June 19, 2001

OPINION NO. 2001-021

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

Dear Prosecutor Whitney:

You have requested an opinion concerning the authority of a county to contract with a private company to perform certain inspections for the offices of the county engineer and the county sanitary engineer. According to your letter, the county contemplates contracting with a company that employs no licensed, professional engineers. Under the proposed contract, the company's employees will perform certain inspection services, consisting of unspecified "field and lab procedures," for the two offices mentioned.

You ask whether a contract for the services of such company is subject to the competitive bidding requirements of R.C. 307.86. In particular, you question whether the contract you describe falls within the type of contract excepted from the competitive bidding requirements of R.C. 307.86 as a purchase of services of a professional engineer within the meaning of that statute. In the alternative, you ask whether such a contract is excepted from the competitive bidding requirements of R.C. 307.86 as a "personal services" contract, as described in *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945).

Let us begin by examining the requirements of R.C. 307.86.[1] With numerous exceptions set forth therein, R.C. 307.86 establishes the fundamental requirement that anything, including

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[1] R.C. 307.86 states in pertinent part:

> *Anything to be purchased*, leased, leased with an option or agreement to purchase, or constructed, *including*, but not limited to, *any* product, structure, construction, reconstruction, improvement, maintenance, repair, or *service*, *except*

services, to be purchased by or on behalf of a county or a county contracting authority[2] at a cost in excess of fifteen thousand dollars, be obtained through competitive bidding. As explained by the court in *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St. 3d 590, 602, 653 N.E.2d 646, 656 (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."

Among the many exceptions to the competitive bidding requirements of R.C. 307.86 are purchases of particular services, including those of "an accountant, architect, attorney at law, physician, *professional engineer*, construction project manager, consultant, surveyor, or appraiser," R.C. 307.86 (emphasis added). Purchases of other services are also excepted from the competitive bidding requirements of R.C. 307.86 by express statutory provision. *See, e.g.*, R.C. 307.86(H) (child day-care services for provision to county employees); R.C. 307.86(K) (certain types of services purchased by a public children services agency); R.C. 340.03(A)(6)(a) (purchase of mental health services by a board of alcohol, drug addiction, and mental health services).

With this general statutory framework in mind, let us consider your first question whether a purchase of services for the performance of unspecified "field and lab procedures" for the county engineer and county sanitary engineer is excepted from the competitive bidding

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> *the services of* an accountant, architect, attorney at law, physician, *professional engineer*, construction project manager, consultant, surveyor, or appraiser, *by or on behalf of the county or contracting authority*, as defined in [R.C. 307.92], at a cost *in excess of fifteen thousand dollars*, [with specific statutory exceptions], shall be obtained through competitive bidding. (Emphasis added.)

R.C. 307.86 also describes specific situations to which its competitive bidding requirements do not apply, including, among others, purchases of supplies or parts that are available only from a single supplier, R.C. 307.86(B), purchases from "the federal government, the state, another county or contracting authority of another county, or a board of education, township, or municipal corporation," R.C. 307.86(C), and certain purchases of various types of family services, programs, or ancillary services by a public children services agency, R.C. 307.86(K). Specific statutory exceptions to the terms of R.C. 307.86 are also listed therein, *e.g.*, R.C. 125.04 (political subdivision participation in purchases by the Department of Administrative Services); R.C. 307.022 (county commissioners' lease of correctional facility).

[2] *See generally* R.C. 307.92 (defining "contracting authority," as used in R.C. 307.86, as meaning "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").

requirements of R.C. 307.86 as a purchase of the services of a professional engineer. While R.C. 307.86 does not define what activities constitute the services of a "professional engineer" for purposes of that statute, the provisions of R.C. Chapter 4733 are useful in understanding the meaning of that language.

R.C. Chapter 4733 concerns the registration of professional engineers and professional surveyors and the practice of those professions. As used in R.C. Chapter 4733, the "practice of engineering" includes:

> any professional service, such as consultation, investigation, evaluation, planning, design, or *inspection of construction or operation*, for the purpose of assuring compliance with drawings or specifications in connection with any public or privately owned public utilities, structures, buildings, machines, equipment, processes, works, or projects in the proper rendering of which the qualifications of [R.C. 4733.11] are required to protect the public welfare or to safeguard life, health, or property.

R.C. 4733.01(D) (emphasis added). *See generally* R.C. 4733.01(F) (defining the "practice of surveying," in part, as a branch of the practice of engineering).

Under the statutory framework prescribed by R.C. Chapter 4733, a person must be registered as a professional engineer or exempted therefrom in accordance with R.C. 4733.01-.23 in order to perform services as a professional engineer.[3] R.C. 4733.02 (registration requirement); R.C. 4733.22 (prohibition against the unauthorized practice of engineering or surveying). Various exemptions from this registration requirement are provided by statute.[4] R.C. Chapter 4733 also establishes requirements for and limitations upon the practice of engineering by a firm, partnership, association, limited liability company, or corporation. *See, e.g.*, R.C. 4733.16.

Because the statutory framework in R.C. Chapter 4733 regulating the practice of professional engineering was already in place at the time R.C. 307.86 was enacted,[5] it must be

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[3] As used in R.C. Chapter 4733, the term "professional engineer" means "a person registered as a professional engineer" under R.C. Chapter 4733. R.C. 4733.01(A).

[4] *See, e.g.*, R.C. 4733.18(A) (temporary certification); R.C. 4733.18(B)(1) (exempting from the registration requirements of R.C. 4733.01-.23, "[a]n employee or a subordinate of a person holding a certificate of registration or an employee of a person holding temporary certification under division (A)(1) of this section or exempted from registration by division (A)(2) of this section; provided the employee's or subordinate's duties do not include responsible charge of engineering or surveying work").

[5] *See* 1967-1968 Ohio Laws, Parts II-III, 2623 (Am. Sub. H.B. 428, eff. Dec. 12, 1967) (enacting statutory scheme for competitive bidding applicable to counties) (text of R.C. 307.86 appearing in 1967-1968 Ohio Laws, Part I, 273).

assumed that the General Assembly was aware of those regulatory provisions when it excepted from the competitive bidding requirements of R.C. 307.86 a contract for the services of a "professional engineer." *See Charles v. Fawley*, 71 Ohio St. 50, 72 N.E. 294 (1904) (the General Assembly is presumed to act with knowledge of existing statutes).

It necessarily follows, therefore, that the services of a professional engineer that are excepted from the competitive bidding requirements of R.C. 307.86 are any services that a professional engineer may provide in accordance with R.C. Chapter 4733, *i.e.*, activities that fall within the practice of engineering. *See* 1983 Op. Att'y Gen. No. 83-027 (syllabus, paragraph five) ("[p]ursuant to R.C. 305.15,[6] when the services of an engineer are required and the amount of work to be performed makes it necessary, the county commissioners may, upon written request of the county engineer, enter into contracts with any person, firm, partnership, association, or corporation *qualified to perform engineering services* in the state for the performance of such services" (footnote and emphasis added)).

According to your letter, the services to be purchased under the proposed contract consist of unspecified "field and lab procedures" for the county engineer and county sanitary engineer. In this regard, we note that the General Assembly has imposed upon the offices of county engineer and county sanitary engineer the performance of a variety of tasks, only some of which fall within the practice of engineering, as defined in R.C. 4733.01(D).[7] A purchase of services of

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[6] R.C. 305.15 states, in pertinent part:

> When the services of an engineer are required with respect to roads, turnpikes, ditches, bridges, or any other matter, and when, on account of the amount of work to be performed, the board of county commissioners deems it necessary, upon the written request of the county engineer, the board may employ a registered professional engineer and as many assistant engineers, rodmen, and inspectors as are needed, and may also enter into contracts with any person, firm, partnership, association, or corporation qualified to perform engineering services in the state for this purpose and fix the compensation therefor.

[7] For example, the General Assembly has specifically required that certain duties of the county engineer be performed only by a registered professional engineer or by a registered surveyor. *See, e.g.*, R.C. 315.14 (requiring the county engineer, in part, to "make all surveys required by law and perform all necessary services to be performed by a registered surveyor or registered professional engineer in connection with the construction, repair, or opening of all county roads or ditches constructed under the authority of the board"). Moreover, aspects of certain public construction projects may be performed only by a licensed professional engineer or licensed professional surveyor. *See, e.g.*, R.C. 153.31 (stating in part, "[w]hen it becomes necessary for the board of county commissioners of a county to erect or cause to be erected a public building, or a substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor,

a professional engineer to which the competitive bidding requirements of R.C. 307.86 do not apply encompasses only those activities that fall within the practice of engineering, as defined in R.C. 4733.01(D). Thus, a purchase of the services about which you ask is excepted from the competitive bidding requirements of 307.86, as a contract for the services of a professional engineer, only if those services fall within the practice of engineering.

Whether the particular services to be provided under the proposed contract constitute the services of a professional engineer depends, in part, upon the nature of the services to be performed and, perhaps, the manner in which such services will be executed, *see, e.g.*, R.C. 4733.18(B)(1) (exempting from the registration requirements of R.C. 4733.01-.23, "[a]n employee or a subordinate of a person holding a certificate of registration or an employee of a person holding temporary certification under division (A)(1) of this section or exempted from registration by division (A)(2) of this section; provided the employee's or subordinate's duties do

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they shall cause to be made by a registered architect or registered professional engineer the following…"); R.C. 4733.17 (stating, in part, "[n]either this state, nor any of its political subdivisions … shall engage in the construction of any public work involving the practice of professional engineering or professional surveying, for which plans, specifications, and estimates have not been made by, and the construction thereof inspected by, a licensed professional engineer or professional surveyor; provided this section shall not apply to the design, construction, improvement, or maintenance of any public work wherein the contemplated expenditure for the completed project does not exceed five thousand dollars").

The General Assembly has also acknowledged, however, that execution of the duties of the office of county engineer may require the assistance of persons in addition to those who are registered professional engineers. *See, e.g.*, R.C. 325.17 (county engineer, among others, "may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees").

Similarly, the sanitary engineer may perform tasks that fall within the practice of engineering, as well as some tasks that do not. *See, e.g.*, R.C. 6117.01(C) (in part, authorizing a board of county commissioners to employ a registered professional engineer as county sanitary engineer, whom they may authorize to employ necessary assistants).

Also, both the county engineer and the sanitary engineer may perform a variety of inspections and examinations. *See generally, e.g.*, R.C. 315.14 (stating, in part, "[t]he county engineer shall be responsible for the inspection of all public improvements made under authority of the board of county commissioners"); R.C. 6131.46 (stating in part, "[a]ll work on an improvement and all material furnished for use therein shall be under the supervision and inspection of the county engineer or a deputy appointed by him for the purpose. All material furnished under the specifications and contract shall be inspected by him before use and within a reasonable time after the same is delivered and placed upon the line of the improvement or such other place as is designated").

not include responsible charge of engineering or surveying work").[8] Whether the contract you describe is exempt from the competitive bidding requirements of R.C. 307.86 as a contract for the services of a professional engineer, therefore, presents questions of fact, which cannot be resolved by means of an opinion of the Attorney General.[9]

In answer to your first question, we conclude that the exception from the competitive bidding requirements of R.C. 307.86 applicable to a purchase of the services of a professional engineer applies to a purchase of only those services that fall within the practice of engineering, as defined in R.C. 4733.01(D). *See generally State ex rel. Schaefer v. Board of County Comm'rs*, 11 Ohio App. 2d 132, 229 N.E.2d 88 (Montgomery County 1967) (syllabus, paragraph eight) ("[a] person who seeks to excuse himself from the operation of mandatory statutes requiring competitive bidding is required to prove the facts warranting such exception. And, whether the nature of the work or service is such as to except such work or service from the force of such statutes is a matter which must be proved by the party contending for such exception").

Your second question asks whether a contract for the performance of "field and lab procedures" for the county engineer and sanitary engineer may be excepted from the competitive

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[8] *See also, e.g.*, R.C. 4733.161 (circumstances in which a person who performs labor or who provides services pursuant to a construction contract may offer or provide engineering services in connection with that person's own labor or services); R.C. 4733.17 (performance by a qualified or registered architect of "such engineering practice as may be incident to the practice of his profession").

[9] *See* 1999 Op. Att'y Gen. No. 99-053 at 2-323 (note eleven); 1983 Op. Att'y Gen. No. 83-027 at 2-104 ("[w]hether the services of an engineer are required for each of the particular functions involved must be determined on a case by case basis"). *See generally Clark v. State Bd. of Registration*, 121 Ohio App. 3d 278, 285, 699 N.E.2d 968, 972 (Summit County 1997) ("[i]t is elementary that anything falling within the 'practice of surveying' is under the … jurisdiction [of the State Board of Registration for Professional Engineers and Surveyors]"); 1972 Op. Att'y Gen. No. 72-108 (syllabus, paragraph one) (stating, in part: "[t]he State Board of Registration for Professional Engineers and Surveyors has the authority, under [R.C. Chapter 4733], to make the determination of the types of services which shall be intrinsic to the practice of engineering").

We caution that any professional services that fall within the practice of engineering, as defined in R.C. 4733.01(D), may be provided only by a person who is registered in accordance with R.C. Chapter 4733 to engage in the practice of engineering or by a person who is exempted under R.C. 4733.01-.23 from such registration requirement. Thus, if the services to be provided under the contract about which you ask fall within the practice of engineering, as defined in R.C. 4733.01(D), the county would be advised to assure that those who will perform those services are in compliance with the registration requirements of R.C. Chapter 4733 governing the practice of engineering.

bidding requirements of R.C. 307.86 as a contract for personal services, as described in *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945). At issue in the *Doria* case was the validity of a contract entered into by the Department of Highways (now the Department of Transportation) for the preparation of a number of abstracts of title. The *Doria* court began by finding that the preparation of such abstracts, which recited only facts available in public records, without opinion as to the legal significance of those facts, did not constitute the practice of law.

The *Doria* court then considered whether former G.C. 1206 (analogous provisions now at R.C. 5525.01) and related provisions required that a contract for the preparation of such abstracts at a cost in excess of five hundred dollars be let through competitive bidding. As enacted in 1933 Ohio Laws 524 (H.B. 281, filed July 19, 1933),[10] G.C. 1206 stated in pertinent part: "Before entering into *a contract* the director [of highways] shall advertise for bids for two consecutive weeks in two newspapers of general circulation" (emphasis added). G.C. 1206 set forth additional requirements regarding the letting of such contracts, including such things as the contents of bid notices and the information to be provided by bidders. Concerning the awarding of such a contract, G.C. 1206 stated: "The director shall award the contract to the lowest competent and responsible bidder qualified to bid in accordance with the terms of this act."

In concluding that G.C. 1206 did not require competitive bidding in the letting of a contract for the preparation of abstracts of title, the *Doria* court stated:

> While it is quite true that public contracts may not ordinarily be entered into without advertisement and competitive bidding, a well recognized exception exists where the contract is for *personal services of a specialized nature requiring the exercise of peculiar skill and aptitude*. This exception has been recognized and applied in Ohio. *Compare State, ex rel Baen, v. Yeatman, Aud.*, 22 Ohio St. 546 [(1872)].[11]
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> The services relator was engaged to supply fall within the noted exception. They represented a *necessary emergency undertaking* demanding the immediate enlistment of *trained persons* thoroughly familiar with the public records and their use.

145 Ohio St. at 17, 60 N.E.2d at 478-79 (footnote and emphasis added; various citations omitted). The *Doria* court thus concluded that a contract for the purchase of "personal services of a specialized nature requiring the exercise of peculiar skill and aptitude" that was entered into

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[10] G.C. 1206 and related sections were repealed in 1945-1946 Ohio Laws 455, 531 (Am. S.B. 204, filed July 12, 1945).

[11] The case of *State ex rel. Baen v. Yeatman*, 22 Ohio St. 546 (1872), found that a contract for the recopying of plats for use by the county auditor at a cost in excess of five hundred dollars was required to be competitively bid under the language of a statute requiring that any contract "for the performance of any job or work" at a cost in excess of five hundred dollars be competitively bid.

as a "necessary emergency undertaking," was excepted from the general rule that public contracts are to be competitively bid. *Id*.

The statutory scheme governing the letting of the contract considered in the *Doria* case, however, differs significantly from the provisions of R.C. 307.86 about which you ask. The *Doria* case concerned the application of G.C. 1206, which neither described the types of contracts entered into by the Director of Highways to which its provisions applied, nor included any express exceptions to its application.[12] In contrast, R.C. 307.86 establishes in broad terms the types of contracts that are subject to competitive bidding. *See generally* note one, *supra*. R.C. 307.86 also lists numerous exceptions to its competitive bidding requirements, either by reference to other statutes, or by defining other categories of contracts to which those requirements do not apply. *See generally* note one, *supra*. Finally, R.C. 307.86 contains express exceptions for purchases of the services of "an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser," as well as other carefully defined services.[13]

Because R.C. 307.86 describes in great detail the types of services that a county may obtain by contract without competitive bidding, we must conclude that the General Assembly

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[12] Your letter also cites *Yellow Cab of Cleveland, Inc. v. Greater Cleveland Regional Transit Authority*, 72 Ohio App. 3d 558, 595 N.E.2d 508 (Cuyahoga County 1991), which considered the meaning of the term "personal services," as used in former R.C. 306.43. At that time, R.C. 306.43, which governed competitive bidding by regional transit authorities, contained a general exception from its competitive bidding requirements for purchases of "personal services." Because former R.C. 306.43 provided no definition of that term, the *Yellow Cab* court adopted a definition of the term "personal services" contract, as developed in various cases, including *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945). Unlike former R.C. 306.43, as considered in the *Yellow Cab* case, R.C. 307.86 does not contain an express exception from its competitive bidding requirements for purchases of "personal services."

[13] *See, e.g.*, R.C. 307.86(D) (purchases of public family services or workforce development activities for provision by the county department of job and family services under R.C. 329.04, or "program services, such as direct and ancillary client services, child day-care, case management services, residential services, and family resource services" by a county board of mental retardation and developmental disabilities under R.C. 5126.05); R.C. 307.86(E) (purchases of family services or workforce development activities from nonprofit corporations or associations under programs that are funded entirely by the federal government); R.C. 307.86(H) (child day-care services for provision to county employees); R.C. 307.86(J) (purchases under R.C. 5139.34 or R.C. 5139.41-.46 of programs or services that provide "case management, treatment, or prevention services to any felony or misdemeanant delinquent, unruly youth, or status offender under the supervision of the juvenile court, including, but not limited to, community residential care, day treatment, services to children in their home, or electronic monitoring").

intended to except from the competitive bidding requirements of R.C. 307.86 contracts for only those services expressly excepted therefrom by statute. *See* 1984 Op. Att'y Gen. No. 84-064 (finding that a contract for the services of occupational and physical therapists is not excepted from the competitive bidding requirements of R.C. 307.86 because such services are not among those listed in R.C. 307.86 that are not subject to competitive bidding). *See generally State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620, 622 (1998) ("[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded" (various citations omitted)). Accordingly, unless the purchase of a particular service is expressly excepted by statute from the competitive bidding requirements of R.C. 307.86, whether or not the contract is for the purchase of "personal services," as described in *State ex rel. Doria v. Ferguson*, a purchase of such services by or on behalf of a county or a county contracting authority at a cost in excess of fifteen thousand dollars is subject to the competitive bidding requirements of R.C. 307.86.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. The exception from the competitive bidding requirements of R.C. 307.86 applicable to a purchase of the services of a professional engineer applies to a purchase of only those services that fall within the practice of engineering, as defined in R.C. 4733.01(D).

2. Unless a contract for the purchase of a particular service is expressly excepted by statute from the competitive bidding requirements of R.C. 307.86, whether or not the contract is for the purchase of "personal services," as described in *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945), a purchase of such services by or on behalf of a county or a county contracting authority at a cost in excess of fifteen thousand dollars is subject to the competitive bidding requirements of R.C. 307.86.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

June 19, 2001

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

SYLLABUS: 2001-021

1. The exception from the competitive bidding requirements of R.C. 307.86 applicable to a purchase of the services of a professional engineer applies to a purchase of only those services that fall within the practice of engineering, as defined in R.C. 4733.01(D).

2. Unless a contract for the purchase of a particular service is expressly excepted by statute from the competitive bidding requirements of R.C. 307.86, whether or not the contract is for the purchase of "personal services," as described in *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945), a purchase of such services by or on behalf of a county or a county contracting authority at a cost in excess of fifteen thousand dollars is subject to the competitive bidding requirements of R.C. 307.86.