

OPINION NO. 2008-007

To: Stanley E. Flegm, Crawford County Prosecuting Attorney, Bucyrus, Ohio
By: Marc Dann, Attorney General, March 5, 2008

You have posed several questions about the application of force account legislation to bridge and culvert replacement work undertaken by the county engineer. Your questions arise from findings made by the Auditor of State that Crawford County has violated statutory force account limitations on several occasions. We will use the situations you have described to help develop “general principles of law that may be applied to particular situations as appropriate.” 2005 Op. Att’y Gen. No. 2005-033 at 2-347. However, “it is inappropriate to use a formal opinion of the Attorney General to make findings of fact or to attempt to determine rights between particular parties.” 2004 Op. Att’y Gen. No. 2004-022 at 2-186. “Those matters must be determined in a particular case by the persons involved, or by the courts.” 2005 Op. Att’y Gen. No. 2005-033 at 2-347.

An analysis of your questions necessitates application of the statutory schemes governing competitive bidding and work undertaken by force account, including Am. Sub. H.B. 87, 125th Gen. A. (2003) (relevant portions eff. June 30, 2003), which we shall summarize briefly before turning to your specific concerns. Pursuant to R.C. 307.86, the county’s acquisition of “anything,” including “any product, structure, construction, reconstruction, improvement, maintenance, repair, or service,” is required to be competitively bid if the cost exceeds \$25,000 “except as otherwise provided” in R.C. 5543.19 (among other statutes).¹ Under R.C.

¹ To comply with competitive bidding requirements, a county must, *inter alia*, provide notice of the proposed project and available bidding opportunities, as specifically described in R.C. 307.87, and the county’s notice must include certain statutorily prescribed information, such as a description of the subject of the proposed contract, the time and place for filing bids and for opening bids, the location where specifications can be obtained, and the existence of any system of preferences for products mined and produced in Ohio and the United States. R.C. 307.87(B). *See also* R.C. 307.88. Award of a contract must be made to the “lowest and best bidder.” R.C. 307.90(A). *See generally* 2005 Op. Att’y Gen. No. 2005-029. *See also* R.C. 9.312(C) (a county or other political subdivision “required by

5543.19, a county engineer, if authorized by the board of county commissioners, may “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,” so long as competitive bidding is not otherwise required by statute. R.C. 5543.19(A) and (B). “Force account” means “that the county engineer will act as contractor, using labor employed by the engineer using material and equipment either owned by the county or leased or purchased in compliance with [R.C. 307.86-.92] and excludes subcontracting any part of such work unless done pursuant to [R.C. 307.86-.92].” R.C. 5543.19(C).

A county engineer may undertake work by force account, however, only if the cost of the work falls below certain dollar limits. If “the total estimated cost of the work” exceeds \$30,000 per mile for roads or \$100,000 for bridges and culverts, the board of county commissioners must “invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work in accordance with [R.C. 307.86-.92].” R.C. 5543.19(A) and (B). *See also* R.C. 117.16(E)(1); R.C. 5555.72.

Am. Sub. H.B. 87 has imposed upon the Auditor of State certain responsibilities to ensure compliance with these force account limits. The Auditor is required by R.C. 117.16(A)(1) to “[d]evelop a force account project assessment form that each public office that undertakes force account projects shall use to estimate or report the cost of a force account project.” The form must “include costs for employee salaries and benefits, any other labor costs, materials, freight, fuel, hauling, overhead expense, workers’ compensation premiums, and all other items of cost and expense, including a reasonable allowance for the use of all tools and equipment used on or in connection with such work and for the depreciation on the tools and equipment.” *Id.* The county engineer must use the Auditor’s force account project assessment form to estimate the cost of the work and determine whether the work may be undertaken by force account. R.C. 5543.19(A) and (B).

When conducting an audit of a public office, the Auditor must “examine the forms and records of a sampling of the force account projects the public office completed since an audit was last conducted, to determine compliance with its force account limits.” R.C. 117.16(A)(3). The Auditor may also conduct an audit if she “receives a complaint from any person that a public office has violated the force account limits established for that office . . . if the auditor of state has reasonable cause to believe that an additional audit is in the public interest.” R.C. 117.16(B).

law to award contracts by competitive bidding may by ordinance or resolution adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder,” as described in that section); R.C. Chapter 153 (construction of public improvements); R.C. 5555.61-72 (contracts for road improvements).

As discussed in note 7, *infra*, R.C. 307.86 sets forth several exceptional circumstances where a county is not required to follow these competitive bidding procedures.

If the Auditor of State finds that a county has violated the applicable force account limits, the county's limits are reduced from \$30,000 to \$10,000 per mile for roads and from \$100,000 to \$40,000 for bridges and culverts. R.C. 117.16(C)(1)(a). Upon a county's first violation, the force account limits are reduced for a period of one year. R.C. 117.16(C)(1). If the Auditor of State finds a second or subsequent violation, the limits are reduced for a period of two years. R.C. 117.16(C)(2). If the Auditor finds that a county violated its force account limits a third or subsequent time, the Auditor must certify to the state Tax Commissioner an amount equal to 20% of the total cost of the force account project that is the basis of the violation, and the Tax Commissioner must withhold that amount from any moneys due or payable to the county. R.C. 117.16(C)(3). The monetary penalty is in addition to the force account limit reductions. *Id.*

We turn now to your specific questions.

1. At what point does a force account project start for purposes of R.C. 5543.19? Does the project begin when the county engineer makes an estimate, when the work actually begins, or when the goods and services are paid?

You pose this question about what triggers the commencement of a force account project in light of the following facts. In 2004, the Auditor of State notified Crawford County that it had committed a force account violation, and that, pursuant to R.C. 117.16(C), the applicable limit for determining whether the county could perform bridge work by force account would be reduced from \$100,000 to \$40,000 for the period from August 1, 2005 to July 31, 2006. In February 2006, the county engineer completed a force account project assessment form for a new bridge replacement project. The estimated cost calculated by the engineer on the form was more than \$40,000 but less than \$100,000. You have stated that the engineer decided to delay work on the project until after the limit was restored to \$100,000 on August 1, 2006, but proceeded in June 2006 to order the necessary materials and supplies in order to avoid delivery and project delays. On August 7, 2006, physical construction began on the project, and the materials were delivered on August 15 and paid for on September 8, 2006.

The Auditor's Office asserts that the second bridge replacement project began in February 2006 when the engineer completed the assessment form estimating the cost of the project, and that the limit in effect for determining whether the project could be completed by force account was thus \$40,000. The county contends that the project began when physical construction of the project started in August 2006, and that the applicable limit was thus \$100,000.

R.C. 5543.19 is silent as to what action or event triggers the commencement of a force account project for purposes of determining which dollar limit is in effect. It does state, however, that the county engineer must "first cause to be made an estimate of the cost of" the work to be undertaken by force account "using the force account project assessment form" developed by the Auditor of State under R.C. 117.16. The engineer's cost estimate can thus be viewed as the first stage of a force account project, and the Auditor's Office has taken the position that the engineer's completion of the assessment form, which establishes the method for

performing the work (whether by force account or competitive bidding), also establishes the commencement of the project for purposes of determining the applicable force account limit.

As set forth above, Am. Sub. H.B. 87 vests the Auditor of State with certain responsibilities to administer, and monitor public offices' compliance with, force account limits. Not only is the Auditor required to develop the force account project assessment form, but she is also charged with auditing political subdivisions for compliance with the statutory force account limits and administering penalties for violations thereof. As articulated by the court in *Weiss v. Public Utilities Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000), "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Accord State ex rel. Clark v. Great Lakes Construction Co.*, , 2003-Ohio-3802, 791 N.E.2d 974, at ¶10 ("[i]t is a fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable").

The Auditor's use of the engineer's completion of the assessment form to establish commencement of a project is consistent with, and facilitates the performance of, her statutory duty to enforce the force account limits. As the situation you have presented illustrates, goods and services may be ordered, paid for, and delivered at times different from one another and from the time physical construction begins. Completion of the assessment form provides a fixed, definite reference point that is readily ascertainable for purposes of determining compliance with the force account limits.

The county has suggested that a project begins upon the commencement of physical work at the site. To focus on this event, however, could lead to abuse of the statutory limits. By the time physical work commences, counties may have already incurred any number of costs in connection with the project. Not only does completion of the assessment form provide a readily identifiable point at which all parties may determine which force account limit is in effect, but it occurs early enough in the process to thwart possible abuses of the force account limits. Again, this objective is consistent with the Auditor's enforcement responsibilities.²

Therefore, we conclude that the county engineer's completion of the

² To conclude that completion of the Auditor's assessment form establishes commencement of a project does not mean that costs incurred by the county in connection with the project prior to completion of the form can be excluded from the engineer's estimate of the cost of the project. R.C. 117.16 and R.C. 5543.19 require the engineer to include *all* items of cost and expense in estimating the *total* cost of a project, regardless of when any particular cost or expense is actually incurred; the statutes make no provision for excluding the cost of items that the county may have already purchased or are "on hand." Furthermore, as discussed more fully below, the items must be included in the engineer's cost estimate even where they were acquired by the county pursuant to competitive bidding or other competitive selection process.

Auditor's force account project assessment form estimating the cost of the road or bridge work constitutes commencement of the project for purposes of determining which force account limit is in effect and applicable to the project.³

2. What statutory authority exists for the Auditor of State to direct through technical bulletins or otherwise, the utilization of "safe harbor" rates for overhead for purposes of applying R.C. 117.16 and R.C. 5543.19?

You have explained that, when estimating the cost of the projects in question, the county engineer used a rate of 10% of the cost of materials as the figure for overhead, and concluded that the work on each project could be completed by force account. The Auditor of State subsequently determined, however, that the engineer should have used the "safe harbor" rate of 15%, as set forth in the Auditor of State's (AOS) Bulletin 2003-003, and that, consequently, the total cost of the work exceeded the limit for using force account and the projects should have been competitively bid.

AOS Bulletin 2003-003 states that in estimating the cost of materials, an overhead cost must be added to the cost of materials. "The safe harbor rate for overhead is 15 percent," and "[i]f a public office uses a different percentage, it will be required to justify the rate it uses."⁴ We note first that the General Assembly has specifically identified overhead as a cost that must be included on the Auditor's project assessment form and used by the county engineer in estimating the total cost of a project. R.C. 117.16(A)(1). The issue, therefore, is not whether the Auditor has the authority to require the inclusion of overhead in the engineer's estimate of a project's cost, but whether the Auditor has the authority to prescribe a "safe harbor" rate for counties to use in calculating the cost of overhead.

As discussed above, the General Assembly has delegated to the Auditor of State the responsibility to ensure compliance with the statutory force account limits, and we must give deference to the Auditor's interpretations of the force account law. Furthermore, AOS Bulletin 2003-003 does not compel a county to use the "safe harbor" overhead rate but permits an office to use a different rate if it can justify the rate it chooses to use.⁵ See generally *State ex rel. Coss v. Industrial Comm'n*, 39 Ohio St. 3d 350, 351, 530 N.E.2d 1318 (1988) (presumption created

³ We recognize, of course, that only a court has the authority to determine ultimately the validity of administrative standards adopted by a public agency to carry out its statutory enforcement responsibilities.

⁴ AOS Bulletin 2003-003 also states that in estimating the cost of labor, "[o]verhead costs may be calculated using a safe harbor rate of 38 percent of the total amount of base wages and fringe benefits," and that "[i]f a public office chooses to use different percentages, it will be required to justify the rates it uses."

⁵ Without delving into the specifics of the dispute between Crawford County and the Auditor of State, we emphasize that the Auditor must in practice, as well as in policy, permit the county engineer to justify his use of the lower overhead rate, without automatically citing a county for noncompliance whenever it uses a rate different than the one set forth in AOS Bulletin 2003-003.

under an administrative rule did not violate due process where the party against whom the presumption operated was given two opportunities to rebut it). Thus, the county is not conclusively bound by the 15% figure.

In light of the Auditor's statutory authority to administer and enforce the force account limits, the General Assembly's inclusion of the cost of overhead on the assessment form the Auditor is required to develop, and the deference paid to administrative interpretations and formulations, we conclude that the Auditor of State has the authority to require a county to use a "safe harbor" rate for the cost of overhead or justify its use of a different rate.⁶

3. If the project is determined to not be in compliance with the competitive bidding statute, should the Force Account statutes be applied to the project?

On one bridge and culvert replacement project that was undertaken by force account, the engineer's estimate of approximately \$22,000 did not include materials and labor purchased from a local contractor. These additional costs, which exceeded \$89,000, increased the total estimated cost of the project to over \$100,000. The contract with the local vendor was not competitively bid by the county, and the county and Auditor of State disagree whether it met one or more of the exceptions to the competitive bidding requirements in R.C. 307.86.⁷ Again, this is a factual dispute upon which we cannot opine; however, resolution of the factual dispute is not essential to an analysis of the issues presented by your question.

We understand your position to be that: (1) the cost of labor and material

⁶ You have asked upon what basis the Auditor of State has determined that a safe harbor rate of 15% for overhead is appropriate. You will need to seek this information from the Auditor of State's Office. Again, the courts are the final arbiters of the lawfulness of administrative standards adopted by a public agency.

⁷ R.C. 307.86(A) provides an exception where the board of county commissioners, by unanimous vote, determines that "a real and present emergency exists," when either the "estimated cost is less than fifty thousand dollars," or there is "actual physical disaster to structures, radio communications equipment, or computers." The commissioners' "determination and the reasons for it" must be entered in the minutes of the board's proceedings. *Id.* R.C. 315.13 also authorizes the county engineer to "make all emergency repairs on all roads, bridges, and culverts in the county, including state highways," and to "keep on hand at all times a supply of material for the purposes of making such repairs." If a road or bridge in the county needs "immediate attention," the engineer must, "if he deems it an emergency repair, proceed at once to make such repair by force account, without preparing plans, specifications, estimates of cost, or forms of contract." *Id.* "Necessary repairs, the total cost of which is not more than five thousand dollars, shall be deemed as necessary for emergency repairs." *Id.*

R.C. 307.86(B)(1) provides an exception where the "purchase consists of supplies or a replacement or supplemental part or parts for a product or equipment owned or leased by the county, and the only source of supply for the supplies, part, or parts is limited to a single supplier."

provided under contract by a private vendor to the county for a bridge and culvert replacement project is not required to be included in the total cost of the project for purposes of determining whether the county engineer may undertake the work by force account; and, (2) the failure to competitively bid the contract for labor and material, as required by R.C. 307.86, is not a violation of the force account statute. The premise underlying your arguments is that the county's contract with the outside vendor for material and labor is not a part of the force account project, and is not governed by, or subject to, the force account law and its limitations on cost. The premise, however, is inconsistent with the statutory definition of "force account" found in R.C. 5543.19(C) and the statutory scheme as a whole.

R.C. 5543.19(C) defines "force account" to mean "that the county engineer will act as contractor, using labor employed by the engineer using material and equipment either owned by the county or leased or purchased in compliance with [R.C. 307.86-.92] and excludes subcontracting any part of such work unless done pursuant to [R.C. 307.86-.92]." See note 1, *supra*. Under the statutory definition of "force account" in R.C. 5543.19, therefore, 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. See *Wyandot Blacktop, Inc. v. Morrow County*, Case No. CA-564, 1980 Ohio App. LEXIS 12001 (Morrow County Feb. 14, 1980) (although a county may proceed by force account if the total cost of the project falls below the dollar limits set forth in R.C. 5543.19, the county must competitively bid the purchase of materials used as part of the force account project if their cost exceeds the monetary threshold set forth in R.C. 307.86). 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. Cf. *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966) (decided prior to the enactment of the definition of force account in R.C. 5543.19(C),⁸ and concluding that, the long-standing practice in many political subdivisions where the board of county commissioners (or other legislative authority) would authorize the engineer to proceed by force account and the engineer would contract the work out to private companies without using competitive bidding did not comport with R.C. 5543.19, and such a contract between the county engineer and a private company was void because it should have been competitively bid).

Because R.C. 5543.19(C) thus incorporates contracts with outside vendors—whether for materials and equipment or as subcontractors—into the force account project as a whole, the costs of materials and equipment acquired under a contract, and the costs of work performed by subcontractors, must be included in the engineer's estimate of the project's total cost. If the total exceeds the force account limit, then the whole project must be competitively bid.

⁸ The General Assembly enacted the definition of "force account" now found in R.C. 5543.19(C) in 1967. 1967-1968 Ohio Laws, Part I, 1874-1875, 1881-1882 and Parts II-III, 2623 (Am. Sub. H.B. 428, eff. Dec. 9, 1967).

This interpretation of R.C. 5543.19(C) is consistent with the overall statutory scheme. Division (A) of R.C. 5543.19 states that, “[i]n determining whether construction or reconstruction, including widening and resurfacing, of roads may be undertaken by force account, the county engineer shall first cause to be made an estimate of the cost of *such work*.” Division (B) of R.C. 5543.19 states that, “[i]n determining whether such construction, reconstruction, improvement, maintenance, or repair of bridges or culverts may be undertaken by force account, the county engineer shall first cause to be made an estimate of the cost of *such work*.” Divisions (A) and (B), like division (C), view the project—the construction, reconstruction, improvement, maintenance, or repair—as a whole, and require the engineer to include in his estimate the costs of the project as a whole.

Furthermore, as discussed above, a county engineer is required to estimate the cost of a project before he may undertake the road or bridge construction or other work; it is the cost estimate which controls which method must be used to perform the work—competitive bidding or force account. Under the county’s position, however, the method of performing the work would dictate which costs would be included in the engineer’s estimate—by choosing to acquire materials or equipment by contract or to subcontract a part of the work, and excluding the costs thereof from the total cost of the project, the county could manipulate the estimate and avoid being required to competitively bid the entire project in direct circumvention of the statutory force account limits. During execution of the engineer’s cost estimate the method that will be used to perform the work has not yet been legally determined. Not only would it be premature for the engineer to try and exclude from the total cost of the project the cost of the materials, equipment and labor he deems will be acquired under contract, such exclusion of contract costs clearly misrepresents the total cost of the project.

For the same reasons that the county engineer must include in his estimate the costs of materials, equipment, and labor to be acquired by contract, the failure to competitively bid the contract, if so required by R.C. 307.86, is a violation of the force account limit, as well as the competitive bidding law.⁹ The failure to bid a contract for the acquisition of materials and equipment used on a project undertaken by force account, or a subcontract for work on the project undertaken by force ac-

⁹ The fact that a contract is part of a force account project does not mean that the county will be relieved of the consequences of not complying with R.C. 307.86-.92. See *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966) (syllabus) (statutory competitive bidding requirements are mandatory, and a contract made without compliance therewith is void). See also *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N.E. 372 (1899) (syllabus) (“[a] contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party”); 2000 Op. Att’y Gen. No. 2000-048 at 2-294 (“[i]t has long been established that any contract made by a public entity that is in violation of statute or

count, clearly contravenes the express language of R.C. 5543.19(C) incorporating these contracts into the force account work itself and requiring that they comply with R.C. 307.86-.92.

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

1. Before constructing or reconstructing a road, or constructing, reconstructing, improving, maintaining, or repairing a bridge or culvert by force account, a county engineer is required by R.C. 5543.19 to “first cause to be made an estimate of the cost of such work,” using the force account project assessment form developed by the Auditor of State under R.C. 117.16. The county engineer’s completion of the Auditor’s force account project assessment form estimating the cost of the work constitutes commencement of the project for purposes of determining which force account limit is in effect and applicable to the project under R.C. 5543.19.
2. The Auditor of State is authorized by R.C. 117.16 to require a county engineer who is estimating the cost of road, bridge, or culvert work under R.C. 5543.19 to use a “safe harbor rate” for the cost of overhead or justify the use of a different rate.
3. Under R.C. 5543.19, a county engineer may, as the general contractor of a force account project, acquire material and equipment pursuant to contract, and may subcontract part of the work undertaken by force account, so long as the contracts for material and equipment and the subcontracts are let in compliance with R.C. 307.86-.92.
4. A county engineer who is estimating the cost of road, bridge, or culvert work under R.C. 5543.19 must include in the estimate the cost of materials and equipment that would be acquired by contract, and the cost of work that would be performed pursuant to a subcontract, if the project were undertaken by force account. If the total exceeds the applicable force account limit, as set forth in R.C. 5543.19, the whole project must be competitively bid.
5. A county’s failure to comply with R.C. 307.86-.92 when contracting for materials or equipment as part of a force account project, or when subcontracting work performed on a force account project, constitutes a violation of the force account limits as well as the competitive bidding law.

beyond the power of the entity to make is void and binding on neither party”) (citations omitted)).