

**OPINION NO. 80-062****Syllabus:**

1. The requirement of R.C. 5543.19(A) that a cost estimate be made and competitive bidding be used if the estimated cost of the work exceeds ten thousand dollars per mile is applicable only to the construction and reconstruction, including widening and resurfacing, of roads by force account.
2. Pursuant to R.C. 5543.19(A), the county engineer is not required to obtain an estimate of the cost of the work in the maintenance, improvement or repair of roads before proceeding by force account, if such work does not constitute construction or reconstruction, including widening and resurfacing, of roads.
3. Where the cost estimate requirement of R.C. 5543.19(A) or (B) is applicable, and the cost estimates required have been obtained and are found to exceed the statutory limits, requiring that competitive bids be invited and received, neither the county commissioners nor the county engineer may reject all bids and authorize the work to be undertaken by force account. Pursuant to R.C. 307.91, if the county commissioners reject all bids received, the county commissioners must either readvertise using the original estimate or amend the original estimate and then advertise.

**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**

**By: William J. Brown, Attorney General, October 2, 1980**

I have before me your request for an opinion on two questions regarding the authority of a county engineer to proceed by force account pursuant to R.C. 5543.19. Your specific questions are as follows:

- (1) Is a county engineer required to obtain an estimate of the cost of work in the improvement, maintenance, or repair of roads before proceeding by force account, or is this requirement only applicable to the construction or reconstruction of roads;
- (2) Where the cost estimates required by Section 5543.19 ORC, have been obtained and are found to exceed the statutory limits, requiring that competitive bids be invited and received, may the county engineer then reject all bids and proceed by force account[?]

R.C. 5543.19, which authorizes a county engineer to proceed in the construction and reconstruction of roads, bridges and culverts by force account, provides, in pertinent part, as follows:

(A) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads by force account.

In determining whether he may undertake construction or reconstruction, including widening and resurfacing, of roads by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other

items of cost. When the total estimated cost of the work exceeds ten thousand dollars per mile, the county commissioners shall invite and receive competitive bids for furnishing all labor, materials and equipment necessary to complete the work in accordance with sections 307.86 to 307.92, inclusive, of the Revised Code.

(B) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of bridges and culverts by force account.

In determining whether he may undertake such construction, reconstruction, improvement, maintenance, or repair of bridges or culverts by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. When the total estimated cost of the work exceeds forty thousand dollars, the board of county commissioners shall invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work, in accordance with sections 307.86 to 307.92, inclusive, of the Revised Code. (Emphasis added.)

In your first question you have inquired whether the county engineer is required, pursuant to R.C. 5543.19(A), to obtain an estimate of the cost involved in the improvement, maintenance or repair of roads, or whether such a cost estimate is required only for the construction or reconstruction of roads. The express purpose of the cost estimate requirement in R.C. 5543.19(A) is to determine whether the county engineer may proceed by force account or whether competitive bidding is required; if the estimated cost of the road project exceeds ten thousand dollars per mile, the county commissioners must invite competitive bids in compliance with R.C. 307.86 - .92. Clearly, the cost estimate requirement of R.C. 5543.19(A) cannot be separated from the requirement that competitive bidding be used if the estimated cost of the road project to be undertaken exceeds ten thousand dollars per mile. The issue raised by your first question, therefore, is not merely whether the county engineer is required to obtain an estimate of the cost involved in the maintenance, improvement or repair of roads, but, rather, whether competitive bidding is required to be employed if the estimated cost of such work exceeds ten thousand dollars per mile. The answer to your first question necessarily involves the language employed in, and the relationship between, the first and second paragraphs of R.C. 5543.19(A).

The first paragraph of R.C. 5543.19(A), which authorizes the county engineer to proceed by force account when not otherwise required to use competitive bidding, is expressly applicable to the maintenance, improvement and repair of roads, as well as to the construction and reconstruction of roads. The second paragraph of R.C. 5543.19(A) restricts the authority, granted in the first paragraph of that section, of the county engineer to proceed by force account. Pursuant to the second paragraph of R.C. 5543.19(A), in determining whether he may undertake the construction or reconstruction of any road by force account, the county engineer must first make an estimate of the cost of such work, and if the estimated cost exceeds ten thousand dollars per mile, the county commissioners must invite and receive competitive bids, in accordance with R.C. 307.86 - .92, for the performance of the work to be undertaken and for the furnishing of the labor and materials needed therefor.

The second paragraph of R.C. 5543.19(A), unlike the first paragraph of that section, expressly mentions only the "construction or reconstruction, including widening and resurfacing, of roads by force account." The question to be determined, therefore, is whether the intent, in employing the terms "construction or reconstruction, including widening and resurfacing" in the second paragraph of division (A), was to exempt projects for the improvement, maintenance or repair of

roads from the cost estimate and competitive bidding requirements of R.C. 5543.19(A).

Since there is no case law or other authority dealing with this issue, the intent of the legislature must be determined primarily from the language of the statute itself and from the available legislative history of such statute. The terms "construction, reconstruction, improvement, maintenance, or repair" are employed in the first paragraph of division (B) of R.C. 5543.19, which authorizes the engineer to proceed with bridge and culvert projects by force account, and in the second paragraph of division (B) of R.C. 5543.19, which requires that cost estimates be obtained for bridge and culvert projects, as well as in the first paragraph of division (A) of R.C. 5543.19. Only in the second paragraph of division (A) of R.C. 5543.19 are the terms "construction and reconstruction" alone employed. In statutory construction, it is generally presumed, in the absence of evidence of a contrary intent, that, when specific language is employed in one section of a statute and different language is employed in another section, different results and applications were intended. Kiefer v. State, 106 Ohio St. 285, 139 N.E. 852 (1922). Thus, in the absence of any evidence of a contrary intent, it must be presumed that the legislature, in employing different terms in the first and second paragraphs of R.C. 5543.19(A), intended for the first paragraph of division (A) to apply to the construction, reconstruction, improvement, maintenance and repair of roads, but for the second paragraph of division (A) to apply only to the construction and reconstruction of roads.

Neither the language nor the legislative history of R.C. 5543.19 discloses any evidence of a contrary legislative intent. In fact, the legislative history of R.C. 5543.19 further supports the presumption that the intent was for the cost estimate and competitive bidding requirements, embodied in the second paragraph of R.C. 5543.19(A), to apply only to the construction and reconstruction, including the widening and resurfacing, of roads.

Prior to its amendment in 1971, R.C. 5543.19 provided, in pertinent part, as follows:

The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts, by force account.

In determining whether he may undertake such construction, reconstruction, improvement, maintenance, or repair of bridges or culverts by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. When the total estimated cost of the work exceeds twenty-five thousand dollars, the county commissioners shall invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work.

1967 - 1968 Ohio Laws 1874 (Am. Sub. H.B. No. 428, eff. Dec. 9, 1967) (emphasis added). Although R.C. 5543.19 did not, at that time require that cost estimates be made for projects involving the construction or reconstruction of roads, R.C. 5555.71 did embody such a requirement. 1967 - 1968 Ohio Laws 1881 (Am. Sub. H.B. 428, eff. Dec. 9, 1967). Prior to 1971, R.C. 5555.71 provided as follows:

Before undertaking the construction, reconstruction, widening, resurfacing, repair, or improvement of a road, the board of county commissioners shall cause to be made by the county engineer an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and

all other items of cost. The board may, in lieu of constructing such improvement by letting the work by contract, proceed by force account. When the total estimated cost of the work exceeds ten thousand dollars per mile, the board shall invite and receive competitive bids for furnishing all the labor, materials, and equipment and doing the work, as provided in section 5555.61 of the Revised Code, and shall consider and reject such bids before ordering the work done by force account. When such bids are received, considered, and rejected, and the work done by force account, such work shall be performed in compliance with the plans and specifications upon which the bids were based. This section applies to new construction and repair work. (Emphasis added.)

The cost estimate and competitive bidding requirements of R.C. 5555.71 were clearly applicable to projects involving the maintenance or repair of roads, as well as to projects involving the construction, reconstruction, widening or resurfacing of roads.

In 1971, R.C. 5543.19 was amended and R.C. 5555.71 was repealed by the enactment of Am. Sub. H.B. No. 785. 1971 - 1972 Ohio Laws Pt. II 2179 (Am. Sub. H.B. No. 785, eff. Dec. 17, 1971). As part of the 1971 amendments, the portion of former R.C. 5543.19, which had governed bridge and culvert work by force account, was incorporated, in substantially the same form, in R.C. 5543.19(B). The provisions of R.C. 5555.71, which had governed road work by force account prior to 1971, were incorporated, in part, in division (A) of R.C. 5543.19. In incorporating the provisions of R.C. 5555.71, however, the General Assembly made material changes in the language of that section. In regard to the cost estimate requirement, the terms "construction, reconstruction, resurfacing and widening" were incorporated in the language of the second paragraph of R.C. 5543.19(A); however, the terms "repair or improvement," which had appeared in R.C. 5555.71, were deleted from the language of the second paragraph of R.C. 5543.19(A).

When a change in wording results from the amendment of a statute, the presumption is that the General Assembly intended a change in the meaning and the application of that statute. *State ex rel. Clampitt v. Brown*, 165 Ohio St. 139, 133 N.E.2d 369 (1956). In light of the fact that the terms "construction, reconstruction, resurfacing or widening" were incorporated in the language of R.C. 5543.19(A) as a result of the 1971 amendments, whereas the terms "repair or improvement" were deleted, it must be presumed that the legislature intended a change in the application of the cost estimate requirement in reference to road projects to be undertaken by force account.

Consequently, in view of the plain language and the legislative history of R.C. 5543.19, it must be concluded that the requirement in R.C. 5543.19(A), that an estimate of cost be made and competitive bidding be used if the estimated cost exceeds ten thousand dollars per mile, is applicable only to the construction and reconstruction, including the widening and resurfacing, of roads. In specific answer to your first question, then, it is my opinion that the county engineer is not required, pursuant to R.C. 5543.19(A), to obtain an estimate of the cost of the work in the improvement, maintenance or repair of roads by force account, if such work does not constitute construction, reconstruction, widening or resurfacing of roads.

Before turning to a discussion of your second question, it should be noted that, although R.C. 5543.19(A) does not require that an estimate of cost be made before the county engineer proceeds with the improvement, maintenance or repair of roads by force account, other sections of the Revised Code may require that

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1 It should be noted that even though the county engineer may proceed in the improvement, maintenance or repair of roads by force account, R.C. 5543.19(C) has been interpreted to require that the materials and equipment needed for the force account project be purchased or leased through competitive bidding. *Wyandot Blacktop, Inc. v. Morrow County*, No. 564 (Ct. App. Morrow County Feb. 14, 1980).

such an estimate be made. For example, R.C. 5555.72 requires the board of county commissioners to cause to be kept by the county engineer a complete and detailed account of the cost of road work undertaken by force account, where the estimated cost of such work exceeds three thousand dollars per mile. Pursuant to R.C. 315.08, the board of county commissioners may require the county engineer to prepare an estimate of the cost involved in the "construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements." See 1972 Op. Att'y Gen. No. 72-080 (county commissioners may order county engineer to prepare estimates of cost on a road project not included in engineer's recommendation for work to be done).

I turn now to a discussion of your second question, in which you have inquired whether the county engineer may, where R.C. 5543.19(A) or (B) requires that competitive bids be invited and received, reject all bids so received and thereafter proceed by force account. I assume, for the purposes of discussion of this question, that the cost estimate and competitive bidding requirements of R.C. 5543.19(A) and (B) are applicable to the work contemplated and that the estimated cost of that work exceeds the statutory limits such that competitive bids are required to be invited and received.

In regard to the construction or reconstruction of roads by force account, R.C. 5543.19(A) provides that "[w]hen the total estimated cost of the work exceeds ten thousand dollars per mile, the county commissioners shall invite and receive competitive bids for furnishing all the labor, materials and equipment necessary to complete the work in accordance with section 307.86 to 307.92, inclusive, of the Revised Code" (emphasis added). As to the construction, reconstruction, improvement, maintenance or repair of bridges or culverts by force account, R.C. 5543.19(B) provides that "[w]hen the total estimated cost of the work exceeds forty thousand dollars, the board of county commissioners shall invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work, in accordance with sections 307.86 to 307.92, inclusive, of the Revised Code" (emphasis added).

R.C. 5543.19(A) and (B) require the county commissioners, rather than the county engineer, to invite and receive competitive bids. There is no statute which authorizes the county engineer, himself, either to invite and receive or to reject such competitive bids. Since the county commissioners, pursuant to R.C. 5543.19, must authorize the county engineer to proceed by force account, it would appear that, if any statutory authority does exist to reject all bids and to proceed by force account, such authority must be vested in the county commissioners.

It is well settled that a board of county commissioners has only such authority as is expressly granted by statute or necessarily implied therefrom. *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921); 1979 Op. Att'y Gen. No. 79-026; 1975 Op. Att'y Gen. No. 75-070. R.C. 5543.19(A) and (B) do not authorize the county commissioners to reject all bids and to proceed by force account. Rather, R.C. 5543.19(A) and (B) require that competitive bids be invited and received pursuant to R.C. 307.86 - .92.

R.C. 307.86 - .92 provide the competitive bidding procedures to be followed by county "contracting authorities," which, by definition, includes county commissioners. R.C. 307.92. The procedure for the rejection of bids is expressly provided for under R.C. 307.91. R.C. 307.91 provides that "[w]hen the contracting authority rejects all bids it may either readvertise, using the original estimate, or amend the estimate and proceed to advertise in the manner provided for advertisement in section 307.86 of the Revised Code" (emphasis added). The effect, therefore, of a rejection of bids is a new competitive bidding procedure and not the elimination of competitive bidding. No exception is made in R.C. 307.91 for bids invited and received pursuant to R.C. 5543.19. Since county commissioners have only such authority as is expressly granted or necessarily implied, and since R.C. 5543.19(A) and (B) expressly require bids to be invited and received pursuant to R.C. 307.86 - .92, it must be concluded that the county commissioners have no authority to reject all bids received and then to proceed by force account.

The history of R.C. 5543.19, discussed in answer to your first question, further supports such a conclusion. Prior to the amendment of R.C. 5543.19 in 1971, the county commissioners were expressly authorized to reject all bids received and to thereafter proceed by force account. In regard to projects involving bridges and culverts, R.C. 5543.19, prior to its amendment, provided that such work "shall be done pursuant to a contract let in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code, unless no bids are received, or unless upon consideration thereof the board of county commissioners rejects such bids, whereupon the board may order such work done by force account." 1967 - 1968 Ohio Laws 1874 (Am. Sub. H.B. No. 428, eff. Dec. 9, 1967) (emphasis added). Prior to 1971, R.C. 5555.71, discussed in answer to your first question, provided as to road projects that the board of county commissioners "shall consider and reject such bids before ordering the work done by force account." 1967 - 1968 Ohio Laws 1881 (Am. Sub. H.B. No. 428, eff. Dec. 9, 1967) (emphasis added). R.C. 307.91, which at that time embodied an exception for bids received pursuant to R.C. 5543.19, provided that "[w]hen the contracting authority rejects all bids, except as provided in section 5543.19 of the Revised Code, it may either readvertise, . . . or amend the estimate and proceed to advertise. . . ." 1967 - 1968 Ohio Laws 276 (Am. Sub. H.B. No. 428, eff. Dec. 9, 1967) (emphasis added).

As previously discussed, R.C. 5543.19 was amended by the enactment of H.B. No. 785 in 1971. As a result of the enactment of H.B. No. 785, R.C. 5555.71 was repealed, the provisions of R.C. 5555.71 and the provisions of former R.C. 5543.19 were incorporated, in part, in R.C. 5543.19(A) and (B), and the language of R.C. 307.91 was amended to delete the exclusion provided for bids received pursuant to R.C. 5543.19.

In light of the fact that the language of former R.C. 5543.19 and R.C. 5555.71, which had authorized the county commissioners to reject all bids and to proceed by force account, was not incorporated in R.C. 5543.19, as amended by H.B. No. 785, and in light of the fact that R.C. 307.91 was expressly amended to delete the exclusion provided for bids received pursuant to R.C. 5543.19, it must be concluded that the legislative intent was to require bids invited and received pursuant to R.C. 5543.19 to be rejected in accordance with the provisions of R.C. 307.91. Based upon the language and the legislative history of R.C. 307.91 and R.C. 5543.19, it is my opinion that, where the cost estimates required by R.C. 5543.19(A) or (B) have been obtained and are found to exceed the statutory limit, requiring that competitive bids be invited and received, neither the county engineer nor the county commissioners may reject all bids and thereafter authorize the work to be undertaken by force account.

In specific answer to your questions, then, it is my opinion, and you are so advised, that:

1. The requirement of R.C. 5543.19(A) that a cost estimate be made and competitive bidding be used if the estimated cost of the work exceeds ten thousand dollars per mile is applicable only to the construction and reconstruction, including widening and resurfacing, of roads by force account.
2. Pursuant to R.C. 5543.19(A), the county engineer is not required to obtain an estimate of the cost of the work in the maintenance, improvement or repair of roads before proceeding by force account, if such work does not constitute construction or reconstruction, including widening and resurfacing, of roads.
3. Where the cost estimate requirement of R.C. 5543.19(A) or (B) is applicable, and the cost estimates required have been obtained and are found to exceed the statutory limits, requiring that competitive bids be invited and received, neither the county commissioners nor the county engineer may reject all bids and authorize the work to be undertaken by force account. Pursuant to R.C. 307.91, if the county commissioners reject all bids received, the county commissioners must either readvertise using the original estimate or amend the original estimate and then advertise.