OPINION NO. 83-034

Syllabus:

1. R.C. 3517.13(J), which prohibits an agency or department of the state or any political subdivision from awarding contracts in certain instances, applies only if a contribution in excess of one thousand dollars was made to the holder of a public office or to such person's campaign committee, and not if such a contribution was made to an individual, or to the campaign committee of an individual, who was merely a candidate for public office, and not the holder of a public office, at the time of the contribution.

2. The Director of Development is vested with authority to award contracts on behalf of the Department of Development under R.C. 122.02.

3. The Governor does not have "ultimate responsibility" for the awarding of a contract by the Department of Development, as that term is used in R.C. 3517.13(J).

4. R.C. 3517.13(J) does not operate to prohibit the Department of Development from awarding a contract to a corporation in a situation in which the spouse of an owner of more than twenty percent of the corporation (who had been an owner for the two previous calendar years), within the two previous calendar years, made a contribution in excess of one thousand dollars to a candidate for Governor who subsequently became Governor, or to such individual's campaign committee.

5. R.C. 3517.13(J) does not apply to contracts which are let by competitive bidding.

6. A contract for personal services may be let by competitive bidding, absent applicable statutory provisions, if reasonable action is taken to provide all qualified persons with the opportunity to submit proposals, and if the contract is awarded on the basis of the merit of the proposals.

To: William G. Sykes, Director, Department of Administrative Services, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 15, 1983

I have before me your request for my opinion on the following issue:

Whether Revised Code Section 3517.13(J) precludes the Director of Development from awarding a noncompetitively bid contract to an advertising company, to promote travel and tourism in Ohio, where the spouse of an owner and officer of the advertising company contributed over $1,000.00 to the political campaign of the Governor who appointed the Director of Development.

R.C. 3517.13(J) states:

> No agency or department of this state or any political subdivision shall award any contract, other than one let by competitive bidding or a contract incidental to such contract or which is by force account, for the purchase of goods and services to a corporation or business trust if an owner of more than twenty per cent thereof, or the spouse of such person, has made within the two previous calendar years, if an owner for all of such period, a contribution in excess of one thousand dollars to the holder of a public office having ultimate responsibility for the award of any such contract or to his campaign committee.

Your question involves a situation in which, in order to promote tourism and travel in the State of Ohio, the Department of Development awarded a contract[1] for advertising services to a particular corporation. The spouse of one of the owners of the corporation, within the two previous calendar years, made a contribution of more than $1000 to the Governor or his campaign committee; when the contribution was made, the individual for whose benefit it was made was not yet in office but was merely a candidate for Governor. It is my understanding that the individual whose spouse made the contribution is owner of more than twenty percent of the corporation and has been owner for all of the two previous calendar years. Your request recites that the contract in question was awarded without competitive bidding. It is, however, my understanding that, in preparation for awarding this contract, the Department of Development sent to approximately two dozen advertising agencies a letter inviting the submission of capability proposals for the consulting, marketing, and public relations services desired. The Department evaluated the responses that were received in accordance with specified criteria and selected a small number of finalists. It provided the finalists with an opportunity to meet with representatives of the Department and make a presentation of credentials. Based upon the materials submitted and the presentations made, the Department awarded the contract to the corporation in question.

Your question is whether, in light of the facts outlined above, the awarding of the contract in question violated the provisions of R.C. 3517.13(J). It is my understanding that you have raised this question because you are concerned about the possible application of R.C. 3517.13(J) to actions of the Department of Administrative Services, since the awarding of state contracts is a major part of your Department's function. See, e.g., R.C. 123.15 (Director of Administrative Services may enter into contracts for labor, materials or construction of any structures and buildings necessary to the maintenance, control, and management of public works of the state); R.C. 123.52(A)(1) (in relation to the Office of Lake Lands in the Department of Administrative Services, the Director shall "make contracts as may be required to carry out his powers and duties, including contracts for the services of consultants, engineers, and surveyors"); R.C. 125.06 (prohibiting state officers, boards, or commissions, except in certain instances, from procuring or purchasing supplies, equipment, contracts of insurance, or contracts for data processing machine services other than from or through the Department of Administrative Services).

Let me begin by noting that the prohibition of R.C. 3517.13(J) is addressed to an agency or department of the state or any political subdivision. It prohibits the granting of certain types of contracts in particular circumstances involving "a contribution in excess of one thousand dollars to the holder of a public office having ultimate responsibility for the award of any such contract or to his campaign committee."

It is, however, not clear that the contribution in question was made "to the holder of a public office having ultimate responsibility for the award of any such contract or to his campaign committee." It is true that the Governor is currently the holder of a public office. See Ohio Const. art. III, §1; R.C. 3517.01(B)(9). When the contribution was made, however, the individual who is currently Governor was merely a candidate for that office, and it does not appear that R.C. 3517.13(J) encompasses such a contribution. R.C. 3517.13(J) expressly includes only those contributions which were made to "the holder of a public office" or to his campaign

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[1] Your letter makes reference to the awarding of two contracts. It is my understanding that the Department's intention was to award two contracts—one to implement a special travel advertising and promotion campaign for tourism during the remainder of the fiscal year ending June 30, 1983, and the second to develop a comprehensive program to be funded by the 1984-1985 biennial budget. The Department had determined to award both contracts to the same agency, but it is my understanding that only the first contract has been executed, funded, and approved by the State Controlling Board.

committee. See generally R.C. 3517.01(B)(1) (defining "[c]ampaign committee" to mean "a candidate or a combination of two or more persons authorized by a candidate under [R.C. 3517.081] to receive contributions and make expenditures"); R.C. 3517.01(B)(3) (defining "[c]andidate" to include "any person who, at any time prior to or after an election, receives contributions or makes expenditures, has given consent for another to receive contributions or make expenditures, or appoints a campaign treasurer, for the purpose of bringing about his nomination or election to public office"); R.C. 3517.081. When the contribution in question was made, the individual who is currently Governor was not the holder of a public office, and his campaign committee was not the campaign committee of the holder of a public office.

That the language of R.C. 3517.13(J) does not extend to a situation of the sort you have described may be inferred from the history of that provision. R.C. 3517.13(J) was enacted by 1974 Ohio Laws, Part II, 12, 27 (Am. Sub. S.B. 46, eff. July 23, 1974), as R.C. 3517.13(K). The version of that bill which was reported by the Senate Financial Institutions, Insurance, and Elections Committee and passed the Senate by its terms applied to a contribution in excess of one thousand dollars made to the "holder of a public office having ultimate responsibility for the award of any such contract, or to a candidate for such office, or to his campaign committee." The express reference to a candidate for public office was dropped from the final version of the bill, thus supporting the conclusion that contributions made to persons who are candidates (and not public officials) when the contributions are made do not come within the language now appearing in R.C. 3517.13(J).[2] See generally 1975-1976 Ohio Laws, Part II, 3815 (Am. Sub. H.B. 1379, eff. June 25, 1976) (changing R.C. 3517.13(K) to 3517.13(J)).

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[2] I note that the Legislative Service Commission's summary of Am. Sub. S.B. 46, as enacted, states in part:

> The bill would prohibit a state agency or department or a political subdivision from awarding a noncompetitively bid contract for goods or services, including incidental or force account contracts, to any person (including the executor or administrator of an estate, the trustee of a trust, partner of a partnership, or member of an association) who has within the two previous calendar years made a contribution of over $1,000 to a candidate for office in that agency or department, his campaign committee, or a public official having ultimate responsibility for awarding any such contract. The ban would also apply if [sic] the owner of more than 20% of a corporation or business trust if he were an owner for 2 years, his spouse, or the spouse of any individual, partner, association member, administrator, executor, or trustee made such a contribution. (Emphasis added.)

See generally R.C. 3517.13(I) (formerly R.C. 3517.13(J)).

The Ohio Supreme Court has indicated that, although it is not bound by an analysis made by the Legislative Service Commission, the court may refer to such analyses "when [it finds] them helpful and objective," on the basis that " '[S]tatutes are to be read in the light of attendant circumstances and conditions, and are to be construed as they were intended to be understood, when they were passed.' " Meeks v. Papadopulos, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159, 162 (1980) (quoting Miller v. Fairley, 141 Ohio St. 327, 48 N.E.2d 217 (1943) (syllabus, paragraph two)). It is, however, clear that a report of the Legislative Service Commission may not be used to vary the meaning of a legislative enactment when the language is clear. As was stated in Cleveland Trust Co. v. Eaton, 21 Ohio St. 2d 129, 138, 256 N.E.2d 198, 204 (1970):

> In our opinion, a report of the Legislative Service Commission, with respect to proposed legislation, may not be used to give a meaning to a legislative enactment other than

Even if it is assumed, however, for purposes of argument, that the provisions of R.C. 3517.13(J) may be extended to contributions made to a candidate for public office, as well as to contributions made to a person who is actually the holder of such an office, there arises the question whether the Governor is the individual "having ultimate responsibility for the award" of the contract in question, within the meaning of R.C. 3517.13(J).

It is my understanding that the contract about which you have inquired was awarded by the Department of Development pursuant to R.C. 122.02, which states in part: "It [the Department of Development] may contract or enter into agreements with any person, governmental agency, or public or private organization. . .to carry out the purposes of [R.C. Chapter 122]." R.C. 121.02(O) creates the Department of Development and provides that it is to be administered by the Director of Development. R.C. 121.02 states further: "The director of each department shall exercise the powers and perform the duties vested by law in such department." Thus, it is clear that the Director of Development is authorized to enter into contracts on behalf of the Department of Development.[3]

The question, then, is whether the Director has "ultimate responsibility for the award" of such a contract for purposes of R.C. 3517.13(J), or whether such ultimate responsibility resides in the Governor. The Governor is authorized by R.C. 121.03(A)(10) to appoint the Director of Development, with the advice and consent of the Senate. Pursuant to R.C. 121.03, the Director holds office during the term of the appointing Governor, but subject to removal at the pleasure of the Governor.[4] Further, Ohio Const. art. III, §5 provides: "The supreme executive power of this state shall be vested in the governor."

It does not, however, follow from the foregoing that the Governor has "ultimate responsibility" for all actions of the Director of Development. The relationship between the Governor and the department directors whom he appoints was described by one of my predecessors as follows:

> that which is clearly expressed by the General Assembly. As stated in paragraph five of the syllabus of Sears v. Weimer (1944), 143 Ohio St. 312, 55 N.E.2d 413, "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation." See also Slingluff v. Weaver (1902), 66 Ohio St. 621, 64 N.E. 574.
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> That rule of construction is one of long standing in the federal courts, as well as in our own. As stated in United States v. Missouri Pacific Rd. Co. (1929), 278 U.S. 269, 278, 73 L. Ed. 322:
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> "* * *where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

See also State v. Merriweather, 64 Ohio St. 2d 57, 59, 413 N.E.2d 790, 791 (1960) (the court is not bound by unofficial Legislative Service Commission Notes).

[3] Similar authority is vested in the Department of Administrative Services and its director. See, e.g., R.C. 121.02(C); R.C. 123.15 (authority of Director of Administrative Services to contract for labor, materials and construction of necessary structures and buildings); R.C. 125.071 (authority of Department of Administrative Services to procure services).

[4] R.C. 121.03(A)(12) establishes the same relationship between the Governor and the Director of Administrative Services.

> Although there is vested in the governor, under Section 5, Article III, Ohio Constitution, the supreme executive power of the state, preliminarily it ought to be said that this power is not exclusive. Rather, the executive power of the sovereign state is divided among the governor and the lesser executive officers, the latter deriving their powers from the Constitution and the laws of the state and not from appointment by the governor nor, except in a few specific instances, through his direction. Further, the Supreme Court, while recognizing the principle of the supremacy of the governor's executive powers, at the same time has differentiated supreme power from exclusive power. Specifically, it has ruled that even within the framework of those powers vested in the governor, a part of the sovereignty of the state resides with his own department heads, that the power to select the officers who shall hold these offices does not include the power to take or have himself those duties and responsibilities vested in the several departments.

1958 Op. Att'y Gen. No. 1868, p. 157 at 159-60 (citation omitted; emphasis added).

The landmark case in Ohio dealing with the relationship between a Governor and his department heads is State ex rel. S. Monroe & Son Co. v. Baker, 112 Ohio St. 356, 147 N.E. 501 (1925). That case involved a situation in which the Governor issued several executive orders. He directed the Director of Highways to reject all bids received in connection with one improvement and directed him to award a contract for concrete pavement, rather than asphalt, in another matter. In both instances, he directed the Director of Finance not to issue a certificate that money was available. The Ohio Supreme Court held, in the second paragraph of the syllabus, that "the director of highways and public works is invested with certain powers and duties involving judgment and discretion, independent of the Governor and not subject to be controlled by executive orders." The language of the court is instructive:

> The Governor's authority is supreme in the sense that no other executive authority is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively. . . . It is the policy and the spirit of our institutions that every executive officer is invested with certain powers and discretion, and within the scope of the powers granted and discretion conferred his dictum is supreme and his judgment is not subject to the dictation of any other officer. . . .
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> . . .State officials in the executive departments are not in any sense deputies of the Governor, but, on the contrary, possess powers and are charged with duties and have independent discretion and judgment entirely beyond his control, except in those instances where it is otherwise provided.

Id. at 366-68; 147 N.E. at 504-05.

The court concluded:

> The Governor has such power as has been conferred by the Constitution and by the Legislature, and such incidental powers as may be necessary to carry into effect the powers expressly conferred, and all other executive officers of the state government likewise have powers and authority which have been conferred by the Constitution and by the Legislature, and each is independent of the other; and the Governor may not control the discretion and judgment of any other state officer within the limits of the power conferred upon such officer, unless the power of review or the requirement of approval has been imposed in the act which creates such other state officer and defines his powers.

Id. at 371; 147 N.E. at 505-06. See generally 1973 Op. Att'y Gen. No. 73-120 (the Governor has only the authority prescribed by the Constitution or by legislation); 1950 Op. Att'y Gen. No. 2181, p. 566; 1945 Op. Att'y Gen. No. 152, p. 121 at 122 ("the Governor, as all other public officials, has only such powers as have been expressly conferred upon him by the Constitution and statutes, and such implied or incidental powers as may be necessary to carry into effect, those expressly conferred").

Based upon the principles set forth in State ex rel. S. Monroe & Son Co. v. Baker, it is apparent that the Director of Development has authority to enter into contracts on behalf of the Department without any participation by, or instruction from, the Governor. The independent nature of his authority to act on such matters contrasts with those instances in which gubernatorial approval is required. See, e.g., R.C. 121.07 (the director of a department, with the approval of the Governor, may establish divisions within his department); R.C. 121.15 (the director of a department, with the approval of the Governor, may establish and maintain branch offices for the conduct of the functions of his department); R.C. 122.01(I), 122.09 (the Director of Development with the approval of the Governor, may appoint technical and advisory boards); R.C. 122.12 ("[u]pon approval of the governor, the director of development may request the administrator of the bureau of employment services to transfer to the credit of the department of development such sums from the special administrative fund established under section 4141.11 of the Revised Code as are available for programs to promote the regularization of employment and to prevent unemployment in Ohio"). See generally State ex rel. S. Monroe & Son Co. v. Baker, 112 Ohio St. at 369, 147 N.E. at 505; 1963 Op. Att'y Gen. No. 3548, p. 58 (also appearing at 1962 Op. Att'y Gen. No. 3548, p. 1093) (the director of finance and other officials appointed under R.C. 121.03 are not subject to the direction and control of a superior officer; they are public officers, rather than public employees) (quoted in 1963 Op. Att'y Gen. No. 56, p. 128 at 130-31, and 1963 Op. Att'y Gen. No. 20, p. 102 at 104-05).

Given that the Director of Development has authority to enter into contracts on behalf of the Department without the approval of the Governor, I am unaware of any sense in which the Governor has "responsibility" for the award of such contracts. It is true that, if he is not satisfied with the manner in which the Director of Development exercises his discretion, the Governor may, pursuant to R.C. 121.03, remove the Director at his pleasure. Such removal would not, however, affect the status of any contract entered into by the Director while he held the office of Director, nor would it permit the Governor to assume the authority granted by statute to the Director of Development to award contracts under R.C. 122.02. See generally State ex rel. S. Monroe & Son Co. v. Baker; 1958 Op. No. 1868.

Where the General Assembly has intended that the Governor have ultimate responsibility for particular actions of state departments, it has expressly so provided. See, e.g., R.C. 107.16 ("The governor is the official of the state having the ultimate responsibility for dealing with the federal government with respect to programs and activities pursuant to the 'Highway Safety Act of 1966' and any amendments thereto. To that end he shall coordinate the activities of any and all departments and agencies of the state and its subdivisions, relating thereto"). The General Assembly has not given the Governor such responsibility for awarding contracts on behalf of the Department of Development.

Based on the foregoing, I conclude that the Governor does not have "ultimate responsibility" for the awarding of a contract by the Department of Development pursuant to R.C. 122.02. Rather, the responsibility for awarding such a contract is vested in the Director of Development. As a result, R.C. 3517.13(J) does not operate to prohibit the Department of Development from awarding a contract to a corporation in a situation in which the spouse of an owner of more than twenty percent of the corporation (who had been an owner for the two previous calendar years), within the two previous calendar years, made a contribution in excess of one thousand dollars to a candidate for Governor who subsequently became Governor, or to such individual's campaign committee. A similar conclusion applies, of course, to other state departments which are granted the authority to enter into contracts without the participation or approval of the Governor. The Department of Administrative Services is one such department. See notes 3 and 4, supra.

I recognize that the construction of R.C. 3517.13(J) which is set forth above results in a more narrow application of that provision than might be sought from a public policy standpoint to avoid any possible impropriety or appearance of impropriety. It is, however, my opinion that the language of that subdivision is clear and that I am, therefore, constrained to apply it as it was written. To the extent that a different result may be desirable, the remedy lies with the General Assembly. State ex rel. Nimberger v. Bushnell, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph four) ("[w]hen the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction"). See also State ex rel. Lyne v. Kennedy, 90 Ohio St. 75, 106 N.E. 773 (1914); 1981 Op. Att'y Gen. No. 81-101.

I note, in addition, that even if it were concluded that the Governor had ultimate responsibility for the award of the contract in question, so that R.C. 3517.13(J) did apply to your situation, it might be argued that the facts involved in the instant case would support an analysis that the contract was let by competitive bidding and, thus, that R.C. 3517.13(J) is not applicable.

The prohibition contained in R.C. 3517.13(J) against an agency or department's awarding a contract for the purchase of goods or services to certain corporations does not apply where the contract is let by competitive bidding. R.C. 3517.13 does not, however, define the term "competitive bidding," as used in that section. In applying such term to the awarding of a contract by a state agency or department, I note that various other statutes impose specific competitive bidding procedures to be used in letting certain types of contracts. See, e.g., R.C. 125.07 (competitive bidding for purchase of equipment, materials, and supplies by Department of Administrative Services); R.C. 125.071 (competitive bidding for procurement of services by Department of Administrative Services, under notice provisions of R.C. 125.07); R.C. 125.48 et seq. (bidding for state printing contracts); R.C. 153.06 et seq. (bidding for state building contracts).

A contract for the services of an advertising agency is considered a personal services contract. See Hordin v. City of Cleveland, 77 Ohio App. 491, 62 N.E.2d 889 (Cuyahoga County 1945). No statute of which I am aware specified a bidding procedure applicable to the Department of Development in letting the contract in question.[5] Since that Department had authority to enter into such a personal services contract, the Department had the option of letting the contract through competitive bidding, even though there were no statutory provisions requiring such bidding or prescribing the bidding method to be used. See 1980 Op. Att'y Gen. No. 80-028 (where no statute requires township trustees to offer property for lease only after competitive bidding, the trustees, in their discretion, may choose to lease by means of competitive bidding if they so desire). In such a situation, where no statute required competitive bidding, the Department of Development was authorized, if it chose to let a contract by competitive bidding, to use its discretion in adopting a method for soliciting bids. See Leonard v. Mayfield Heights, 6 Ohio L.Abs. 739 (Ct. App. Cuyahoga County 1928) (where contracting authority is required to accept best bid and there is no statutory standard for determining best

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[5] When the contract in question was awarded, R.C. 127.16 stated, in pertinent part:

> (B) Neither of the following acquisitions shall be made unless approved by the controlling board or unless they are competitively bid:
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> (1) Acquiring from a particular supplier of professional services, technical services, and the advice of experts, or any combination thereof to cost, in the aggregate over a twelve-month period, ten thousand dollars or more;
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> (2) Acquiring from a particular supplier of personal services not included in division (B)(1) of this section, labor, or

bid, determination is left to contracting authority's discretion). See also Moore v. City of Cincinnati, 9 Ohio Dec. Reprint 587 (Super. Ct. of Cincinnati 1886) (where there is a statute that speaks to the form and contents of bids in certain respects, the contracting authority may adopt rules concerning matters of execution and detail not dealt with by the statute). Any such policy must, of course, ensure that the department will use reasonable efforts to secure competitive bids. State ex rel. Davies Manufacturing Co. v. Donahey, 94 Ohio St. 382, 114 N.E. 1037 (1916). See State ex rel. Buehler Print. Co. v. French, 6 Ohio L.Abs. 606 (Ct. App. Cuyahoga County 1928) (contracting authority must use reasonable efforts to ascertain which bidder is qualified to perform the terms of a proposed contract). As was stated in Rewco, Inc. v. Cleveland, 21 Ohio Op. 2d 61, 63, 183 N.E.2d 646, 649 (C.P. Cuyahoga County 1961):

> Competition between bidders on public contracts has always been the primary means of protecting the taxpayer. With the development of technology the idea of what competition should be has changed. . . . The contracting agency needs a wider latitude for exercise of reasonable discretion. . . .
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> With the right of wider discretion, goes the stricter duty of comparison of the submitted bids. Every reasonable effort should be made to find the bidder who in fact is the best one.

State ex rel. Davies Manufacturing Co. v. Donahey concerned a contract for the furnishing of automobile tags to the state, which was awarded on the basis of a written proposal made by the manufacturer, in response to the state's specifications. The court found in that case that, although the statute requiring competitive bidding did not specify the manner in which such bidding should be conducted, "still reasonable efforts to secure such competitive bidding must be made." 94 Ohio St. at 386, 114 N.E. at 1038. The court determined that the method used by the state to award the contract in that case did not constitute competitive bidding, stating:

> materials, or any combination thereof to cost, in the aggregate over a twelve-month period, ten thousand dollars or more.

This section required a state agency to use competitive bidding or to obtain controlling board approval when acquiring personal services costing at least ten thousand dollars within a twelve month period. The statute did not, however, specify the procedures to be used by the agency in conducting competitive bidding. This section was recently amended by the biennial budget bill, H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983), but the changes do not materially alter the effect of the provision on the question at issue.

As also recently amended by the biennial budget bill, H.B. 291, R.C. 125.071 states:

> The department of administrative services may procure services. Where the cost of services totals ten thousand dollars or more, the services shall be procured by competitive bidding, except where controlling board approval is obtained. Where services are procured by competitive bidding, notice of the proposed procurement shall be given as provided in divisions (A) to (E) of section 125.07 of the Revised Code. For the purposes of this section, procurement does not include acquisition incidental to a lease. A state agency may without competitive bidding, procure services that cost less than ten thousand dollars.

This provision currently governs the purchase of services of all sorts, including those of professionals, by the Department of Administrative Services. Prior to its amendment, however, R.C. 125.071 authorized the Deparment of Administrative Services to procure only services that were not professional, technical, or advisory in nature.

> The competition must be open to everyone, as it was evidently the policy of the statute to require that current requirements should be obtained at the lowest and best price for the same quality of work and materials.
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> . . .While there was a limited competition in the procurement of the. . .contract, we are convinced that open, competitive bidding was not resorted to, but that it was unduly restricted. It should have been more general and pronounced and a wider opportunity therefore presented.

94 Ohio St. at 386, 114 N.E. at 1038. While State ex rel. Davies Manufacturing Co. v. Donahey suggests that reasonable competition requires that a very broad opportunity to bid be given, the court did not prescribe a particular procedure which would be reasonable in all circumstances. Whether a particular competitive bidding procedure is reasonable is a determination which must be made in light of the particular facts involved in each situation.

In the situation here under consideration, the Department invited approximately two dozen advertising agencies to submit proposals for a particular advertising campaign. Whether such a method may be found to constitute a reasonable manner of competitive bidding is dependent upon many factors. As a general rule, since the performance of personal services involves the exercise of particular skills, aptitude, and expertise, such work is considered non-competitive, State ex rel. Scobie v. Cass, 13 Ohio C.C. (n.s.) 449 (Cuyahoga County 1910), and need not be submitted to competitive bidding, State ex rel. Doria v. Ferguson, 145 Ohio St. 12, 60 N.E.2d 476 (1945) (contract by state department for services of attorney to prepare title reports); City of Cleveland v. Lausche, 71 Ohio App. 273, 49 N.E.2d 207 (Cuyahoga County 1943) (city contracting with corporation to operate city zoological garden). Thus, if competitive bidding is sought, it may be reasonable for an agency to make a preliminary determination as to the qualifications of the field of bidders—as, for example, determining that bidders should be of a certain size or have a certain type of experience. The fact that bidding is not open to the general public does not necessarily mean that no competitive bidding has taken place. Heninger v. Akron, 64 Ohio L.Abs. 417, 112 N.E.2d 77 (Ct. App. Summit County 1951), concerned a situation in which a municipality seeking bids for the codification, printing, and review of its ordinances set out precise specifications as to qualifications of bidders, including the type of business in which they engaged and the extent of their previous experience. The specifications were challenged as unfair, unreasonable, and unduly restrictive of competition among qualified bidders. The court, however, recognized that in a field requiring particular expertise it was not unwise to establish specifications which "confine bidders to persons of capacity and experience, to insure the most skillful workmanship." 64 Ohio L.Abs. at 420, 112 N.E.2d at 79.

While the situation involved in the Heninger case included advertising for bids, I cannot say as a matter of law that, absent a statutory requirement, advertisement is always essential to assure competitive bidding. In Mutual Electric Co. v. Village of Pomeroy, 99 Ohio St. 75, 124 N.E. 58 (1918), the court discussed whether a contracting authority had complied with a statute requiring advertisement for bids. The court stated: "Advertisement, where there is but one source of supply, would be a foolish and absurd performance." 99 Ohio St. at 82, 124 N.E. at 60. See also 10 U.S.C. §2304 (Supp. V 1981) (purchases of and contracts for certain property and services shall be made by formal advertising; where such method is not feasible or practicable, the head of an agency may, in certain circumstances, including the purchase of or contract for personal or professional services, negotiate such a purchase or contract). Where there are a limited and identifiable number of persons or firms which may qualify for a personal services contract, it may be that the requirements of competitive bidding are satisfied if an

opportunity is given to each of those persons or firms to respond to a request for proposals.[6]

As outlined above, a number of factors affect a determination as to whether a particular procedure constitutes competitive bidding. I am not attempting, in considering your question, to make the findings of fact which would be essential to a determination as to whether competitive bidding has taken place in the circumstances involved in this situation. I am, however, unable to conclude as a matter of law that the Department's procedure for soliciting proposals did not constitute competitive bidding. If the Department took reasonable action to provide all qualified persons with the opportunity to submit proposals, and if it awarded the contract on the basis of the merit of the proposals, the procedure used by the Department would appear to satisfy the requirements of competitive bidding, thus removing the contract in question from the provisions of R.C. 3517.13(J).

In conclusion, it is my opinion, and you are hereby advised, as follows:

1. R.C. 3517.13(J), which prohibits an agency or department of the state or any political subdivision from awarding contracts in certain instances, applies only if a contribution in excess of one thousand dollars was made to the holder of a public office or to such person's campaign committee, and not if such a contribution was made to an individual, or to the campaign committee of an individual, who was merely a candidate for public office, and not the holder of a public office, at the time of the contribution.

2. The Director of Development is vested with authority to award contracts on behalf of the Department of Development under R.C. 122.02.

3. The Governor does not have "ultimate responsibility" for the awarding of a contract by the Department of Development, as that term is used in R.C. 3517.13(J).

4. R.C. 3517.13(J) does not operate to prohibit the Department of Development from awarding a contract to a corporation in a situation in which the spouse of an owner of more than twenty percent of the corporation (who had been an owner for the two previous calendar years), within the two previous calendar years, made a contribution in excess of one thousand dollars to a candidate for Governor who subsequently became Governor, or to such individual's campaign committee.

5. R.C. 3517.13(J) does not apply to contracts which are let by competitive bidding.

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[6] See generally R.C. 125.07 ("[w]here purchases [of equipment, materials, supplies or contracts of insurance by the Department of Administrative Services] are required to be made by competitive bidding, . .[t]he department shall advertise such competitive bidding by notice sent by mail to competing persons, firms, or corporations producing or dealing in such equipment, materials, or supply, or contract of insurance, including but not limited to, the persons, firms, or corporations whose names appear on the appropriate list provided for in [R.C. 125.08]. . . . The department shall also maintain in a public place in its office, a bulletin board upon which it shall post and maintain a copy of such notice for at least fifteen days preceding the day of the opening of such bids. The failure to post such notices shall invalidate all proceedings had and any contract entered into pursuant to such proceedings").

6. A contract for personal services may be let by competitive bidding, absent applicable statutory provisions, if reasonable action is taken to provide all qualified persons with the opportunity to submit proposals, and if the contract is awarded on the basis of the merit of the proposals.