

**OPINION NO. 2012-031**

**Syllabus:**

2012-031

1. R.C. 307.87(A) authorizes a county contracting authority to solicit bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an electronic bidding system, provided the county contracting authority complies with all other statutory notice requirements.
2. Pursuant to R.C. 307.87(B) and R.C. 307.88(A), a county contracting authority may receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an electronic bidding system, provided (1) bidders and the county contracting authority comply with R.C. Chapters

304 and 1306; (2) bid guaranties are filed in the form of a bond or letter of credit; and (3) the county contracting authority permits a person to access the bidding information described in R.C. 307.87(B)(1) other than through the electronic bidding system and file a bid and bid guaranty in paper form.

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**To: John D. Ferrero, Stark County Prosecuting Attorney, Canton, Ohio**  
**By: Michael DeWine, Ohio Attorney General, September 21, 2012**

You have requested an opinion concerning the use of an electronic bidding system (EBS) to solicit and receive bids and bid guaranties for public contracts.<sup>1</sup> According to information provided to us by your staff, the EBS will be operated by a private company. For a fee, the company will permit the county to post on the EBS website a notice that the county is accepting bids and bid guaranties for a public contract and a general description of the subject matter of the contract. The posting may be viewed at no cost by a person visiting the EBS website.

The EBS website may also make plans, specifications, or other pertinent information about the proposed contract available for viewing at no cost to the public.<sup>2</sup> However, only a person who registers with, and pays a fee to, the private company will be able to prepare and file a bid and bid guaranty for the contract with the county through the EBS website. You wish to know whether a county contracting authority may use an EBS to solicit and receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G).<sup>3</sup>

**Authority of a County Contracting Authority to Solicit Bids**

R.C. 307.86 declares that, except as otherwise provided by law, “anything

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<sup>1</sup> An electronic bidding system (EBS) is used to conduct Internet bidding or two-way bidding. An EBS uses the Internet to enable one person to solicit bids for goods or services and another person to submit a bid to provide the goods or services. An EBS also is used for other purposes associated with the bidding process, including, but not limited to, offering bid-related information, posting bid results, and providing software for creating bid solicitations and preparing bids.

<sup>2</sup> A private company operating an EBS website may charge a person a fee to view plans, specifications, or other pertinent information related to a public contract.

<sup>3</sup> In lieu of using a competitive bidding process to award a contract, a county contracting authority may use a competitive sealed proposal process to award the contract. See R.C. 307.86(M); R.C. 307.862. The competitive sealed proposal process may not, however, be used to award a contract for the “construction, design, demolition, alteration, repair, or reconstruction of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water-works,” or other structure or work of any nature by a county contracting authority. R.C. 307.862(G). The awarding of a contract described in R.C. 307.862(G) must instead be done through the competitive bidding process unless competitive bidding is not required. See R.C. 307.86 (setting forth instances in which competitive bidding is not required).

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” must be obtained through competitive bidding.<sup>4</sup> When a county is required to award a public contract through competitive bidding, the contracting authority must, among other things, provide notice of that fact to the public, as specifically described in R.C. 307.87. 2005 Op. Att’y Gen. No. 2005-029 at 2-299. This means that, if a contract pertaining to a public improvement project described in R.C. 307.862(G) is subject to competitive bidding, a county contracting authority must provide notice thereof to the public in the manner set forth in R.C. 307.87. *See id.* at 2-300 and 2-301 (the statutory requirements for competitive bidding for county contracts are mandatory).

When competitive bidding is required under R.C. 307.86, notice thereof *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.”<sup>5</sup> R.C. 307.87(A). In addition, the notice *must* be posted for at least two weeks preceding the day of the opening of the bids on a bulletin board that is maintained in a public place. R.C. 307.87(C).

The strict notice requirements of R.C. 307.87 are needed to promote fair competition among bidders. 2005 Op. Att’y Gen. No. 2005-029 at 2-301. *See generally 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 Constr. Co. v. Trumbull County Bd. of Comm’rs*, 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”); *Wilson Bennett, Inc. v. Greater Cleveland Reg’l Transit Auth.*, 67 Ohio App. 3d 812, 819, 588 N.E.2d 920 (Cuyahoga County 1990) (“[i]nvitations to bid . . . 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”). It is no coincidence then that, “the more vendors who know of a project and bid on it, the more competitive the process will be.” 2005 Op. Att’y Gen. No. 2005-029 at 2-301. *See generally Abel Converting, Inc. v. United States*, 679 F. Supp. at 1141 (“the absence of even one responsible bidder significantly diminishes the level of competition,” especially when few bidders participate in a solicitation); 1991 Op. Att’y Gen. No. 91-002 at 2-12 (the purpose of the competitive bidding process is to invite competition). Thus, in order to promote fair compe-

<sup>4</sup> As used in R.C. 307.86-.91, a “contracting authority” is “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.

<sup>5</sup> If a county 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. R.C. 307.87(A).

tion for public contracts, the General Assembly has mandated the manner by which a county contracting authority shall solicit bids for a public contract whenever it uses the competitive bidding process. *See* 2005 Op. Att'y Gen. No. 2005-029 at 2-301 (“[t]he precept that prospective bidders must have the same opportunity to learn of a proposal . . . is crucial to a process that is fair in both actuality and perception”).

These mandates do “not mean, however, that the county cannot take steps . . . to more fully advertise bidding opportunities.” *Id.* at 2-303. R.C. 307.87(A) explicitly provides that a county contracting authority “may also cause notice [of competitive bidding opportunities] to be inserted in trade papers or other publications designated by it *or to be distributed by electronic means*, including posting the notice on the contracting authority’s internet site on the world wide web.” (Emphasis added.) *See PHH Mortgage Corp. v. Prater*, 2012-Ohio-3931, 2012 Ohio LEXIS 2211, ¶16 (“notice by Internet posting is . . . akin to publication in a newspaper”); *see also* R.C. 1.59(K) (unless the context of a statute indicates otherwise, the term “Internet” means the “international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork known as the world wide web”); 2002 Op. Att'y Gen. No. 2002-001 at 2-1 n.1 (the world wide web is a system of Internet servers). Given that the language of R.C. 307.87(A) authorizes a county contracting authority to cause notice of competitive bidding opportunities to be distributed by electronic means through the use of the Internet, a county contracting authority may solicit bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) by using the Internet.

As explained previously, an EBS uses the Internet and world wide web to transmit solicitations for bids, bids, bid guaranties, and other bid-related information. Thus, insofar as an EBS is an electronic means by which to distribute notice of competitive bidding opportunities, R.C. 307.87(A) authorizes a county contracting authority to use an EBS to solicit bids for public contracts.<sup>6</sup>

In a similar situation, 2005 Op. Att'y Gen. No. 2005-029 considered the authority of a county contracting authority to develop a vendor notification list to publicize bidding opportunities. In concluding that a county contracting authority has this authority, the opinion explained at 2-303 that the use of such a list “would promote competition while providing an open process, subject to scrutiny by the public and competing vendors, and a standardized, uniform system for providing

<sup>6</sup> Insofar as a county contracting authority has express authority to cause notice of competitive bidding opportunities to be distributed by electronic means, it also has the concomitant authority to pay a reasonable fee to do so. *See State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 468-71, 423 N.E.2d 105 (1981) (a public agency has the implied authority to expend public funds for dissemination of information to the public where it is reasonably related to the duties of the agency); 1999 Op. Att'y Gen. No. 99-030 at 2-202 n.5 (“[i]t is generally accepted that the dissemination of information is a proper function of a public body and that public money may be expended for that purpose”).

the same information to vendors at the same time,” so long as the county contracting authority also complies with the mandatory notice requirements of R.C. 307.87. In other words, the mandatory provisions of R.C. 307.87 for providing notice of competitive bidding opportunities do not act to constrain a county contracting authority from using additional methods to provide such notice to the public, including using an EBS. Accordingly, R.C. 307.87(A) authorizes a county contracting authority to solicit bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided the county contracting authority complies with all other statutory notice requirements.<sup>7</sup>

#### **Authority of a County Contracting Authority to Receive Bids and Bid Guaranties**

Having determined that a county contracting authority may use an EBS to solicit bids for a public contract, we turn now to whether it may use an EBS to receive bids and bid guarantees.<sup>8</sup> R.C. 307.87(B) requires a notice of a competitive bidding opportunity to include, among other things, the “time and place for filing bids” and the “[c]onditions under which bids will be received.” R.C. 307.88(A) provides further that “[b]ids submitted pursuant to [R.C. 307.86-.92] shall be in a form prescribed by the contracting authority and filed in the manner and at the time and place mentioned in the notice.”

R.C. 307.87(B) and R.C. 307.88(A) grant a county contracting authority the discretion to determine how bids and bid guarantees are to be filed. *See generally* 1989 Op. Att'y Gen. No. 89-064 at 2-289 (it is “within the discretion of the contracting authority . . . to provide sufficient detail so that all bidders will have an equal opportunity to bid”). As there are no express statutory limitations upon this

<sup>7</sup> Nothing in R.C. Chapter 1306, which governs the use of electronic records and electronic signatures, prohibits a county contracting authority from soliciting bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS. *See generally* R.C. 1306.07(B) (if a statute other than R.C. 1306.01-.23 applies to the posting or sending of an electronic record that statute applies).

<sup>8</sup> Except as provided in R.C. 9.334, R.C. 153.693, and R.C. 307.88(B), a person must submit a bid guaranty that complies with all applicable statutory requirements whenever filing a bid for a public contract for any public improvement undertaken by a county. R.C. 153.54(A); R.C. 307.88(B). *See generally* 2005 Op. Att'y Gen. No. 2005-029 at 2-299 n.2 (a county is “subject to R.C. Chapter 153, which governs contracts for the construction of public improvements and taking bids therefor”). A bid guaranty may be in the form of a (1) bond for the full amount of the bid or (2) a certified check, cashier's check, or letter of credit in an amount equal to 10 percent of the bid. R.C. 153.54(A); *see also* R.C. 153.54(B) (describing the requirements for a bond filed as a bid guaranty under R.C. 153.54); R.C. 153.54(C) (describing the requirements for a certified check, cashier's check, or letter of credit filed as a bid guaranty under R.C. 153.54); R.C. 153.571 (setting forth the form of a bond used as a bid guaranty under R.C. 153.54).

discretion, a county contracting authority may receive bids and bid guaranties in any manner that is reasonable, promotes a fair and honest competitive bidding process, and provides a level playing field for prospective bidders. *See generally State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138 (1915) (where an officer has been given no clear direction on a particular matter, the officer “has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method” of performing his duties), *aff’d*, 241 U.S. 565 (1916); 2005 Op. Att’y Gen. No. 2005-029 at 2-299 through 2-301 (some of the purposes of the competitive bidding process are to provide a fair and honest manner for awarding public contracts and a level playing field for prospective bidders); 1991 Op. Att’y Gen. No. 91-002 at 2-12 (same as the previous parenthetical).

To meet this standard, the manner in which a county contracting authority receives bids and bid guaranties must, at a minimum, ensure, as far as possible, that potential bidders have equal access to the bidding process and be permitted to file a bid and bid guaranty. *See Wilson Bennett, Inc. v. Greater Cleveland Reg’l Transit Auth.*, 67 Ohio App. 3d at 819; 2005 Op. Att’y Gen. No. 2005-029 at 2-301; 1991 Op. Att’y Gen. No. 91-002 at 2-12. Any competitive bidding process that does not meet this standard invites favoritism and reduces the opportunity for prospective bidders to receive information regarding a bidding opportunity and to file bids and bid guaranties. Because every prospective bidder should have access to the same information related to a competitive bidding opportunity and the opportunity to submit a bid and bid guaranty, a county contracting authority may not use an EBS to receive bids and bid guaranties if it reduces the opportunity for persons to file a bid and bid guaranty. *See Wilson Bennett, Inc. v. Greater Cleveland Reg’l Transit Auth.*, 67 Ohio App. 3d at 819; *Boger v. Contracting Corp. v. Bd. of Comm’rs of Stark County*, 60 Ohio App. 2d 195, 200, 396 N.E.2d 1059 (Stark County 1978); 2005 Op. Att’y Gen. No. 2005-029 at 2-301; 1991 Op. Att’y Gen. No. 91-002 at 2-12.

To file a bid and bid guaranty through an EBS a person must have access to the Internet. Further, a person who would like to file a bid and bid guaranty through an EBS may have to pay a fee to do so. Requiring a person to have access to the Internet, computer skills, or pay a fee to file a bid and bid guaranty for a public contract imposes a restriction on persons who do not have Internet access, computer skills, or money to pay the fee. Again, as emphasized above, when a county contracting authority uses the competitive bidding process to award a public contract, the process must be as accessible as possible and not unreasonably limit people’s opportunity to file a bid and bid guaranty. Because the use of just an EBS to receive bids may reduce the opportunity for people to compete for a public contract, an EBS may not be the sole means by which a person may file a bid and bid guaranty for a public contract. *See generally PHH Mortgage Corp. v. Prater*, at ¶17 (“notice that misses 30 to 40 percent of its intended audience does not constitute the notice our Constitution demands”).

Instead, an EBS must be used in conjunction with procedures that enable a person to access the bidding information described in R.C. 307.87(B) other than through the EBS and file a bid and bid guaranty in paper form. *See* R.C. 307.87(B)(1) (a notice of a competitive bidding opportunity must set forth “[a] general descrip-

tion of the subject of the proposed contract and the time and place where the plans and specifications or itemized list of supplies, facilities, or equipment and estimated quantities can be obtained or examined’’). *See generally Wilson Bennett, Inc. v. Greater Cleveland Reg’l Transit Auth.*, 67 Ohio App. 3d at 819 (the competitive bidding process requires ‘‘an equal opportunity to secure the bid’’); *Boger Contracting Corp. v. Bd. of Comm’rs of Stark County*, 60 Ohio App. 2d at 200 (‘‘[w]here mandatory competitive bidding is required, it is axiomatic that every prospective bidder should have identical information upon which to submit a proposal’’); 2005 Op. Att’y Gen. No. 2005-029 at 2-301 (‘‘vendors must be given access to the same information and they must be given access to information at the same point in time’’); 1991 Op. Att’y Gen. No. 91-002 at 2-12 (the competitive bidding process must place bidders on equal footing). By using an EBS in this manner, a county contracting authority expands, rather than constricts, the pool of prospective bidders. It also allows persons who do not have Internet access, computer skills, or money to pay a fee for using an EBS to be able to access the bidding information described in R.C. 307.87(B)(1) and file a bid and bid guaranty, and thus compete for the public contract. Accordingly, R.C. 307.87(B) and R.C. 307.88(A) authorize a county contracting authority to receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided the county contracting authority also permits a person to access the bidding information described in R.C. 307.87(B)(1) other than through the EBS and file a bid and bid guaranty in paper form.

#### **Authority of a County to Accept Electronic Records and Electronic Signatures**

Our conclusion that a county contracting authority may receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS is supported further by R.C. Chapters 304 (electronic records and signatures) and 1306 (enacting select provisions of the uniform electronic transactions act (UETA)). These chapters ‘‘recognize the legitimacy of conducting business, including county-conducted business, electronically.’’ 2006 Op. Att’y Gen. No. 2006-025 at 2-216. *See* R.C. 1306.01(P) (as used in R.C. 1306.01-23, a ‘‘transaction’’ is ‘‘an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs’’ (emphasis added)); R.C. 1306.02(A) (except as provided in R.C. 1306.02(B), R.C. 1306.01-23 ‘‘apply to electronic records and electronic signatures relating to a transaction’’); UETA § 2 cmt. 12, 7A U.L.A., Part I, 226, 231 (1999) (the term ‘‘transaction, as used in the UETA, ‘includes all interactions between people for . . . governmental purposes’’). *See generally* R.C. 304.04 (‘‘[n]othing in [R.C. Chapter 304] or [R.C. Chapter 1306] requires or shall be construed to require any county office to use or permit the use of electronic records and electronic signatures’’).

First, R.C. Chapter 1306 ‘‘sanctions the use of electronic filings and electronic signatures, so long as the parties to a transaction have agreed to conduct the transaction by electronic means, R.C. 1306.04(B), and otherwise comply with all statutory requirements.’’ 2006 Op. Att’y Gen. No. 2006-025 at 2-216. Furthermore, as summarized in 2006 Op. Att’y Gen. No. 2006-025 at 2-216 and 2-217:

[A] “record or signature may not be denied legal effect or enforceability solely because it is in electronic form,” R.C. 1306.06(A). An electronic record satisfies a law requiring a record to be in writing, R.C. 1306.06(C), and an electronic signature satisfies a law requiring a signature, R.C. 1306.06(D). *See also* R.C. 1306.10 (“[i]f a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts . . . is attached to or logically associated with the signature or record”); R.C. 1306.12 (“evidence of a record or signature may not be excluded solely because it is in electronic form”). An electronic record that is capable of being retained—that is, of being printed or stored—by the recipient at the time of receipt satisfies a law requiring a person to “provide, send, or deliver information in writing to another person,” R.C. 1306.07(A). *See also* R.C. 1306.11 (satisfying requirements that records be retained); R.C. 1306.14 (when an electronic record is deemed sent and received); R.C. 1306.18 (compliance with security procedures); R.C. 1306.20 (use of electronic records and electronic signatures by state agencies).

R.C. Chapter 1306 thus establishes that information and signatures on a document that is electronically filed with a county contracting authority under R.C. 307.86-.92 are given the same legal effect as if the information and signatures are on papers physically filed with the county contracting authority, so long as the bidders and county contracting authority comply with the requirements of R.C. Chapter 1306. *See generally* 2006 Op. Att'y Gen. No. 2006-025 (a county auditor may accept electronic records and signatures when the auditor and other parties to the transaction comply with the requirements of R.C. Chapter 1306). *See generally* R.C. 1306.01(G) (as used in R.C. 1306.01-.23, an “electronic record” is “a record created, generated, sent, communicated, received, or stored by electronic means”); R.C. 1306.01(H) (the term “electronic signature,” as used in R.C. 1306.01-.23, means “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record”); R.C. 1306.01(M) (for purposes of R.C. 1306.01-.23, a “record” is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”).

R.C. Chapter 304 sets forth provisions governing the use of electronic records and signatures by county offices. R.C. 304.02 states that, before a county office may use electronic records and electronic signatures, the office must adopt a written security procedure for verifying that an electronic record or signature is that of a specific person or “for detecting changes or errors in the information in an electronic record.” *See* R.C. 117.111 (“[i]f a county office uses electronic records and electronic signatures under [R.C. Chapter 1306],” the auditor of state must, in conducting an audit, “inquire into the method, accuracy, and effectiveness of any security procedure adopted by that office under [R.C. 304.02]”). And, R.C. 304.03(A) declares that, “[w]henever any rule or law requires or authorizes the fil-

*ing of any information, notice, lien, or other document or record with any county office, a filing made by an electronic record shall have the same force and effect as a filing made on paper* in all cases where the county office has authorized or agreed to the electronic filing and the filing is made in accordance with applicable rules or an applicable agreement.” (Emphasis added.)

As a county contracting authority is a “county office” for purposes of R.C. Chapter 304, *see* R.C. 304.01(B); R.C. 307.92, that is authorized by R.C. 307.86-.92 to receive information and documents from bidders, the filing of such information and documents electronically with a county contracting authority has the same force and effect as a filing made on paper, provided the county contracting authority complies with R.C. 304.02. R.C. 304.03(A). *See generally* R.C. 304.01(D) (as used in R.C. Chapter 304, an “electronic record” is “a record created, generated, sent, communicated, received, or stored by electronic means”); R.C. 304.01(H) (for purposes of R.C. Chapter 304, a “record” is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”). Hence, a county contracting authority may in accordance with R.C. Chapters 304 and 1306 receive bids and bid guaranties for a public contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS. *See generally* 2006 Op. Att'y Gen. No. 2006-025 (syllabus) (“[a] county auditor has the authority, pursuant to R.C. 120.33(A)(4) and R.C. 319.16, to issue a warrant to pay the fees and expenses of court-appointed legal counsel, who sign and file their requests for payment and supporting documents electronically under a system developed by the State Public Defender, so long as the auditor, the court, and other parties to the transaction comply with R.C. Chapter 304 and R.C. Chapter 1306”); UETA § 2 cmt. 6, 7A U.L.A., Part I, 226, 229 (1999) (an “electronic record” is “any record created, used, or stored in a medium other than paper (see definition of electronic) . . . . ‘Information processing systems, computer equipment and programs, [and] electronic data interchange . . . all qualify as electronic under [the UETA]’”).

#### **Exceptions to the Electronic Filing Requirements of R.C. Chapters 304 and 1306**

Specific limitations on the use of electronic records and electronic signatures are set forth in R.C. 1306.02.<sup>9</sup> This statute provides, in part, that R.C. 1306.01-.23 do not apply to a transaction to the extent it is governed by R.C. Chapters 1301

<sup>9</sup> An additional limitation on the use of electronic records and electronic signatures is set forth in R.C. 1306.07(B). This limitation provides, in part, that, if a law other than R.C. 1306.01-.23 requires a record “to be sent, communicated, or transmitted by a specified method,” the record must “be sent, communicated, or transmitted by the method specified in the other law” unless R.C. 1306.07(D)(2) applies. R.C. 1306.07(B).

Nothing in the Revised Code requires a bid and bid guaranty to be sent, communicated, or transmitted to a county contracting authority by a specified method. To the contrary, a county contracting authority has the discretion to

(except as provided in R.C. 1301.306), 1303, 1304, 1305, 1307, 1308, and 1309.<sup>10</sup> R.C. 1306.02(B)(2). The purpose of this limitation is to exclude certain transactions within the scope of the Uniform Commercial Code (UCC), which is set forth in part in R.C. Chapters 1301, 1303, 1304, 1305, 1307, 1308, and 1309. As explained by the drafters of the UETA:

2. [The UETA] affects the medium in which information, records and signatures may be presented and retained under current legal requirements. While this Act covers all electronic records and signatures which are used in a business, commercial (including consumer) or governmental transaction, the operative provisions of the Act relate to requirements for writings and signatures under other laws. Accordingly, the exclusions in subsection (b)<sup>11</sup> focus on those legal rules imposing certain writing and signature requirements which will **not** be affected by this Act.
3. The exclusions listed in subsection (b) provide clarity and certainty regarding the laws which are and are not affected by this Act. This section provides that transactions subject to specific laws are unaffected by this Act and leaves the balance subject to this Act.
4. . . Paragraph (2) excludes all of the Uniform Commercial Code other than UCC Sections 1-107 and 1-206, and Articles 2 and 2A. This Act does not apply to the excluded UCC articles, whether in “current” or “revised” form. The Act does apply to UCC Articles 2 and 2A and to UCC Sections 1-107 and 1-206. (Footnote added.)

UETA § 3 cmts. 2-4, 7A U.L.A., Part I, 235, 235-36 (1999); *accord* Patricia Brumfield Fry, *Article: Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions*, 37 Idaho L. Rev. 237, 252 (2001).

R.C. 1306.02(B) demonstrates that there are specific documents that the General Assembly does not believe are appropriately authenticated through electronic means and thus not subject to being filed electronically with a county contracting authority in accordance with R.C. Chapters 304 and 1306. Accordingly, absent inclusion in R.C. 1306.02(B)(2)'s exception, the provisions of R.C. Chapters 304 and 1306 apply to a bid or bid guaranty and a bid or bid guaranty may be filed electronically with a county contracting authority in accordance with R.C. Chapters 304 and 1306. *See* R.C. 1306.02; UETA § 3 cmts. 2-4, 7A U.L.A., Part I, 235, 235-36 (1999). *See generally Anderson v. Lt. Governor Gregg Bell*, 2010 UT 47,

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determine how bids and bid guaranties are to be filed. *See* R.C. 307.87(B); R.C. 307.88(A). R.C. 1306.07(B)'s limitation thus does not apply to your situation.

<sup>10</sup> R.C. 1306.02(B)(1) provides that R.C. 1306.01-.23 do not apply to a transaction “to the extent it is governed” by a “law governing the creation and execution of wills, codicils, and testamentary trusts[.]” As your question concerns filing bids and bid guaranties, R.C. 1306.02(B)(1) does not apply.

<sup>11</sup> Subsection (b) of section 3 of the Uniform Electronic Transactions Act (UETA) is codified in part in R.C. 1306.02(B).

234 P.3d 1147, 2010 Utah LEXIS 100, ¶18 (the exclusion list set forth in Utah Code § 46-4-103(2), which is similar to UETA § 3(b), may be used to show “that the requirements of the Election Code are *not* specifically excluded from the UETA. Therefore, the UETA will govern electronic signatures where its other requirements can be satisfied”).

The documents covered by R.C. 1306.02(B)(2)’s exception include commercial paper, bank deposits and collections, letters of credit, warehouse receipts, bills of lading, documents of title, investment securities, and instruments used in secured transactions. *See* R.C. Chapter 1303; R.C. Chapter 1304; R.C. Chapter 1305; R.C. Chapter 1307; R.C. Chapter 1308; R.C. Chapter 1309. A bid submitted pursuant to the competitive bidding process is not a document that is included in the aforementioned list. *See generally Black’s Law Dictionary* 183 (9th ed. 2009) (a “bid” is “[a] submitted price at which one will perform work or supply goods . . . . **competitive bid**. A bid submitted in response to public notice of an intended sale or purchase”). For this reason, a county contracting authority may receive bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided bidders and the county contracting authority comply with R.C. Chapters 304 and 1306.

With respect to bid guaranties, R.C. 153.54(A) requires them to be in the form of a bond, certified check, cashier’s check, or letter of credit. Like bids, nothing in R.C. Chapters 1301, 1303, 1304, 1305, 1307, 1308, or 1309 governs the submission of bid guaranties that are filed in the form of a bond. Consequently, a county contracting authority may receive bid guaranties that are filed in the form of a bond for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided bidders and the county contracting authority comply with R.C. Chapters 304 and 1306.

Certified checks and cashier’s checks are negotiable instruments governed by R.C. Chapter 1303. *See* R.C. 1303.03; *see also* R.C. 1303.46(D) (defining “certified check”). To the extent that nothing in R.C. Chapter 1303 provides otherwise, certified checks and cashier’s checks are governed by R.C. Chapter 1303 and may not be filed electronically under R.C. Chapters 304 and 1306.<sup>12</sup> R.C. 1306.02. This means that a county contracting authority may not receive bid guaranties that are

<sup>12</sup> R.C. 1306.15, which authorizes the creation of a transferable record that is also a note under R.C. Chapter 1303, “provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor” and “provides the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.” UETA § 16 cmt. 1, 7A U.L.A., Part I, 279, 280 (1999). In other words, R.C. 1306.15 provides that in certain instances a note under R.C. Chapter 1303 may be regarded as a transferable record that may be given effect under R.C. Chapters 304 and 1306. Neither a certified check nor cashier’s check, however, may qualify as a transferable record that may be given effect under R.C. Chapters 304 and 1306. UETA § 16 cmt. 2, 7A U.L.A., Part I, 279, 281 (1999); Richard A. Lord, *Article: A Primer on Electronic Contract-*

filed in the form of a certified check or cashier's check for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS.<sup>18</sup>

The final form of a bid guaranty is a letter of credit. Although letters of credit are governed by R.C. Chapter 1305, provision is made therein for the electronic filing of letters of credit. R.C. 1305.03, which governs the formal requirements of a letter of credit, states that a "letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated by a signature or in accordance with the agreement of the parties or the standard practice referred to in [R.C. 1305.07(E)]." In turn, a "record" is information "inscribed on a tangible medium" or "stored in an *electronic* or other medium." R.C. 1305.01(A)(14) (emphasis added). R.C. Chapter 1305 thus authorizes a county contracting authority to receive bid guaranties that are filed in the form of a letter of credit for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided bidders and the county contracting authority comply with R.C. Chapters 304 and 1306. *See generally* UETA § 3 cmt. 5, 7A U.L.A., Part I, 235, 236 (1999) (Article 5 of the U.C.C., which governs letters of credit, has "been excluded" from the operation of the UETA "because the revision process relating to [that] Article[] included significant consideration of electronic practices"); U.C.C. § 5-104 cmt. 3, 2B U.L.A., Part II,

*ing and Transactions in North Carolina*, 30 Campbell L. Rev. 7, 72 (2007); Jane K. Winn, *Association of American Law Schools 2001 Annual Meeting Section on Law and Computers: January 5, 2001—San Francisco, California What Is a Transferable Record and Who Cares?*, 7 B.U. J. Sci & Tech. L. 203, 207 (2001); Amelia H. Boss, *Article: The Uniform Electronic Transactions Act in a Global Environment*, 37 Idaho L. Rev. 275, 348 (2001).

<sup>18</sup> R.C. 301.28 authorizes a county to receive electronic checks and other financial transaction devices as payment for county expenses. The purpose of this statute is to provide authority for a county to accept electronic checks and other financial transaction devices for moneys owed to the county. *See* R.C. 301.28(A)(1); 2012 Op. Att'y Gen. No. 2012-016 at 2-132.

When a bidder files a bid guaranty in the form of a certified check or cashier's check with a bid, the bidder is not paying money owed to the county. Instead, the bidder is using the check to cover the costs the county *may* incur if the bidder is successful in securing the public contract and fails to withdraw his bid in accordance with R.C. 153.54(G) or enter into the contract and post a bond. R.C. 153.54(C)-(E). If the successful bidder enters into the contract and files the bond required under R.C. 153.54(C), the county contracting authority returns the check to the bidder. R.C. 153.54(H). Also, the county contracting authority is required to return all checks to unsuccessful bidders. *Id.* Given that a bid guaranty in the form of a certified check or cashier's check is not used to pay a county expense, R.C. 301.28 does not authorize a county contracting authority to receive bid guaranties that are filed in the form of a certified check or cashier's check for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS.

149, 150 (1995) (“[m]any banking transactions, including the issuance of many letters of credit, are now conducted mostly by electronic means”).

Accordingly, in response to your question whether a county contracting authority may use an EBS to receive bids and bid guaranties, we conclude that, pursuant to R.C. 307.87(B) and R.C. 307.88(A), a county contracting authority may receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an EBS, provided (1) bidders and the county contracting authority comply with R.C. Chapters 304 and 1306; (2) bid guaranties are filed in the form of a bond or letter of credit; and (3) the county contracting authority permits a person to access the bidding information described in R.C. 307.87(B)(1) other than through the EBS and file a bid and bid guaranty in paper form.

**Effect of Recent Legislation on the Authority of a County Contracting Authority to Solicit and Receive Bids and Bid Guaranties Through an EBS**

In your letter, you have raised a concern that recently enacted legislation may prohibit a county contracting authority from soliciting and receiving bids and bid guaranties through an EBS. In particular, you state that Sub. H.B. 225, 129th Gen. A. (2011) (eff. Mar. 22, 2012), amended R.C. 307.862 and R.C. 307.88(A) to authorize a county contracting authority to use an EBS to solicit and receive competitive sealed proposals. R.C. 307.862, as amended, states, in part:

(A) When a county contracting authority uses competitive sealed proposals pursuant to [R.C. 307.86], the county contracting authority shall do all of the following:

. . . ;  
(4) Give notice of the request for proposals in the same manner that notice must be given for competitive bidding pursuant to [R.C. 307.87]. The county contracting authority also may give notice of the request for proposals and receive proposals through a uniform, interactive, and secure electronic system in a manner consistent with [R.C. Chapter 1306].

. . .  
(H) Nothing in this section limits a county contracting authority's ability to award a contract under this section through the use of a uniform, interactive, and secure electronic system.

Sub. H.B. 225 also removed from R.C. 307.88(A) the requirement that bids and proposals be filed in a sealed envelope at the time and place mentioned in the notice of the opportunity to compete for a public contract. As Sub. H.B. 225 does not expressly authorize a county contracting authority to use an EBS to solicit and receive bids and bid guaranties for a public contract, you are concerned that “the legislature has now authorized the use of such an electronic system *only* with re-

spect to a narrow class of county contracts, i.e., those contracts that are let out using the competitive sealed proposals procedures, and which are not contracts for public works” and that “[t]he inescapable conclusion seems to be that such electronic procedures are *not* authorized for other types of county contracts.”

The purpose of Sub. H.B. 225’s amendments to R.C. 307.862 and R.C. 307.88(A) thus was twofold. First, the amendments permit “a county contracting authority to give notice of a request for proposals and to receive proposals through an electronic system that is uniform, interactive, and secure.” Ohio Legislative Serv. Comm’n, Final Analysis, Sub. H.B. 225, 129th Gen. A., at 3 (as passed by the General Assembly). In addition, the amendments require “that competitive sealed bids be submitted to a county contracting authority in the manner mentioned in the notice published by the authority, rather than in a sealed envelope.” *Id.*

Prior to the enactment of Sub. H.B. 225, a county contracting authority did not have the authority to accept competitive bids or sealed proposals other than by way of a sealed envelope. *See generally* 2005-2006 Ohio Laws, Part II, 2868, 3121 (Am. Sub. H.B. 66, eff. June 30, 2005, with certain sections effective on other dates) (R.C. 307.88(A), as in effect prior to the enactment of Sub. H.B. 225, required bids to be filed in a sealed envelope). This meant that a county contracting authority did not have the authority to accept bids and proposals by electronic means. Instead, a county contracting authority was limited to receiving bids and proposals in paper form.

Sub. H.B. 225’s amendments to R.C. 307.862 and R.C. 307.88(A) thus clarify and elaborate “on the authority of a county contracting authority with regard to the authority’s acceptance of competitive sealed proposals.” Ohio Legislative Serv. Comm’n, Final Analysis, Sub. H.B. 225, 129th Gen. A., at 24 (as passed by the General Assembly). Sub. H.B. 225 does not directly address the authority of a county contracting authority to solicit or receive bids and bid guaranties by electronic means.

Nevertheless, the removal of R.C. 307.88(A)’s requirement that bids be filed in a sealed envelope supports the conclusion that a county contracting authority may electronically solicit and receive bids and bid guaranties for a public contract. Under R.C. 307.88(A), as amended by Sub. H.B. 225, a county contracting authority is no longer limited to soliciting and receiving bids and bid guaranties in paper form. Rather, pursuant to R.C. 307.87(A) and R.C. 307.88(A), as amended by Sub. H.B. 225, a county contracting authority now has express authority to determine the manner in which it will solicit and accept bids and bid guaranties. This authority, as previously stated, empowers a county contracting authority to solicit and accept bids and bid guaranties through an EBS. Accordingly, Sub. H.B. 225 does not prohibit a county contracting authority from soliciting and receiving bids and bid guaranties through an EBS.

### **Conclusions**

On the basis of the foregoing, it is my opinion, and you are hereby advised as follows:

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1. R.C. 307.87(A) authorizes a county contracting authority to solicit bids for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an electronic bidding system, provided the county contracting authority complies with all other statutory notice requirements.
2. Pursuant to R.C. 307.87(B) and R.C. 307.88(A), a county contracting authority may receive bids and bid guaranties for a contract pertaining to a public improvement project described in R.C. 307.862(G) through an electronic bidding system, provided (1) bidders and the county contracting authority comply with R.C. Chapters 304 and 1306; (2) bid guaranties are filed in the form of a bond or letter of credit; and (3) the county contracting authority permits a person to access the bidding information described in R.C. 307.87(B)(1) other than through the electronic bidding system and file a bid and bid guaranty in paper form.