December 30, 2013

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

SYLLABUS: 2013-045

1. R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the county department of job and family services when the county uses one of its own entities to provide those services to the department.

2. R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services from its county transit board for the county department of job and family services.

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OPINION NO. 2013-045

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

Dear Prosecutor Watkins:

You have requested an opinion concerning a county's use of competitive bidding or competitive sealed proposals to obtain transportation services for the county department of job and family services (CDJFS).[1] Specifically, you ask:

1. Does R.C. 307.86 require a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS, or may the county acquire such services from its county transit board without using competitive bidding or competitive sealed proposals?

2. If R.C. 307.86 requires a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS, may the board of county commissioners authorize its county transit board to (1) use federal grant moneys to acquire transportation services on behalf of the CDJFS and (2) receive bids or proposals to provide transportation services to the CDJFS?

3. If R.C. 307.86 requires a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS, may the county transit board submit a bid or proposal to provide transportation services to the CDJFS?

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[1] You also have inquired about the authority of a county transit board to borrow money from a bank and the county's obligation to repay the loan. We answered these questions in 2013 Op. Att'y Gen. No. 2013-037.

**The Competitive Bidding Process under R.C. 307.86-.92**

R.C. 307.86-.92 set forth procedures a county must follow when purchasing goods and services.[2] *See generally* 2005 Op. Att'y Gen. No. 2005-029 at 2-300 and 2-301 (the statutory requirements for competitive bidding for county contracts are mandatory). R.C. 307.86 provides that a county or contracting authority is required to obtain through competitive bidding "[a]nything to be purchased, … including, but not limited to, any … service, … by or on behalf of the county or contracting authority … at a cost in excess of fifty thousand dollars."[3] *See generally* 2006 Op. Att'y Gen. No. 2006-027 at 2-239 n.4 ("[t]he term 'competitive bidding' refers to a strict procedure of providing public notice and then accepting bids for specified goods or defined services"). The competitive bidding process is used "to provide a fair and honest process for the awarding of public contracts." *Rein Constr. Co. v. Trumbull Cnty. Bd. of Comm'rs*, 138 Ohio App. 3d 622, 630, 741 N.E.2d 979 (Trumbull County 2000); *accord* 2012 Op. Att'y Gen. No. 2012-036 at 2-314. *See generally Danis Clarko Landfill Co. v. Clark Cnty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 602, 653 N.E.2d 646 (1995) ("among the purposes of competitive bidding legislation are the protection of the taxpayer; prevention of 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").

When a county uses competitive bidding to award a contract under R.C. 307.86, R.C. 307.87(A) requires the county to provide notice that it will accept bids for the contract. *See also* R.C. 307.87(B) (setting forth the information a county must include in a notice for bids for a public contract); R.C. 307.88(A) (setting forth bid requirements). *See generally* 2012 Op. Att'y Gen. No.

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[2] Trumbull County has not acquired home rule powers, *see* Ohio Const. art. X, § 1; R.C. 9.482; R.C. 307.15, adopted a charter, *see* Ohio Const. art. X, §§ 3 and 4, or adopted an alternative form of county government, *see* Ohio Const. art. X, § 1; R.C. Chapter 302. We will therefore consider your questions in light of the provisions of R.C. 307.86-.92 governing the awarding of county contracts through the use of competitive bidding and competitive sealed proposals.

This opinion also does not address the use of competitive bidding or competitive sealed proposals to obtain transportation services for a joint county department of job and family services or a private entity designated as a county department of job and family services (CDJFS). *See generally* R.C. 307.981(B)(2) (a board of county commissioners may designate a private or government entity within this state to serve as its CDJFS); R.C. 329.40(A)(1) (a county may enter into an agreement with one or more counties to "form a joint county department of job and family services to perform the duties, provide the services, and operate the programs required" of a single CDJFS under R.C. Chapter 329).

[3] 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.

2012-036 at 2-314 ("[t]he notice required by R.C. 307.87 … serves as an invitation by a county contracting authority to receive bids for a public contract"); *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"). After receiving bids, the county reviews them and, except when it rejects all bids, awards the contract to the person who submits the "lowest and best" bid.[4] R.C. 307.90(A); *see* R.C. 307.91; 2012 Op. Att'y Gen. No. 2012-036 at 2-315. *See generally Greater Cincinnati Plumbing Contractors' Ass'n 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. Factors such as quality, service, performance and record are also part of the competitive process. 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'"); 2012 Op. Att'y Gen. No. 2012-036 at 2-317 ("when a public contract is awarded through competitive bidding, a county contracting authority is required to either accept or reject the specific price and terms stated in a bid. The county contracting authority may not enter into discussions or negotiations with a person who submits a bid to amend or change the price or terms of the person's bid"). Thus, unless another provision of the law provides otherwise, R.C. 307.86 requires a county to use the competitive bidding process established in R.C. 307.86-.92 to purchase transportation services for the CDJFS when the cost of the purchase will exceed $50,000.[5] *See* 2012 Op. Att'y Gen. No. 2012-036 at 2-313 and 2-314; 2012 Op. Att'y Gen. No. 2012-031 at 2-269 and 2-270; 2001 Op. Att'y Gen. No. 2001-021 at 2-116 and 2-117. *See generally Yellow Cab of Cleveland, Inc. v. Greater Cleveland Reg'l Transit Auth.*, 72 Ohio App. 3d 558, 595 N.E.2d 508 (Cuyahoga County 1991) (a contract to purchase transportation services must be competitively bid in accordance with R.C. 306.43 by a regional transit authority unless the law provides otherwise).

**The Competitive Sealed Proposal Process under R.C. 307.862**

In lieu of using the competitive bidding process of R.C. 307.86-.92 to award a contract to provide transportation services to the CDJFS, a county may use a competitive sealed proposal process to award the contract. R.C. 307.86(M) states that a county may use competitive sealed proposals, rather than competitive bidding, when it determines that the use of such proposals would be

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[4] A county that awards contracts by competitive bidding may "adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder." R.C. 9.312(C).

[5] Various exceptions to the competitive bidding requirements of R.C. 307.86-.92 appear in R.C. 307.86 and elsewhere in the Revised Code. *See, e.g.*, R.C. 307.86(A)-(M) (describing specific situations in which the competitive bidding requirements of R.C. 307.86-.92 do not apply); R.C. 340.03(A)(8)(a) (a county board of alcohol, drug addiction, and mental health services is not required to comply with R.C. 307.86 when purchasing community addiction and mental health services).

advantageous to the county.[6] Under the competitive sealed proposal process, a county solicits requests for proposals by giving "notice of the request for proposals in the same manner that notice must be given for competitive bidding pursuant to [R.C. 307.87]." R.C. 307.862(A)(4); *see* R.C. 307.862(A)(2); *see also* R.C. 307.862(B) (setting forth the information a county must include in its request for proposals). If a county does not cancel or reissue a request for proposals, the county evaluates the submitted proposals, determines which proposal is the most advantageous to the county, and negotiates with, and awards the contract to, the person who submitted the winning proposal.[7] *See* R.C. 307.862(A)(1); R.C. 307.862(A)(9)-(11); R.C. 307.862(E); R.C. 307.862(F). *See generally* R.C. 307.862(A)(6) (a county's request for proposals must include the factors and criteria the county will consider in evaluating the proposals it receives). Hence, pursuant to R.C. 307.86(M) and R.C. 307.862, a county may determine that it is advantageous for the county to use the competitive sealed proposal process in lieu of competitive bidding to acquire transportation services for the CDJFS. *See* 2012 Op. Att'y Gen. No. 2012-036 at 2-318 ("R.C. 307.862 establishes a process whereby a person may discuss and negotiate the price and terms of a public contract with a county contracting authority").

**Use of Competitive Bidding or Competitive Sealed Proposals to Obtain Transportation Services for the CDJFS**

Your first question asks whether R.C. 307.86 requires a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS, or may the county acquire such services from its county transit board without using competitive bidding or competitive sealed proposals.[8] As explained above, unless another provision of the law requires otherwise, R.C.

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[6] A county may "not use competitive sealed proposals for contracts for construction, design, demolition, alteration, repair, or reconstruction of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, waterworks, and all other structures or works of any nature by a county." R.C. 307.862(G).

[7] A county may terminate negotiations with the person who submits the winning proposal for a public contract under R.C. 307.862 when the person fails to provide necessary information for the negotiations or fails to negotiate in good faith. R.C. 307.862(D). If negotiations are terminated, the county may negotiate and award the public contract to the person who submitted the next most advantageous proposal to the county. R.C. 307.862(D)-(E).

[8] In your letter you state that "[a] large portion of transit services in Trumbull County are provided by funding secured by the Trumbull County Department of Job and Family Services." You explain further that, for this reason, the county transit board, the CDJFS, and county commissioners are "exploring the feasibility of transferring the procurement of, operation of, and payment for TANF [(temporary assistance for needy families)], Title XX [of the Social Security Act], NET [(non-emergency transportation)], and PRS [(pregnancy related services)] transit services from" the CDJFS to the county transit board. *See generally* R.C. 329.04(A)(7) (a CDJFS must consult with the board of county commissioners "in the development of the transportation work plan developed under [R.C.

307.86 requires a county to use competitive bidding or competitive sealed proposals when the cost of transportation services to be "purchased" by the county for the CDJFS exceeds $50,000.[9]

The use of the term "purchased" in R.C. 307.86 means that the provisions of that statute apply when a county is *buying* transportation services for the CDJFS. *See generally Merriam-Webster's Collegiate Dictionary* 1010 (11th ed. 2005) (the verb "purchase" means "to obtain by paying money or its equivalent : BUY"). A county buys transportation services for its CDJFS when it pays money to acquire those services from another entity or from an outside source, rather than using one of its own entities to provide the services to the CDJFS. *See generally Merriam-Webster's Collegiate Dictionary* 169 (11th ed. 2005) ("buy" means "to acquire possession, ownership, or rights to the use or services of by payment esp. of money"). This means that a county is required to comply with R.C. 307.86 when it wants to fulfill the transportation service needs of the CDJFS through outsourcing. *See generally Dictionary of Business and Economics Terms* 503 (5th ed. 2012) ("outsourcing" is "having a service or product supplied or manufactured by another"); *Merriam-Webster's Collegiate Dictionary* 882 (11th ed. 2005) ("outsourcing" means "to procure (as some goods or services needed by a business or organization) under contract with an outside supplier <decided to [outsource] some back-office operations>"). *See generally also* 2008 Op. Att'y Gen. No. 2008-007 at 2-81 ("a county engineer may, as the general contractor of a force account project, acquire material and equipment from *outside vendors*, so long as the acquisitions are made in compliance with the competitive bidding requirements of R.C. 307.86-.92. Furthermore, a county engineer is not precluded from subcontracting to an *outside contractor* part of the work undertaken by force account, again, so long as the subcontract is let in conformity with R.C. 307.86-.92" (emphasis added and citation omitted)).

If, however, a county uses one of its own entities to provide transportation services to the CDJFS, R.C. 307.86 does not apply, as the county is not acquiring anything from an outside source.[10]

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307.985]"); R.C. 329.041 (a CDJFS and county transit board "shall discuss the transportation needs of the county's Ohio works first participants, review existing efforts and develop new options to meet those needs, and measure the accomplishments of those efforts"). *See generally also* R.C. 307.985 ("[e]ach board of county commissioners shall develop a written transportation work plan that establishes policies regarding the transportation needs of low income residents of the county seeking or striving to retain employment. In developing the transportation work plan, the board shall consult with … [the CDJFS]").

[9] A county has the authority to enter into a contract to purchase transportation services to enable the CDJFS to administer federal and state social services programs. *See* R.C. 329.04; R.C. 329.05; R.C. 5101.46(B); R.C. 5101.80(A); R.C. 5101.804; 12 Ohio Admin. Code 5101:1-38-06; 14A Ohio Admin. Code Chapter 5101:3-24; 14B Ohio Admin. Code 5101:9-4-07(A)(1); 2004 Op. Att'y Gen. No. 2004-031.

[10] One example of a situation in which a county is not required to comply with R.C. 307.86 when using county resources exists when the county engineer, as a general contractor of a force

Accordingly, R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS when the county uses one of its own entities to provide those services to the CDJFS.

**A County Transit Board Is a County Entity**

We now consider whether a county transit board is a county entity. There is no comprehensive test for determining whether a particular public board is a county entity. However, prior opinions of the Attorneys General have determined in various contexts that a public board is a county entity when it may be created and dissolved by county officials and is staffed and supervised by county personnel. *See* 1993 Op. Att'y Gen. No. 93-065 at 2-308 and 2-309; 1992 Op. Att'y Gen. No. 92-060 at 2-247 and 2-248; 1989 Op. Att'y Gen. No. 89-001 at 2-7; 1984 Op. Att'y Gen. No. 84-099 at 2-336 and 2-337.

Pursuant to R.C. 306.01(A), a board of county commissioners may establish a county transit system and have the system operated by a county transit board:

> Whenever the county commissioners of any county declare, by resolution, that it is essential to the best interests of the county that a county transit system be established, the commissioners shall either appoint a county transit board, with powers and duties as specified by [R.C. 306.01-.13] and [R.C. 306.99], or state in the resolution that the board of county commissioners itself shall operate the county transit system and assume all the powers and duties assigned to a board of county commissioners in [R.C. 306.04, R.C. 306.06, R.C. 306.08-.10, R.C. 306.12, and R.C. 306.13].

The members of a county transit board are appointed, removed, and have their compensation set by the board of county commissioners. R.C. 306.02; *see also* R.C. 306.01(A)-(B). In addition, R.C. 306.04(A) explicitly provides that, "[e]xcept as otherwise provided in [R.C. 306.04(B)], employees of a county transit board … are employees of the county."[11] Thus, the duties and responsibilities of a county transit board are performed by county officers and employees.[12]

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account project, uses county employees to work on a road construction project. *See* R.C. 5543.19; 2008 Op. Att'y Gen. No. 2008-007.

[11] Division (B) of R.C. 306.04 states that "[a]ny county transit board that established its own civil service organization and procedure prior to October 25, 1995, shall continue to operate under that organization."

[12] Nothing in the Revised Code states that the officers of a county transit board are county officers. Nevertheless, the language of R.C. 306.04(A) stating employees of a county transit board are county employees evinces a legislative intent that the officers of a county transit board are county

A county transit board also is subject to oversight, and may be dissolved, by the board of county commissioners. R.C. 306.04(C)(3) and R.C. 306.09(B) mandate that a board of county commissioners must approve the issuance of revenue bonds secured by revenues and other income accruing to the county transit board. R.C. 306.04(C)(19) requires a county transit board to obtain the approval of the board of county commissioners before selling, leasing, or granting without competitive bidding "the right of use of all or a portion of the county transit system to any other political subdivision, taxing district, or other public body or agency having the power to operate a transit system." A county transit board must prepare and provide to the board of county commissioners an annual report showing the financial results of the operation of the county transit system and a "monthly summary statement of revenues and expenses for the preceding month sufficient to show the exact financial condition of the county transit system as of the last day of the preceding month." R.C. 306.04(C)(18).

With respect to dissolving a county transit board, R.C. 306.01(B) provides, in part:

> Once a county transit system has been established, the board of county commissioners may, by resolution, change the governing board for the system from the board of county commissioners to a county transit board, or from a county transit board to the board of county commissioners. If the resolution transfers the governing authority from the county transit board to the board of county commissioners, the transfer shall not occur for six months after the date of the resolution. On the date of transfer, the transit board shall be dissolved[.]

When a board of county commissioners dissolves the county transit board, the county is required to "assume all contracts, property, and debts of the transit board, and all transit employees [are] transferred to the control of the board of county commissioners." R.C. 306.01(B).

The statutes governing a county transit board thus indicate that the board is a public corporation or instrumentality created, supervised, and used by a board of county commissioners to perform the proprietary function of operating the county's transit system.[13] *See generally City of Cleveland v. Div. 268 of the Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps. of Am.*, 30

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officers, as it would be unreasonable to consider otherwise. *See generally City of Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968) (syllabus, paragraph 4) ("[t]he General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences").

[13] A governmental entity engages in a proprietary function and takes on the character of a private corporation when it operates a transit system. *See Zangerle v. City of Cleveland*, 145 Ohio St. 347, 61 N.E.2d 720 (1945) (syllabus, paragraphs 5 and 6), *overruled on other grounds by City of Cleveland v. Bd. of Tax Appeals*, 167 Ohio St. 263, 147 N.E.2d 663 (1958); *Hordin v. City of Cleveland*, 77 Ohio App. 491, 499-500, 62 N.E.2d 889 (Cuyahoga County 1945).

Ohio Op. 395, 406 (C.P. Cuyahoga County 1945) ("the 'posture' of a public owned utility such as a transit system is that of a 'public' and not a 'private' corporation. And when we refer to the municipality of Cleveland as a public corporation in contradistinction to a private one, we mean it is an agency of the state with its powers and authority defined, limited and restricted by many laws not at all applicable to a private corporation"); *Black's Law Dictionary* 393 (9th ed. 2009) (a "public corporation" is "[a] corporation that is created by the state as an agency in the administration of civil government…. A government-owned corporation that engages in activities that benefit the general public, usu. while remaining financially independent"); *Black's Law Dictionary* 870 (9th ed. 2009) (an "instrumentality" is "[a] thing used to achieve an end or purpose" or "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body").

In other words, the General Assembly authorizes a board of county commissioners to delegate to the county transit board the task of operating the county's transit system for the board of county commissioners. *See* R.C. 306.01. When operating a county transit system, a county transit board serves as an agent for the board of county commissioners. *See Black's Law Dictionary* 70, 72 (9th ed. 2009) (an "agency" is "[a] fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions," and an "agent" is "[o]ne who is authorized to act for or in place of another"). *See generally* 1988 Op. Att'y Gen. No. 88-056 at 2-270 and 2-271 (further discussing nature of an "agency relationship"). The county transit board thus performs tasks that otherwise would be performed by the board of county commissioners. *See* R.C. 306.01. Because a county transit board may be created and dissolved by the board of county commissioners, is staffed and supervised by the county, and serves as an agent for the board of county commissioners, a county transit board is a county entity.

We find additional support for this conclusion in other language used by the General Assembly in R.C. 306.01-.13. Pursuant to R.C. 306.09(B), a county transit board has the authority to "issue revenue bonds *of the county* for the purpose of purchasing, acquiring, constructing, enlarging, and improving the county transit system." (Emphasis added.) And, when a county transit board purchases goods and services, the board must use the same procedures as the county. *See* R.C. 306.11 (a county transit board "shall have jurisdiction of all purchases and contracts entered into in connection with the county transit system pursuant to [R.C. 307.86-.92]"); *see also* R.C. 306.06 ("[a]ny municipal corporation, county, township, school district, or other political subdivision or taxing district may convey or lease to or exchange with any county transit board … and any county transit board … may convey or lease to or exchange with any state, municipal corporation, county, township, school district, or other political subdivision or taxing district without competitive bidding and on mutually agreeable terms any personal property, real estate, or interests therein"). That the General Assembly has authorized a county transit board to issue county revenue bonds and required it to use the same procedures as a county when purchasing goods and services signifies a legislative intent that a county transit board is a county entity.

The General Assembly also has declared that members of a county transit board may "not be interested financially in any contract, work, or service for the county[,]" R.C. 306.02, and that officers and employees of a county transit system are "under the sole control of the county transit board and

are not subject to supervision of other county officers[,]" R.C. 306.11. Again, the language of these two provisions of law demonstrates that the General Assembly considers a county transit board to be a county entity. If a county transit board were not a county entity, it would have been unnecessary for the General Assembly to enact these two provisions. *See generally State ex rel. Cleveland Elec. Illum. Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959) ("the General Assembly is not presumed to do a vain or useless thing, and … when language is inserted in a statute it is inserted to accomplish some definite purpose").

As we have determined that a county transit board is a county entity, R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services from its county transit board. Therefore, R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services from its county transit board for the CDJFS.[14]

**Authority of a County Transit Board to Use Grant Moneys, Receive Bids or Proposals for the CDJFS, and Submit Bids and Proposals to Provide Transportation Services to the CDJFS**

You have also asked, if R.C. 307.86 requires a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the CDJFS, whether a county transit board may (1) use federal grant moneys to acquire transportation services on behalf of the CDJFS; (2) receive bids or proposals to provide transportation services to the CDJFS; and (3) submit a bid or proposal to provide transportation services to the CDJFS. Earlier we determined that R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services from its county transit board for the CDJFS. Hence, it is unnecessary for us to answer your remaining questions.

**Conclusions**

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

1. R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services for the county department of job and family services when the county uses one of its own entities to provide those services to the department.

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[14] Earlier we determined that a county transit board is an agent of the county. In this capacity, a county transit board may contract on behalf of the county to obtain items and services for the operation of the county's transit system. *See* R.C. 306.04(C); R.C. 306.11. A county transit board, as a "contracting authority," as defined in R.C. 307.92, *see* note 3, *supra*, therefore must comply with R.C. 307.86-.92 when acquiring transportation services for the CDJFS. *See* R.C. 306.11.

2. R.C. 307.86 does not require a county to use competitive bidding or competitive sealed proposals to acquire transportation services from its county transit board for the county department of job and family services.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General