March 18, 2024

The Honorable Melissa A. Schiffel
Delaware County Prosecuting Attorney
145 North Union Street, P.O. Box 8006
Delaware, Ohio 43015

SYLLABUS: 2024-003

> The term "services" as used in R.C. 9.48 does not include "construction" or "construction services." 2019 Att'y Gen. No. 2019-028 followed. However, the term "services" may cover the installation, maintenance, repair, and the like of items acquired under R.C. 9.48 provided such services to not constitute nor cross into construction or construction services. Whether any particular service acquired under R.C. 9.48, including any repair, maintenance, replacement, installation, or upgrade constitutes "construction" or "construction services" is a question of fact beyond the opinion-rendering function of the Attorney General.

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OPINION NO. 2024-003

The Honorable Melissa A. Schiffel
Delaware County Prosecuting Attorney
145 North Union Street, P.O. Box 8006
Delaware, Ohio 43015

Dear Prosecutor Schiffel:

You have requested an opinion regarding the term "services" as it appears in R.C. 9.48. Your two questions ask:

1. Ohio Revised Code 9.48 provides that a political subdivision may purchase equipment, materials, supplies, or services from joint purchasing programs. With respect to building maintenance and upgrades, doesn't this also include the labor to install, repair, replace, or upgrade the equipment, materials or supplies purchased from a joint purchasing program under R.C. 9.48?

2. May a political subdivision use joint purchasing programs so long as any labor associated with the items purchased is not construction services for new construction?

For the reasons that follow, I find that the term "services" as it appears in R.C. 9.48 does not include "construction or "construction services," but the term "services" may cover the installation, maintenance, repair, and the like of items acquired under R.C. 9.48 provided such services to not constitute nor cross into construction or construction services.

I

R.C. 9.48 provides authorization for a political subdivision to participate in certain joint purchasing agreements. The statute, in its entirety, reads as follows:

> (A) As used in this section, "political subdivision" has the same meaning as in section 2744.01 of the Revised Code and includes a county hospital as defined in section 339.01 of the Revised Code.
>
> (B) A political subdivision may do any of the following:
>
> > (1) Permit one or more other political subdivisions to participate in contracts into which it has entered for the acquisition of equipment, materials, supplies, or services, and may charge such participating political subdivisions a reasonable fee

> to cover any additional costs incurred as a result of their participation;
>
> (2) Participate in a joint purchasing program operated by or through a national or state association of political subdivisions in which the purchasing political subdivision is eligible for membership.
>
> (3) Participate in contract offerings from the federal government that are available to a political subdivision including, but not limited to, contract offerings from the general services administration.

(C) Acquisition by a political subdivision of *equipment, material, supplies, or services*, through participation in a contract of another political subdivision or participation in an association program under division (B)(1) or (2) of this section, is exempt from any competitive selection requirements otherwise required by law, if the contract in which it is participating was awarded pursuant to a publicly solicited request for a proposal or a competitive selection procedure of another political subdivision within this state or in another state. Acquisition by a political subdivision of *equipment, materials, supplies, or*

> *services pursuant* to division (B)(3) of this section is exempt from any competitive selection requirements otherwise required by law. No political subdivision shall acquire equipment, materials, supplies, or services by participating in a contract under this section if it has received bids for such acquisition, unless its participation enables it to make the acquisition upon the same terms, conditions, and specifications at a lower price.
>
> (D) A political subdivision that is eligible to participate in a joint purchasing program operated by or through a national or state association of political subdivisions in which the purchasing political subdivision is eligible for membership may purchase supplies or services from another party, including another political subdivision, instead of through participation in contracts authorized by division (B)(2) of this section if the political subdivision can purchase those supplies or services from the other party upon equivalent terms, conditions, and specifications but at a lower price than it can through those contracts. Purchases that a political subdivision makes under this division are exempt from any competitive selection procedures otherwise required by law. A political subdivision that makes

> any purchase under this division shall maintain sufficient information regarding the purchase to verify that it satisfied the conditions for making a purchase under this division. Nothing in this division restricts any action taken by a political subdivision as authorized by division (B)(1) of this section.
>
> (E) The authorization granted to a municipal corporation under this section shall be in addition to, and not in derogation of, the powers and authority granted by state law, the Ohio Constitution, and the provisions of a municipal charter, ordinance, or resolution. (Emphasis supplied.)

In 2019 Op. Att'y Gen. No. 2019-028, I concluded that R.C. 9.48 could not be used to acquire "construction" or "construction services" because "[n]either 'construction' nor 'construction services' appears in the list of items that may be the subject of a joint purchasing program under R.C. 9.48." 2019 Op. Att'y Gen. No. 2019-028, Slip Op. at 3; 2-196. The 2019 opinion reasoned that the absence of the terms, "construction" or "construction services," from R.C. 9.48 was an intended choice by the General Assembly. Because both terms were present in many other sections of the Revised Code, the necessary conclusion was that the General Assembly did not intend to authorize the acquisition of construction or construction services in R.C. 9.48. *Id.*, Slip Op. at 4; 2-196 to 2-197; *see also* 2003 Op. Att'y Gen. No. 2003-018, at 2-141, citing *Metropolitan*

Securities Co. v. Warren State Bank, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *see also* 2022 Op. Att'y Gen. No. 2022-004, Slip Op. at 7; 2-22; ("different language connotes different meaning").

R.C. 9.48 has not been amended since 2008. Thus, there has been no change to the law to alter the 2019 opinion's conclusion that "construction" and "construction services" are excluded from acquisition through joint purchasing programs authorized in R.C. 9.48. Without a statutory change or a development in the case law, I find no justification for a conclusion different than the one reached in 2019 Op. Att'y Gen. No. 2019-028.

II

The word "services" in R.C. 9.48 is statutorily undefined, and I found no caselaw interpreting its meaning in the context of R.C. 9.48. When a word does not have a specific definition within the Revised Code chapter or sections where it appears, the undefined term is given its common and ordinary meaning within the context in which it is used. R.C. 1.42. (Absent technical or a statutory definition, "words and phrases shall be read in context and construed according to the rules of grammar and common usage"); *Heidtman v. City of Shaker Hts.*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph one)("Where a statute is silent as to the meaning of a word contained therein and that word has both a wide and a restricted meaning, courts

in interpreting such a statute must give such word a meaning consistent with other provisions of the statute and the objective to be achieved thereby"). The word "service" has various definitions that depend on the context in which it is used.

Focusing on the context in which "services" appears in R.C. 9.48, I find that definitions of "service" consistently reference installation, maintenance, and repair. *See Webster's New International Dictionary* 2288 (2d Ed.1948) ("1. To perform services of maintenance, supply, repair, installation, distribution…"); *Webster's Third New International Dictionary* 2075 (1993) ("to perform services for: meet the needs of: SERVE: as **a**. to repair or provide maintenance for."); *American Heritage Dictionary* 1602 (5th Ed.2011) (Service means "1a. Work that is done for others as an occupation or business… c. An act or a variety of work done for others; especially for pay… 6a. The installation, maintenance, or repairs provided or guaranteed by a dealer or manufacturer"). These definitions of "service" plainly include installation, maintenance, and repair, as well as similar types of activities. As such, installation, maintenance, repairs, and the like reflect the common usage of the word "services." Accordingly, these uses are permissible under R.C. 9.48.

By contrast, in this context the word "construction" is commonly defined as "a. 'the process or art of constructing; act of building; erection; act of devising and forming; fabrication composition; also, a thing constructed;

a structure." *Webster's New International Dictionary* 572 (2d Ed.1948); *accord American Heritage Dictionary* 394 (5th Ed.2011) (Construction: "1a. The act or process of constructing; b. the art, trade, or work of building… 2a. A structure, such as a building, framework, or model…c. An artistic composition using various materials; an assemblage or a collage. 3. The way in which something is built or put together: *a shelter of simple construction*."); Black's Law Dictionary 391 (11th Ed.2019). ("The act of building by combining or arranging parts or elements; the thing so built"). And "construct" means: "That which is built, formed, or constructed." *Webster's New International Dictionary* 572 (2d Ed.1948); *accord American Heritage Dictionary* 394 (5th Ed.2011) (construct "1. To form by assembling or combining parts; build"). The definitions of "construction" do not reference installation, maintenance, and repair— all of which are found within the definitions of "service."

Nothing in R.C. 9.48 indicates that "services" is restricted to "construction." As a result, the conclusion reached in 2019 Op. Att'y Gen. No. 2019-028 does not prevent "services," as the term appears in R.C. 9.48, from encompassing the installation, maintenance, repair, and the like of items acquired under R.C. 9.48. Instead, the 2019 opinion further supports the view that there is a distinction between the term "services" and "construction." But an alternate reading that expands "services" to include "construction," would unjustifiably expand the meaning of the term "services" as it appears in R.C. 9.48. *See State ex rel. Foster v Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944) (syllabus, paragraph 8), *cert denied*, 324 U.S. 878 (1945) ("[t]here

is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statue to meet a situation not provided for"); *see also* R.C. 1.47 (C) ("[a] just and reasonable result is intended").

For the reasons stated, I find that the term "services" as it appears in R.C. 9.48 may include the installation, maintenance, repair, and like items purchased under R.C. 9.48. But, as concluded in 2019 Op. Att'y Gen. No. 2019-028, the term "services" does not cover "construction" or "construction services."

II

My answer to your first question necessarily also answers your second question. Specifically, as long as the services acquired under R.C. 9.48 falls within the common, ordinary meaning of "service" and does not entail "construction," then it is likely permitted. The point at which a "service" crosses into "construction" will ordinarily be a factual question involving the extent and type of labor involved and to what it is applied.

Whether a particular project is a permitted "service" or an unpermitted "construction service," or whether every installation, repair or upgrade is a "service" and not a "construction service" is a question of fact that must be made on a case-by-case basis. Such determinations are beyond my opinion rendering function. *E.g.*, 2014 Op. Att'y Gen. No. 2014-007, Slip Op. at 15; 2-66; *see also,* 1993 Op. Att'y Gen. No. 93-034, at 2-172, citing *State v. Huffman,* 20 Ohio App.2d 263, 269-270, 253 N.E.2d 812, 817 (Hancock County 1969)

(evaluating "total situation as a matter of degree" is required to determine how to categorize the nature of something).

It is important to note that although R.C. 9.48 applies to matters of competitive selection, it does not affect other statutory requirements, such as the applicability of prevailing wage when required under R.C. 4115.02.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

> The term "services" as used in R.C. 9.48 does not include "construction" or "construction services." 2019 Att'y Gen. No. 2019-028, followed. However, the term "services" may cover the installation, maintenance, repair, and the like of items acquired under R.C. 9.48 provided such services to not constitute nor cross into construction or construction services. Whether any particular service to be acquired under R.C. 9.48, including any repair, maintenance, replacement, installation, or upgrade constitutes "construction" or "construction services" is a question of fact beyond the opinion-rendering function of the Attorney General.

Respectfully,

DAVE YOST
Ohio Attorney General