OPINION NO. 73-076

Syllabus:

A county hospital commission constructing a hospital with public bond money is not required by R.C. 339.14 (H) to use competitive bidding for contract modifications costing in excess of one thousand dollars, when such modifications do not exceed the scope of the original contract.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: William J. Brown, Attorney General, July 27, 1973

I have before me your request for my opinion, which reads as follows:

> I have been requested by the Ross County Hospital Commission to ask the following question:
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> > Does a County Hospital Commission constructing a hospital with public bond money under the provisions of the "Hoffman Act" (R.C. 339.14 et seq) have the authority to approve changes to the Construction Contract involving work not called for in the original contract if such work exceeds $2,000.00?
>
> In other words, is the Hospital Commission bound by the provisions of Section 307.86 and 307.87, of the Ohio Revised Code?
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> Examples of problems which have been encountered in the construction process, are as follows:
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> 1. The architect failed to specify plaster and paint in seven stairwells. It will cost $18,000.00 to rectify the error. Can this be considered as an extension of the plaster and paint contract rather than new work?

2. Two years ago when the specifications were written, a certain type of floor tile was specified in areas where anesthestic gases were to be used. Since that time, a new product has come on the market far superior in both explosion proof and aseptic qualities. This represents a substitution of materials.

3. Specifications were omitted completely on insulation of certain exterior walls. Insulation is being placed in other walls. Adding insulation omitted in error represents an additional cost of $18,000.00.

A contingency fund of $500,000 has been established so that funds are available to pay for the costs involved in the above matters through appropriate change orders.

The Ross County Hospital Commission is a legally constituted unit of County government created pursuant to R.C. 339.14 and is in the process of constructing and equipping the new Ross County Medical Center which is now approximately 80% complete.

I understand your question to be whether competitive bidding must be used by a county hospital commission under R.C. 307.86 and 307.87 when changes costing in excess of $2,000 are made to a construction contract. While R.C. 307.86 applies generally to counties, R.C. 339.14 specifically pertains to a county hospital commission and appears to be controlling in this instance. R.C. 339.14 (H) reads as follows:

Before making a contract for the expenditure of money on any structure in excess of one thousand dollars, the county hospital commission shall advertise for bids in accordance with section 307.87 of the Revised Code and shall cause plans, specifications, and detailed drawings to be distributed among the bidders.

This provision requires competitive bidding before a county hospital commission can make a contract for the expenditure of more than one thousand dollars on any structure. In order to answer your question it becomes necessary to determine whether R.C. 339.14 (H) applies to changes made to an existing contract. If so, competitive bidding will be required before such changes can be made, when the cost exceeds one thousand dollars.

A modification of a contract is a change or an alteration which introduces new elements or details but leaves the general purpose and effect of the subject matter intact. Ampt v. Cincinnati, 6 Ohio N.P. 208 (1899), aff'd 60 Ohio St. 621 (1899). Contract modifications are discussed in 45 O. Jur. 2d 479, Public Works and Contracts Section 121, as follows:

> It seems that a "modification", "alteration", or "extra", within the meaning of contract and statutory provisions, is merely such a change or addition to the original contract as is not a departure from the general scope and plan of the work. It is said that a modification in a contract may relate either to the things to be done or furnished or to the manner of doing or furnishing it, but does not concern a material and uncontemplated alteration in the conditions under which the work is to be done or such changes in the general plan as are not in substantial conformity to the original contract. (Emphasis added.)

Thus, modifications or changes to a construction contract must relate to the original contract specifications in order to be considered a part of such contract.

The Ohio Supreme Court has held that a city may authorize modifications to a contract without any additional notice or further bidding, irrespective of a statute requiring competitive bidding when the cost exceeds five hundred dollars. In Wastings v. Columbus, 42 Ohio St. 585 (1885), the Court held in the fourth branch of the syllabus as follows:

> Where it satisfactorily appears to the persons representing the city, in superintending a street improvement, that additional expense, not expressly provided for in the ordinances, notices, or contract, is necessary to make the improvement a good job--as the placing of a French drain in the street, or increasing the width of the improvement--the city may authorize the contractor to make such additions, and assess the abutting lot owners therefor, without any additional notice or further letting, although the amount of the expense exceeds $500.

The logic behind this decision can be seen by examining the possible results of requiring competitive bidding in such a situation. The court in Lloyd v. Toledo, 20 Ohio C.C.R. (n.s.) 47, 55 (1912), stated as follows:

> It can not be that a contract providing for such alterations and modifications is required to be let to the lowest bidder after advertising. Such a course, if it resulted in a contract with a different person than the one holding the main contract, would introduce inextricable confusion and would almost certainly result in vexatious delays and expensive litigation.

In that case, involving the construction of a bridge, water was encountered at an unexpected point, requiring expensive modifications of the contract. Among these were the addition of a layer of concrete 6-10 feet deep over a certain area, substitution of steel cylinders for wooden lagging and iron rings,

and the purchase of a $6000 compressed air plant. The time for completion was extended 6 months beyond the original contract date. 20 Ohio C.C.R. (n.s.) 48-49. In spite of these changes, the court held, at 55, that the modifications were within the scope of the original contract, except for the purchase of the compressed air plant. However, in this case, the modifications actually reduced the total cost. 20 Ohio C.C.R. (n.s.) 56. See also Holloway v. Toledo, 29 O.L.R. 77 (1929).

The view expressed in Hastings v. Columbus, supra, was reinforced by the court in Burke v. Cleveland, 6 Ohio N.P. (n.s.) 225, aff'd. 75 Ohio St. 603 (1905). At 225 the court said:

> The statutory limitation on the authority of the board of public service to make contracts involving more than $500 without the action of the city council, has reference to original contracts, and does not affect the power of the board to make such modifications as it deems necessary in contracts already properly entered into by council; and where a contract for the construction of a sewer has been entered into in due form by the city council, the board of public service has power to enter into a subsidiary agreement with the contractor to meet exigencies subsequently arising.

In this case, unforeseen difficulties increased the cost of sewer construction from the estimated $50 per lineal foot to $60. 6 Ohio N.P. (n.s.) 235. See also Cleveland v. Wilson, 24 Ohio C.C.R. (n.s.) 183 (1902). Thus there appears to be sufficient authority that statutes requiring competitive bidding apply only to original contracts and do not apply to modifications to such contracts as long as the modifications are within the scope of the original contract.

I feel that the instant fact situation fits within the rule established by the foregoing decisions. The modifications are required because of unforeseen occurrences, namely the development of a superior type of floor tile and oversights by the architect. There is no question that the modifications are required for a "good job" (Hastings v. Columbus, supra). They will result in a substantial cost increase, but it will be only a fraction of the total cost of the project. Moreover, the plaster, paint, and insulation which are the subject of the modifications were obviously in the contemplation of the hospital commission, even though they were not specified in the contract due to oversight. As for the improved floor tile, it can hardly be maintained that the parties meant, by specifying another type of tile, to exclude the possibility of using a superior tile which was developed after the original contract was made. Accordingly, the modifications are within the scope of the original contract, and the competitive bidding requirement of R.C. 339.14 (H) does not apply to the contract modifications.

In specific answer to your question, it is my opinion and you are so advised, that a county hospital commission constructing a hospital with public bond money is not required by R.C. 339.14 (H) to use competitive bidding for contract modifications costing in excess of one thousand dollars, when such modifications do not exceed the scope of the original contract.