

OPINION NO. 92-050**Syllabus:**

1. A board of county commissioners may purchase equipment for the use of the county engineer at auction where the cost of each separate purchase does not exceed \$10,000.
 2. A county children's services board must comply with the competitive bidding requirements of R.C. 307.86-.92 in the purchase of food and clothing with respect to any separate purchase the cost of which exceeds \$10,000.
 3. Whether a purchase reasonably and in good faith constitutes a separate contract or whether a purchase has been split into separate contracts to avoid the requirements of competitive bidding is a question of fact to be determined on a case-by-case basis.
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To: James A. Philomena, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Lee Fisher, Attorney General, September 29, 1992

You have requested an opinion on the following questions:

1. May a board of county commissioners purchase equipment for the use of the county engineer at auction where each piece of equipment costs less than \$10,000.00 but, in the aggregate, the total amount of purchases is over \$10,000.00?
2. Must a county children's services board let out for competitive bid the purchase of food and clothing for the children under the care of the board?

**The Board of County Commissioners is Subject to R.C. 307.86-.92
When Purchasing Equipment for the Use of the County Engineer**

Your first question concerns the purchase of equipment at auction by a board of county commissioners for the use of the county engineer. In general, "it is the province of the board of county commissioners to make contracts for the county." *Burkholder v. Lauber*, 6 Ohio Misc. 152, 154, 216 N.E.2d 909, 911 (C.P. Fulton County 1965). In particular, the board of county commissioners has the express authority to "purchase...machinery, tools, or other equipment...for the construction, improvement, maintenance, or repair of the highways, bridges, and culverts under its jurisdiction." R.C. 5549.01. Purchases made by the board of county commissioners pursuant to R.C. 5549.01 are governed by R.C. 307.86-.92. R.C. 5549.01. There is nothing in R.C. 5549.01 or R.C. 307.86-.92 that expressly prohibits the purchase of equipment at auction by the board of county commissioners. Thus, the analysis of your question focuses on whether compliance with the statutes governing the purchase of equipment by the board of county commissioners precludes purchase at auction.

As noted above, R.C. 5549.01 authorizes the board of county commissioners to purchase equipment for the construction, improvement, maintenance and repair of highways, bridges, and culverts. Although R.C. 5549.01 does not prescribe any particular method for such purchases, it incorporates by reference the requirements of R.C. 307.86-.92. These statutes set forth the requirements for competitive bidding and the award of contracts. Specifically, R.C. 307.86 provides that

[a]nything to be purchased...including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except 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 section 307.92 of the Revised Code, at a cost in excess of ten thousand dollars, except as provided in [sections of the Revised Code not relevant here], shall be obtained through competitive bidding.

The statutory provisions governing competitive bidding thus require the board of county commissioners to advertise and accept bids from prospective sellers and to award the contract "to the lowest and best bidder." R.C. 307.90. The competition involved in such competitive bidding is among the parties submitting the bids to the board of county commissioners as purchaser.

Although an auction also involves a competitive sale, *Crandall v. State of Ohio*, 28 Ohio St. 479 (1876), the competition at an auction sale is among the prospective purchasers. Parties proposing to make a purchase at an auction must submit bids in competition with other bidders, and the bidder offering the highest price becomes the successful purchaser. See generally *Crandall*. Clearly, a purchase at an auction could not be accomplished in accordance with the competitive bidding requirements of R.C. 307.86. Thus, any purchase of equipment

by the board of county commissioners that requires competitive bidding cannot be made at an auction.¹

The Board of County Commissioners May Purchase an Item at a Cost of \$10,000 or Less at Auction

Your question specifies that the cost of each purchase will be less than \$10,000, although the aggregate cost of separate purchases might exceed \$10,000. R.C. 307.86 by its terms applies to "[a]nything to be purchased," and not to an aggregate of purchases, and, therefore, the fact that the aggregate cost of a number of separate purchases at one auction exceeds \$10,000 would not generally trigger the requirement of competitive bidding. In applying the dollar limit for competitive bidding, 1980 Op. Att'y Gen. No. 80-038 noted that:

[T]he threshold limitation provided in [R.C. 307.86] should be interpreted as relating separately to any purchase or lease which may reasonably and in good faith be deemed to constitute a separate contract or purchase order. The purchase or lease contemplated may not be split into separate contracts or orders for the purpose of evading the requirements of the statute.

Op. No. 80-038 at 2-162; *see also* 1991 Op. Att'y Gen. No. 91-051 (applying the analysis of Op. No. 80-038 to the county's purchase of towing services where the cost of any single tow did not exceed \$10,000, but where the aggregate cost of tows could exceed \$10,000). Thus, as a general matter, R.C. 307.86 does not necessarily preclude the board of county commissioners from making individual purchases at auction, where the cost of each purchase is less than \$10,000, but where the cost of all purchases, in the aggregate, exceeds \$10,000.

However, items that reasonably would be included in a single purchase contract may not be purchased separately in order to avoid the requirements of competitive bidding. In *Wing v. City of Cleveland*, 9 Ohio Dec. Reprint 551 (C.P. Cuyahoga County 1885), the court determined that a board of fire commissioners, bound by competitive bidding for purchases at a cost in excess of a certain amount, could not purchase a length of fire hose in a number of separate sections to avoid advertising for bids for the entire length of hose. Similarly, it has been held that a competitive bidding requirement cannot be avoided by making several separate payments on an account that represents, in fact, one contract between the parties. *Ludwig Hommel & Co. v. Woodsfield*, 115 Ohio St. 675, 155 N.E. 386 (1927). *See also State ex rel. Kuhn v. Smith*, 25 Ohio Op. 2d 203, 194 N.E.2d 186 (C.P. Monroe County 1963). Thus, depending upon the circumstances, it may be appropriate to aggregate a number of related items for determining the applicability of the dollar threshold requirement for competitive bidding. The primary question is whether each purchase reasonably and in good faith constitutes a separate contract or whether the purchase has been split into separate contracts to avoid the requirements of competitive bidding. What constitutes a purchase therefore is a question of fact to be determined on a case-by-case basis. Op. No. 91-051.

The Board of County Commissioners Must Comply with the Statutes Governing the Expenditure of Money by the County

The nature of an auction purchase, however, might make compliance with certain of the general statutes governing contracts by the board of county

¹ Competitive bidding is not required where "[t]he purchase is from the federal government, state, another county or contracting authority thereof, a board of education, township, or municipal corporation." R.C. 307.86(C). Thus, the board of county commissioners may purchase from any of these entities, regardless of the cost of the purchase, at auction.

commissioners difficult. For example, R.C. 5705.41 restricts the expenditure of money by subdivisions and taxing units. A county is a "subdivision" for purposes of R.C. 5705.41. R.C. 5705.01(A). Pursuant to R.C. 5705.41(D), a county may not

make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision [*i.e.*, the county auditor] that the amount required to meet the obligation ... has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.... *Every such contract made without such a certificate shall be void*, and no warrant shall be issued in payment of any amount due thereon. (Emphasis added.)

Every contract, therefore, must bear the certificate of the county auditor.

Thus, a question arises whether compliance with the requirements of R.C. 5705.41(D) prohibits purchase at auction. In this regard, R.C. 307.083 expressly permits the board of county commissioners, through an individual designated to represent the board, to tender bids for the purchase of real estate at public auction. R.C. 307.083 specifically states that "[a] purchase made under this section is subject to division (D) of section 5705.41 of the Revised Code." The conclusion that may be drawn from R.C. 307.083 is that the General Assembly has presumed that the need to comply with R.C. 5705.41(D) does not preclude purchase at auction.

Another statute with which the board of county commissioners must comply is R.C. 305.25, which provides that "[n]o contract entered into by the board of county commissioners, or order made by it, shall be valid unless it has been assented to at a regular or special session of the board." *See generally Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N.E. 372 (1899) (a contract in violation of this requirement is void). Obviously, the nature of an auction sale does not permit the consideration of the *exact* contract price by the county commissioners prior to the sale. However, the existence of R.C. 307.083 again indicates that the General Assembly did not intend for R.C. 305.25 to preclude a purchase at auction.²

A County Children's Services Board Must Comply With the Competitive Bidding Requirements of R.C. 307.86 When the Cost of a Purchase Exceeds \$10,000

Your second question asks whether the county children's services board must use competitive bidding in the purchase of food and clothing for children under the care of the board. The board purchases food for three group homes operated by the board. The clothing in question is purchased by the board through foster parents for the children in their care. Both the food and clothing are purchased as needed. You have explained that although the cost of any single purchase of food or clothing never exceeds \$10,000, the board annually spends approximately \$45,000 for food for the group homes and \$115,000 for clothing.

The county children's services board is a contracting authority³ subject to R.C. 307.86, quoted above. Accordingly, the board must employ competitive bidding when the cost of any separate purchase exceeds \$10,000.00. As discussed in answer to your first question, the threshold limitation of \$10,000 applies to each single purchase, not to an aggregate of purchases. Therefore, the fact that the annual

² It is beyond the scope of this opinion to determine the appropriate steps that must be taken to comply with R.C. 305.25 and R.C. 5705.41.

³ For purposes of R.C. 307.86, a "contracting authority" includes "any board...which has authority to contract for or on behalf of the county or any

total cost of clothing and food purchased by the board exceeds \$10,000 in and of itself does not require the board to employ competitive bidding. Cf. R.C. 127.16 (requiring competitive bidding by state agencies based upon a calculation of aggregate amounts).

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

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agency, department, authority, commission, office, or board thereof." R.C. 307.92. A county children's services board has authority to contract on its own behalf. See, e.g., R.C. 5153.16, 5153.34.