elections"); *see also Brock v. Lucas County Bd. of Elections*, Lucas App. No. L-03-1072, 2003-Ohio-7256, 2003 Ohio App. LEXIS 6546, at ¶10. It reasonably follows therefore that a board of elections is a "contracting authority" for purposes of R.C. 307.92. *Accord* 1993 Op. Att'y Gen. No. 93-065, at 2-310 ("a veterans service commission is a county agency with the authority to enter into contracts on its own behalf" and is therefore a contracting authority under R.C. 307.92); 1992 Op. Att'y Gen. No. 92-050, at 2-206 (a county children's services board is a contracting authority subject to R.C. 307.86).

Application of R.C. 307.86 and R.C. 3501.301 When a Board of Elections Enters Into a Contract for Printing and Furnishing Supplies

Your next question concerns the relationship of R.C. 307.86 and R.C. 3501.301. Specifically, you ask, if a board of elections is a contracting authority under R.C. 307.92, whether the bidding requirements for contracts for printing and furnishing supplies set forth in R.C. 3501.301 supersede the bidding requirements of R.C. 307.86.

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[5] Under R.C. 3506.03(C), a board of county commissioners also may acquire voting machines, marking devices, and automatic tabulating equipment in whole or in part under a contract of lease. The lease may include an option to purchase the leased equipment. R.C. 3506.03; *see* R.C. 3506.02 (adoption of voting machines, marking devices, and automatic tabulating equipment); R.C. 3506.04.

Let us first examine R.C. 307.86. R.C. 307.86 requires a county or a contracting authority, as defined in R.C. 307.92, to obtain through competitive 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, … at a cost in excess of twenty-five thousand dollars," except as otherwise provided. *See* R.C. 307.861 (renewal of lease for electronic data processing equipment, services, or systems, or a radio communication system); R.C. 307.862 (requirements for competitive sealed proposal process); R.C. 307.87 (publication of notice of competitive bidding); R.C. 307.88 (bid requirements); R.C. 307.89 (acceptance of bids and bond requirements); R.C. 307.90 (awarding of contracts); R.C. 307.91 (action when all bids are rejected); R.C. 307.921 (minority business assistance).

When competitive bidding is required by R.C. 307.86, a county or a contracting authority, as defined in R.C. 307.92, must provide notice of the proposed project in a manner set forth in R.C. 307.87. 2005 Op. Att'y Gen. No. 2005-029, at 2-299. A county's or a contracting authority'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." 2005 Op. Att'y Gen. No. 2005-029, at 2-299. In 2005 Op. Att'y Gen. No. 2005-029, at 2-299, further summarizing R.C. 307.87, the Attorney General explained:

> 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 [or contracting authority] 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 [or contracting authority] 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 [or contracting authority] 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).

For purposes of R.C. 307.86-.92, an award of a contract is made to the "lowest and best bidder," although a county or contracting authority, as defined in R.C. 307.92, "may reject all bids." R.C. 307.90(A); 2005 Op. Att'y Gen. No. 2005-029, at 2-299.

We next consider R.C. 3501.301. R.C. 3501.301 authorizes a board of elections to contract for printing and furnishing supplies:

> A contract involving a cost in excess of ten thousand dollars for printing and furnishing supplies, other than the official ballots, required in [R.C. 3501.30], shall not be let until the board of elections has caused notice to be published once in a newspaper of general circulation within the county or upon notice given by mail, addressed to the responsible suppliers within the state. The board of elections may

> require that each bid be accompanied by a bond, with at least two individual sureties, or a surety company, satisfactory to the board, in a sum double the amount of the bid, conditioned upon the faithful performance of the contract awarded and for the payment as damages by such bidder to the board of any excess of cost over the bid which it may be required to pay for such work by reason of the failure of the bidder to complete the contract. The contract shall be let to the lowest and best bidder.[6] (Footnote added.)

When a contract for printing and furnishing supplies, other than official ballots, does not exceed ten thousand dollars, the notice requirements set forth in R.C. 3501.301 do not apply where a board of elections seeks to award such a contract.[7] *See* R.C. 3501.301 ("[a] contract involving a cost *in excess of ten thousand dollars* for printing and furnishing supplies, other than the official ballots, … *shall not be let until the board of elections has caused notice to be published*" (emphasis added)); *see also Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 601, 653 N.E.2d 646 (1995) ("a public entity is not required to engage in competitive bidding in the absence of legislation requiring it"). But, when a contract for printing and furnishing supplies, other than official ballots, exceeds ten thousand dollars, R.C. 3501.301 requires a board of elections to publish notice once in a newspaper of general circulation within the county or give notice by mail, addressed to responsible suppliers within the state before awarding the contract to the lowest and best bidder. R.C. 3501.301.

Where a contract for printing and furnishing supplies, other than official ballots, exceeds twenty-five thousand dollars, however, the notice requirements in both R.C. 3501.301 and R.C. 307.87 apply. In such a circumstance, the notice requirements of R.C. 3501.301 apply because these notice requirements apply to a contract for printing and furnishing supplies, other than official ballots, in excess of ten thousand dollars. R.C. 3501.301. And, the notice requirements of R.C. 307.87 apply because R.C. 307.86 requires competitive bidding for a purchase of anything by a contracting authority, including a board of elections, that exceeds a cost of twenty-five thousand dollars. R.C. 307.86.

The notice requirements in R.C. 307.87 differ from the notice requirements set forth in R.C. 3501.301. For example, under R.C. 307.87, if notice of the proposed contract is published in a

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[6] R.C. 3501.301 was amended by Am. Sub. H.B. 194, 129th Gen. A. (2011) (eff. Sept. 30, 2011). Am. Sub. H.B. 194 increases the bidding threshold set forth in R.C. 3501.301 from ten thousand dollars to twenty-five thousand dollars. A referendum petition has been filed on Am. Sub. H.B. 194. Whether Am. Sub. H.B. 194 and the increased bidding threshold in R.C. 3501.301 go into effect will depend upon the outcome of the referendum election. *See* 2011 Op. Att'y Gen. No. 2011-035, at 2-275. *See generally* Ohio Const. art II, § 1c.

[7] Even though a board of elections is not required to cause notice to be published, a board of elections may require that each bid be accompanied by a bond in a manner set forth in R.C. 3501.301. R.C. 3501.301.

newspaper of general circulation within the county, such 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.[8] R.C. 307.87(A). Under R.C. 3501.301, if a board of elections publishes the required notice in a newspaper of general circulation within the county, the notice need only appear *once* in that newspaper.[9] Thus, requirements for the publication of notice in a newspaper of general circulation within a county, as set forth in R.C. 307.87 and R.C. 3501.301, conflict in a circumstance where a contract for printing and furnishing supplies, other than official ballots, exceeds twenty-five thousand dollars.

R.C. 307.87 and R.C. 3501.301 differ in other respects. R.C. 307.87(B) specifies the content of notices when competitive bidding is required by R.C. 307.86. R.C. 3501.301 does not specify what must appear in a bidding notice required under that section. R.C. 307.87(C) also requires a contracting authority to "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). R.C. 3501.301 does not require posting of its notice upon a bulletin board in a public place in a board of elections' office or other suitable public place.

Additionally, R.C. 3501.301 permits a board of elections to require each bid to be accompanied by a bond, with at least two individual sureties, or a surety company satisfactory to the board of elections, *in a sum double the amount of the bid* for use in the event a successful bidder fails to complete the contract. R.C. 3501.301. R.C. 307.89, on the other hand, permits a contracting authority to require a successful bidder to provide a bond provided for by R.C. 153.57 "with good and sufficient surety *in an amount not to exceed the amount of the bid*." (Emphasis added.) Also, R.C. 307.90(A) permits a contracting authority to "reject all bids," while R.C. 3501.301 does not authorize a board of elections to reject all bids. R.C. 307.86 also exempts compliance with its competitive bidding requirements under certain circumstances. *See* R.C. 307.86(A)-(M). R.C. 3501.301 does not contain a provision exempting a board of elections from the requirements of R.C. 3501.301.

When interpreting related and co-existing statutes, such statutes must be harmonized and given full application in a manner that carries out the legislative intent of the sections unless they are irreconcilable and in hopeless conflict. *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129 (1994); *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 35, 567 N.E.2d 1018 (1991); *see* 2011 Op. Att'y Gen. No. 2011-013, at 2-117. And, "when two

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[8] Rather than providing notice in a newspaper of general circulation within a county, a county or a contracting authority may cause notice to be inserted in trade papers or other publications designated by it, or distribute notice by electronic means, including the posting of notice on the contracting authority's internet site on the world wide web. R.C. 307.87(A).

[9] Instead of publishing notice in a newspaper of general circulation within the county, a board of elections may publish notice of the proposed contract by mail, addressed to responsible suppliers within Ohio. R.C. 3501.301.

statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply." *State ex rel. Dublin Sec., Inc. v. Ohio Div. of Sec.*, 68 Ohio St. 3d 426, 429, 627 N.E.2d 993 (1994). R.C. 1.51 states: "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *See generally State ex rel. Ehmann v. Schneider*, 78 Ohio App. 27, 31, 67 N.E.2d 117 (Hamilton County 1946) ("for purposes of interpretation of legislative enactments, enactments have long been classed as either general or special, and given different effect upon other enactments dependent as they are found to fall in one class or the other").

When comparing R.C. 3501.301 and R.C. 307.86, it is apparent that R.C. 307.86 is a general provision while R.C. 3501.301 is a special provision. *See generally* 1989 Op. Att'y Gen. No. 89-103 at 2-500 n.7 (modified in part, on other grounds, by 1990 Op. Att'y Gen. No. 90-022) ("[t]he determination as to whether a statute is general or special in character must be made in light of the statute with which it is to be compared"). R.C. 307.86-.92 set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92, whereas R.C. 3501.301 is limited to contracts awarded by a board of elections for printing and furnishing supplies, other than official ballots required in R.C. 3501.30. R.C. 3501.301 thus prevails over R.C. 307.86-.92 unless R.C. 307.86-.92 were adopted after R.C. 3501.301 and the manifest intent is that R.C. 307.86-.92 prevail. In this instance, R.C. 307.86-.92 were not adopted after R.C. 3501.301 and there does not appear a manifest intent that R.C. 307.86-.92 should prevail. *See* 1967-1968 Ohio Laws, Part II 2623 (Am. Sub. H.B. 428, eff. Dec. 9, 1967) (enacting R.C. 307.86-.92 and R.C. 3501.301).

Accordingly, for reasons set forth above, R.C. 3501.301 authorizes a board of elections to contract for printing and furnishing supplies, other than the official ballots, required in R.C. 3501.30. R.C. 3501.301 is an exception to R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

Application of R.C. 307.86 and R.C. 3505.13 to a Contract for the Printing of Official Ballots

In your final question you ask whether R.C. 3501.301's exclusion for a contract involving the printing of official ballots authorizes a board of elections to award a contract for printing official ballots without competitive bidding, or whether such a contract is subject to the bidding requirements of R.C. 307.86.

R.C. 3505.13 concerns contracts for the printing of official ballots, and reads as follows:

> A contract for the printing of ballots involving a cost in excess of ten thousand dollars shall not be let until after five days' notice published once in a newspaper of general circulation in the county or upon notice given by mail by the board of elections, addressed to the responsible printing offices within the state. Except as

> otherwise provided in this section, each bid for such printing must be accompanied by a bond with at least two sureties, or a surety company, satisfactory to the board, in a sum double the amount of the bid, conditioned upon the faithful performance of the contract for such printing as is awarded and for the payment as damages by such bidder to the board of any excess of cost over the bid which it may be obliged to pay for such work by reason of the failure of the bidder to complete the contract. No bid unaccompanied by such bond shall be considered by the board. The board may, however, waive the requirement that each bid be accompanied by a bond if the cost of the contract is ten thousand dollars or less. The contract shall be let to the lowest responsible bidder in the state. All ballots shall be printed within the state.[10] (Footnote added.)

A board of elections must comply with R.C. 3505.13 when it enters into a contract for the printing of official ballots. *See* R.C. 3501.11 ("[e]ach board of elections … shall perform all the duties imposed by law"). Prior to awarding a contract for the printing of ballots involving a cost that exceeds ten thousand dollars, a board of elections must publish notice in a manner set forth in R.C. 3505.13. Before a board of elections may consider a bid for the printing of official ballots, such a bid must be accompanied by a bond, as set forth in R.C. 3505.13, unless waived by a board of elections. R.C. 3505.13. A board of elections may waive the bond requirement in R.C. 3505.13 if a contract for the printing of official ballots costs ten thousand dollars or less. R.C. 3505.13. A board of elections must award a contract for the printing of official ballots "to the lowest responsible bidder" in Ohio. R.C. 3505.13. All ballots must be printed within Ohio. R.C. 3505.13.

As discussed previously, R.C. 307.86-.92 set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92. It is a well-settled principle of statutory construction "that 'when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply.'" *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 2004-Ohio-4354, 814 N.E.2d 55, at ¶14, *on reconsideration, clarified and supplemented by* 106 Ohio St. 3d 1402, 2005-Ohio-3040, 829 N.E.2d 1215 (quoting *State ex rel. Dublin Sec., Inc.*, *supra*, at 429); *see* R.C. 1.51. When comparing R.C. 3505.13 and R.C. 307.86-.92, it is apparent that R.C. 3505.13 is a special provision that specifically sets forth requirements pertaining to a particular service, namely, contracting for the printing of official ballots. Thus, R.C. 3505.13 must be construed as an exception to R.C. 307.86-.92, the general statutes, which might otherwise apply. *Accord* 1965 Op. Att'y Gen. No. 65-139, at 2-315 ("[i]t is my feeling that the Ohio General Assembly sought to and did provide for competitive bidding

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[10] As used in any statute, the term "the state" "means the state of Ohio," unless another definition is provided in that statute or a related statute. R.C. 1.59(G).

Am. Sub. H.B. 194 amends R.C. 3505.13 by increasing the statute's bidding threshold from ten thousand dollars to twenty-five thousand dollars. Whether Am. Sub. H.B. 194 and the increased bidding threshold in R.C. 3501.301 go into effect will depend upon the outcome of the referendum election on that legislation. *See* note 6, *supra*.

in Section 3505.13, supra. The purpose of competitive bidding is to secure the best quality goods for the lowest price"). It follows that R.C. 3505.13 prevails over R.C. 307.86-.92.

Accordingly, R.C. 3505.13 sets forth requirements that a board of elections must follow when it contracts for the printing of official ballots. R.C. 3505.13 is an exception to R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

Conclusions

In accordance with the foregoing analyses, it is my opinion, and you are hereby advised that:

1. A county board of elections may lease a ballots on demand printer in implementing a ballots on demand voting system authorized by R.C. 3506.20.

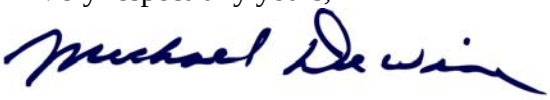
2. Pursuant to R.C. 307.01(A) and R.C. 307.02, a board of county commissioners may lease equipment for use by a board of elections.

3. A board of elections is a "contracting authority" for purposes of R.C. 307.92.

4. R.C. 3501.301 authorizes a board of elections to contract for printing and furnishing supplies, other than the official ballots, required in R.C. 3501.30. R.C. 3501.301 is an exception to R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

5. R.C. 3505.13 sets forth requirements that a board of elections must follow when it contracts for the printing of official ballots. R.C. 3505.13 is a special provision that prevails over R.C. 307.86-.92, which set forth the general scheme for procurements by a county or a contracting authority, as defined in R.C. 307.92.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General