

**OPINION NO. 84-064**

**Syllabus:**

1. A contract entered into by a county board of mental retardation and developmental disabilities for the purchase of the services of occupational therapists and physical therapists must be competitively bid pursuant to R.C. 307.86 if the cost of such contract exceeds five thousand dollars, unless such purchase falls within one of the exceptions set forth in R.C. 307.86.
2. Pursuant to R.C. 307.88, when a bid in excess of six thousand dollars is submitted for a contract for the purchase of the services of occupational therapists and physical therapists, it must be accompanied by a bond or certified check conditioned that the bidder shall, if his bid is accepted, execute a contract in conformity to the invitation and the bid.

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**To: John F. Holcomb, Butler County Prosecuting Attorney, Hamilton, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984**

I have before me your request for an opinion concerning the contracting authority of a county board of mental retardation and developmental disabilities. Specifically, you have asked whether the purchase of services of occupational therapists and physical therapists by such a board is subject to the competitive bidding provisions of R.C. 307.86 and, if so, whether the bidding party is subject to the bonding requirements imposed under R.C. 307.88.

Initially, I note that county boards of mental retardation and developmental disabilities are established pursuant to R.C. 5126.02. Such boards, as creatures of statute, may act only when statutorily authorized to do so. See, e.g., State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921); State ex rel. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917).

The powers and duties of a county board of mental retardation and developmental disabilities are set forth under R.C. 5126.05 which provides, in pertinent part:

Subject to the rules established by the director of the department of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code, the county board of mental retardation and developmental disabilities shall:

. . . .  
 (C) Subject to the approval of the director of mental retardation and developmental disabilities, plan and set priorities based on available funds for the provision of both facilities and services to meet the needs of county residents with mental retardation or developmental disabilities and of former residents of the county presently residing in state institutions or placed under purchase of service agreements according to section 5123.18 of the Revised Code;

. . . .

(E) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under division (C) of this section;

(F) Ensure that related services, as defined in section 3323.01 of the Revised Code and comprehensive evaluation services and residential services are available according to the plan and priorities developed under division (C) of this section;

....

Any county board may enter into contracts with other such boards and with public or private, non-profit or profit making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with Chapters 3323. and 5126. of the Revised Code and rules adopted thereunder. (Emphasis added.)

The terms "adult services" and "early childhood services", as used in R.C. 5126.05, are defined under R.C. 5126.01 as follows:

As used in this chapter:

....

(B) "Adult services" means a range of habilitation services designed to meet the individual needs of persons who are eighteen years of age or over and are not enrolled in a program or service under Chapter 3323. of the Revised Code, and of persons sixteen and seventeen years of age who are eligible under rules adopted by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code. Such services shall include habilitation programs and services, sheltered employment providing a structured work environment, and planned therapeutic and work activities providing meaningful tasks designed to improve adaptive behavior levels.

....

(G) "Early childhood services" means a planned program of habilitation designed to meet the needs of a child who has not attained compulsory school age and who is a client or eligible client. (Emphasis added.)

The term "habilitation", as used in R.C. Chapter 5126 is defined as follows:

"Habilitation" means the process by which the staff of the facility or agency assists a mentally retarded or developmentally disabled person in acquiring and maintaining those life skills that enable him to cope more effectively with the demands of his own person and of his environment, and in raising the level of his personal, physical, mental, social and vocational efficiency. Habilitation includes, but is not limited to, programs of formal, structured education and training. (Emphasis added.)

R.C. 1526.01(H). The term "related services" as used in R.C. 5126.05(F) is defined under R.C. 3323.01(C) which states:

"Related services" means transportation, and such developmental, corrective, and other supportive services as may be required to assist a handicapped child to benefit from special education, including the early identification and assessment of handicapped conditions in children, speech pathology and audiology, psychological services, occupational and physical therapy, physical education, recreation, counseling services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only. (Emphasis added.)

Thus, a board is expressly authorized to enter into contracts in order to provide services which will assist a handicapped child to benefit from special education or

to provide mentally retarded or developmentally disabled persons with services which will raise those individuals' physical and vocational efficiency, *ie.*, physical and occupational therapy services.

You have asked whether contracts for such services are subject to R.C. 307.86 which provides:

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 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 five thousand dollars, except as otherwise provided in sections 307.861 [307.86.1], 4115.31 to 4115.35, 5513.01, 5543.19, 5713.01, or 6137.05 of the Revised Code, shall be obtained through competitive bidding. However, competitive bidding is not required when:

(A) The board of county commissioners, by a unanimous vote of its members, makes a determination that a real and present emergency exists and such determination and the reasons therefor are entered in the minutes of the proceedings of the board, when:

(1) The estimated cost is less than twenty thousand dollars; or

(2) There is actual physical disaster to structures. Whenever a contract of purchase, lease, or construction is exempted from competitive bidding under division (A)(1) of this section because the estimated cost is less than twenty thousand dollars, but the estimated cost is ten thousand dollars or more, the county or contracting authority shall solicit informal estimates from no fewer than three persons who could perform the contract, before awarding the contract. With regard to each such contract, the county or contracting authority shall maintain a record of such estimates, including the name of each person from whom an estimate is solicited, for no less than one year after the contract is awarded.

(B) 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 such supplies, part, or parts is limited to a single supplier;

(C) The purchase is from the federal government, state, another county or contracting authority thereof, a board of education, township, or municipal corporation;

(D) Public social services are purchased for provision by the county department of welfare under section 329.04 of the Revised Code;

(E) The purchase consists of human and social services by the board of county commissioners from nonprofit corporations or associations under programs which are funded entirely by the federal government. (Emphasis added.)

As used in the foregoing statute, "'contracting authority' means any board. . . which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office, or board thereof." R.C. 307.92. The court in C. B. Transportation, Inc. v. Butler County Bd. of Mental Retardation, 60 Ohio Misc. 71, 397 N.E.2d 787 (C.P. Butler County 1979), held that, because a county board of mental retardation had authority to enter into contracts, such board was a contracting authority within the meaning of R.C. 307.92 and thus was subject to the competitive bidding requirements of R.C. 307.86. Accord 1981 Op. Atty Gen.

<sup>1</sup> Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980) amended R.C. Chapter 5126, changing the title "county board of mental retardation" to "county board of mental retardation and developmental disabilities."

No. 81-050. Consequently, any contract entered into by a board of mental retardation and developmental disabilities for the purchase of services is subject to competitive bidding if the cost of such contract exceeds five thousand dollars, unless such contract falls within one of the exceptions set forth under R.C. 307.86.

Contracts for the purchase of the services of an accountant, architect, lawyer, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser are expressly exempt from competitive bidding. Under the doctrine of expressio unius est exclusio alterius, this exemption cannot be extended to include the services of occupational and physical therapists. See State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646, (1952) ("it is generally recognized that the express mention of but one class of persons in a statute implies the exclusion of all others"). See also R.C. 4755.01; R.C. 4755.40.

A proposed purchase by a county board of mental retardation and developmental disabilities which falls within any of the exceptions set forth under R.C. 307.86(A) through (E) need not be competitively bid. In a telephone conversation with a member of my staff, however, you have indicated that the purchase of the therapeutic services in question does not fall within those statutory exceptions. Of course, only contracts in which the cost exceeds five thousand dollars are subject to the provisions of R.C. 307.86.

With respect to your second query, R.C. 307.88 imposes various restrictions related to the submission of bids, by providing:

Bids submitted pursuant to sections 307.86 to 307.92 of the Revised Code shall be in a form prescribed by the contracting authority and filed in a sealed envelope at the time and place mentioned in the advertisement. The bids received shall be opened and tabulated at the time stated in the notice. Each bid shall contain the full name of each person submitting the bid. If the bid is in excess of six thousand dollars and for a contract for the construction, demolition, alteration, repair, or reconstruction of an improvement, it shall meet the requirements of section 153.54 of the Revised Code. If the bid is in excess of six thousand dollars and for any other contract authorized by sections 307.86 to 307.92 of the Revised Code, it shall be accompanied by a bond or certified check on a solvent bank in a reasonable amount stated in the advertisement but not to exceed five per cent of the bid, conditioned that he shall, if his bid is accepted, execute a contract in conformity to the invitation and his bid. (Emphasis added.)

Pursuant to this statute, any bid in excess of six thousand dollars for a contract for the purchase of the services of physical therapists and occupational therapists which is submitted in accordance with R.C. 307.86 must be accompanied by an appropriate bond or certified check.

In conclusion, it is my opinion, and you are advised, that:

1. A contract entered into by a county board of mental retardation and developmental disabilities for the purchase of the services of occupational therapists and physical therapists must be competitively bid pursuant to R.C. 307.86 if the cost of such contract exceeds five thousand dollars, unless such purchase falls within one of the exceptions set forth in R.C. 307.86.
2. Pursuant to R.C. 307.88, when a bid in excess of six thousand dollars is submitted for a contract for the purchase of the services of occupational therapists and physical therapists, it must be accompanied by a bond or certified check conditioned that the bidder shall, if his bid is accepted, execute a contract in conformity to the invitation and the bid.