

**OPINION NO. 87-079**

**Syllabus:**

1. A joint township district hospital board is required to comply with the provisions of R.C. 153.12-.14 when awarding a contract for the construction of an addition to an existing joint township district hospital.
2. A joint township district hospital board is not required to comply with the provisions of R.C. 153.50-.571 when awarding a contract for the

construction of an addition to an existing joint township district hospital.

**To: Charles L. Bartholomew, Wyandot County Prosecuting Attorney, Upper Sandusky, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, October 15, 1987**

You have requested my opinion regarding the application of certain competitive bidding requirements to construction undertaken in connection with a joint township district hospital. Specifically, you wish to know whether the various competitive bidding requirements that appear in R.C. Chapter 153 (public improvements) apply to the construction of an addition to an existing joint township district hospital that is performed by a design-build firm.<sup>1</sup>

Before addressing your specific question, I find it helpful to consider briefly the general statutory plan set forth in R.C. Chapter 513 that governs the establishment of a joint township hospital district, and the construction of a joint township district hospital. See generally 1986 Op. Att'y Gen. No. 86-088; 1986 Op. Att'y Gen. No. 86-043. R.C. Chapter 513 provides, in pertinent part, that the boards of township trustees of any two or more contiguous townships may "form themselves into a joint township district hospital board for the purpose of establishing, constructing, and maintaining a joint township district general hospital or other hospital facilities as defined in [R.C. 140.01],<sup>2</sup> and such townships shall be a part of a joint township hospital district." R.C. 513.07 (footnote added). R.C. 513.16 provides that the joint township district hospital board shall, after its organization, appoint a board of hospital governors, which is empowered to "control the operation of such hospital and perform such other duties as are provided by [R.C. 513.17]." R.C. 513.17 in turn describes the powers conferred upon the board of hospital governors, and states, in pertinent part, that the board of hospital governors "shall, with the consent and approval of the joint township district hospital board...prepare plans and specifications, and may employ technical assistance if necessary, and proceed to erect, furnish, and equip necessary buildings for a joint township general hospital." See

<sup>1</sup> The term "design-build" is commonly understood as referring to an enterprise that, in addition to undertaking the construction of particular buildings or structures, renders architectural and planning services in conjunction therewith.

<sup>2</sup> R.C. Chapter 140 authorizes various statutorily defined hospital agencies and certain governmental entities to cooperate in utilizing various hospital facilities and the medical services they provide for the purpose, as expressed in R.C. 140.02, of enhancing the "availability, efficiency, and economy" of those facilities and services. See generally 1986 Op. Att'y Gen. No. 86-043. R.C. 140.01(E) states that "[h]ospital facilities," as used in R.C. Chapter 140, includes "buildings, structures and other improvements, additions thereto and extensions thereof,...used or to be used for or in connection with one or more hospitals, emergency, intensive, intermediate, extended, long-term, or self-care facilities."

generally 1980 Op. Att'y Gen. No. 80-068 (a board of hospital governors may establish, pursuant to R.C. 513.17, satellite facilities or outpatient clinics in townships that are not part of the joint township hospital district if such facilities or clinics are necessary to provide hospital services to inhabitants of the joint township hospital district); 1957 Op. Att'y Gen. No. 1003, p. 423 (the power vested in a board of hospital governors by R.C. 513.17 to erect, furnish, and equip a joint township district hospital includes, by implication, the power to make capital improvements to a joint township district hospital). Thus, under R.C. 513.16 and R.C. 513.17, a board of hospital governors may, with the consent of the joint township district hospital board, construct an addition to the joint township district hospital if such addition is necessary to, or to be used in connection with, the operation of the hospital. See R.C. 140.01(E); Op. No. 86-088 at 2-500 (a board of hospital governors may construct a building adjacent to the joint township district hospital if necessary to, or to be used in connection with, the operation of the hospital).

I now direct my attention to your specific question. You wish to know whether the pertinent competitive bidding provisions of R.C. Chapter 153 apply to a contract with a design-build firm for the construction of an addition to a joint township district hospital. R.C. Chapter 153 sets forth a comprehensive scheme of various procedural requirements that govern the award of contracts for the construction, reconstruction, alteration, and repair of state buildings, county buildings, and various other public improvements. See generally State ex rel. Schaefer v. Board of County Commissioners, 11 Ohio App. 2d 132, 138, 229 N.E.2d 88, 92 (Montgomery County 1967)("[t]he first 20 sections of [R.C. Chapter 153] pertain to 'state buildings,' the next 29 sections pertain to 'county buildings and bridges,' and the last 10 sections pertain to 'contracts for constructions'").<sup>3</sup> In certain circumstances, the bidding of such contracts on a competitive basis, followed by the award thereof to the lowest and best bidder, is included among those requirements. See, e.g., R.C. 153.08; R.C. 153.26; R.C. 153.52. As a general matter, the imposition of competitive bidding requirements such as those appearing in R.C. Chapter 153 is intended to further the salutary purpose of assuring the best and most efficient expenditure of public moneys by public officials who are responsible for undertaking public construction, and preventing fraud and collusion with respect thereto. See, e.g., Rogers Contracting Corporation v. Board of Commissioners, 60 Ohio App. 2d 195, 198, 396 N.E.2d 1059, 1061-62 (Stark County

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<sup>3</sup> Since the decision in State ex rel. Schaefer v. Board of County Commissioners, 11 Ohio App. 2d 132, 229 N.E.2d 88 (Montgomery County 1967) was rendered, R.C. Chapter 153 has undergone legislative amendment several times, as a result of which several sections have been repealed and approximately ten new sections have been enacted. See, e.g., Sub. H.B. 201, 116th Gen. A. (1985)(eff. July 1, 1985); 1983-1984 Ohio Laws, Part II, 2821 (Am. H.B. 271, eff. Oct. 10, 1983); 1981-1982 Ohio Laws, Part II, 3118 (Am. Sub. H.B. 538, eff. July 26, 1982); 1979-1980 Ohio Laws, Part I, 414 (Am. S.B. 157, eff. Aug. 1, 1980); 1977-1978 Ohio Laws, Part II, 3100 (Am. Sub. H.B. 618, eff. Oct. 28, 1977); 1975-1976 Ohio Laws, Part I, 749 (Am. Sub. S.B. 330, eff. Aug. 27, 1976).

1978)("[t]he overriding purpose of the legislature in compelling mandatory competitive bidding by public bodies for major construction projects...is to protect the taxpayer and the users of the system against excessive costs and corrupt practices"); United States Constructors and Consultants, Inc. v. Cuyahoga Metropolitan Housing Authority, 35 Ohio App. 2d 159, 163, 300 N.E.2d 452, 454 (Cuyahoga County 1973)(competitive bidding "fosters honest competition in order to obtain the best work and supplies at the lowest possible price because taxpayers' money is being used. It is also necessary to guard against favoritism, imprudence, extravagance, fraud and corruption").

Several provisions in R.C. Chapter 153 address the award of construction and public improvement contracts by, inter alia, certain township authorities. See R.C. 153.12-.14; R.C. 153.50-.571. I commence my analysis with those provisions appearing at R.C. 153.12-.14. R.C. 153.12 addresses certain details of the bidding and contracting process, including the time within which such contracts shall be awarded and executed, the opening of submitted bids, and the amounts and time of payments under contracts covered thereby. As pertains to contracts made by township authorities, R.C. 153.12(A) provides, in part, as follows:

With respect to award of any contract for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement made by the state, or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in the state or a political subdivision or that is authorized by state law, the award, and execution of the contract, shall be made within sixty days after the date on which the bids are opened.

....  
The amounts and time of payments of any public improvements contract made by the state or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in the state or a political subdivision or that is authorized by state law, except as provided in section 5525.19 of the Revised Code, shall be governed by this section and sections 153.13 and 153.14 of the Revised Code. (Emphasis added.)

R.C. 153.13 further provides that the relevant governmental contracting authority named in R.C. 153.12 shall approve full detailed estimates of labor and materials for a contract governed by R.C. 153.12, and describes the manner in which payments shall be made for all labor and materials furnished under the contract as the work progresses. R.C. 153.14 also provides for progress payments for the cost of building materials that are delivered to the job site pursuant to the terms of a contract governed by R.C. 153.12. See generally 1980 Op. Att'y Gen. No. 80-051 (syllabus)(the provisions of R.C. 153.12 are applicable to the award and payment of any contract for a public improvement project entered into by any county, township, municipal corporation or other subdivision of

the state, excepting boards of education, whether or not state funds are provided for such project).<sup>4</sup>

R.C. 153.50-.571 also address procedures that govern the awarding of contracts by township authorities for the erection, repair, alteration, or rebuilding of public buildings and other public improvements generally. R.C. 153.50, which imposes separate bid requirements for labor and materials furnished for such undertakings, states as follows:

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement. (Emphasis added.)

R.C. 153.51 requires that when more than one kind of trade or mechanical labor will be required to perform the construction of the contemplated building or improvement, a separate contract must be awarded for each type of trade or labor involved, "unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate."

R.C. 153.52 states that a contract within the purview of R.C. 153.50 shall, in turn, be awarded by the respective contracting authority "to the lowest and best separate bidder therefor," and shall be made "in the manner and upon the terms, conditions, and limitations as to giving bond or bid guarantees as prescribed by law." R.C. 153.54 requires every person bidding on such a contract to file with his bid a bid guaranty, and describes the form in which such bid guaranty shall be submitted. See also R.C. 153.56 (specifying when a creditor may commence an action on a bond against a surety for money due and owing); R.C. 153.57; R.C. 153.571 (describing respectively the form of the bond that is provided for in R.C. 153.54(C) and R.C. 153.54(B)).<sup>5</sup>

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<sup>4</sup> The exception for boards of education that formerly appeared in R.C. 153.12 was repealed by the General Assembly in 1981-1982 Ohio Laws, Part II, 2949 (Am. Sub. H.B. 497, eff. Feb. 11, 1982).

<sup>5</sup> R.C. 153.12-.14 and R.C. 153.50-.571 have been described as laws of general application, the terms of which encompass a broad spectrum of construction projects and public improvements initiated by the state and other local public authorities. See, e.g., Columbus Building & Construction Trades Council v. Moyer, 163 Ohio St. 189, 199, 126 N.E.2d 429, 434 (1955)("[t]he court has taken into consideration [R.C. 153.06, R.C. 153.08, and R.C.

Clearly, the provisions of R.C. 153.12-.14 apply to a contract for the construction of an addition to a joint township district hospital. R.C. 153.12 states, in part, that the various procedures set forth therein, and in R.C. 153.13 and R.C. 153.14, shall apply to the award of any contract for the "construction, reconstruction, improvement, enlargement, alteration,...of a public improvement made by...any township...or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of...a political subdivision." Certainly, for purposes of R.C. 153.12, the construction of an addition to a joint township district hospital constitutes a "public improvement," see, e.g., R.C. 4115.03(C)(defining "[p]ublic improvement," for purposes of the prevailing wage rate law, as including all buildings and all other structures or works constructed by a public authority of the state or any political subdivision thereof, or by any person therefor); Black's Law Dictionary 682 (5th ed. 1979)(defining "[i]mprovement," in part, as a "valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes"), and a joint township district hospital board is a "public board" of a political subdivision, see, e.g., 1960 Op. Att'y Gen. No. 1234, p. 205, at 207 ("[t]ownship trustees when acting as a joint township district hospital board are not, of course, dealing specifically with affairs of their respective townships, but are representing a separate district which has been termed a separate subdivision"); 1946 Op. Att'y Gen. No. 1161, p. 619 (syllabus, paragraph one)(a joint township hospital district established under G.C. 3414-1 (now R.C. 513.07) is a subdivision separate and distinct from the other subdivisions whose territory may be included within its boundary). Thus, a contract for the construction of an addition to a joint township district hospital comes within the scope of R.C. 153.12-.14, and a joint township district hospital board must comply therewith in awarding such a contract.

In contrast, however, it is also clear that the provisions of R.C. 153.50-.571 do not apply to such a contract. By its express terms, R.C. 153.50 requires the submission of separate and distinct bid proposals for all labor and materials furnished under a contract for the erection, alteration, or

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153.50-.52], and finds them to be general statutory provisions which cover other subjects as well as the specific subject matter with which we are concerned"); State ex rel. Fleisher Engineering & Construction Co. v. State Office Building Commission, 123 Ohio St. 70, 74, 174 N.E. 8, 9 (1930)(G.C. 2365-1 and G.C. 2365-2, the statutory predecessors of R.C. 153.54 and R.C. 153.55 (since repealed), "have general application to public buildings, regardless of the amount involved, and relate not only to state, but also to county, city, village, township, and school buildings"); Weibel v. Poda, 116 Ohio App. 38, 40, 186 N.E.2d 504, 506 (Summit County 1962)(R.C. 153.50 "is a mandatory statute of general application"); 1980 Op. Att'y Gen. No. 80-051 at 2-208 (R.C. 153.12 is "a law of general application, governing all contracts entered into by the state or a subdivision of the state for the construction or repair of any public improvement").

repair of a public building or public improvement that is authorized by, inter alia, an "officer, board, or other authority of...a...township,...or of any public institution belonging thereto." In turn, R.C. 153.52 provides that the contracting authorities referred to in R.C. 153.50 shall, in their discretion, award such a contract "to the lowest and best separate bidder therefor." The responsibility for establishing a joint township district hospital, including contracting for the construction of such hospital and all facilities incidental thereto, rests ultimately with the joint township district hospital board. See R.C. 513.07 (a joint township district hospital board may be formed "for the purpose of establishing, constructing, and maintaining a joint township district general hospital or other hospital facilities"); R.C. 513.17 (the board of hospital governors of a joint township district hospital "shall, with the consent and approval of the joint township district hospital board...erect, furnish, and equip necessary buildings for a joint township general hospital"). A joint township hospital district is comprised of two or more contiguous townships, and is formed for the purpose of providing needed hospital services to all the residents thereof. Id.; Op. No. 80-068 at 2-269.

A joint township hospital district, however, is a political subdivision separate and distinct from the individual townships included within such district. 1960 Op. No. 1234; 1946 Op. No. 1161. R.C. 513.07 establishes the joint township district hospital board as the governing authority of the joint township hospital district. In turn, R.C. 513.15 clearly states that, "ownership of a joint township district hospital, including all right, title, and interest in and to all property, both real and personal, pertaining thereto, shall vest in the joint township district hospital board." Thus, while a joint township district hospital may properly be considered a public institution that serves the medical needs of the residents of the townships included in the district, see, e.g., Black's Law Dictionary at 719 (defining "[p]ublic institution" as something "which is created and exists by law or public authority, for benefit of public in general; e.g., a public hospital, charity, college, university, etc."); Stegall v. Joint Township District Memorial Hospital, 20 Ohio App. 3d 100, 102, 484 N.E.2d 1381, 1383 (Auglaize County 1985) (a joint township district hospital is a "public facility"), the hospital itself, and all real and personal property pertaining thereto, belong, as a matter of law, to the joint township district hospital board. Insofar as a joint township district hospital does not belong to the townships that comprise the joint township hospital district, a contract for the construction of an addition to such hospital does not fall within the purview of R.C. 153.50 and R.C. 153.52. Accordingly, a joint township district hospital board is not required to comply with the terms of R.C. 153.50-.571 when awarding such contract.

Thus, although a joint township district hospital board must comply with the procedural requirements set forth in R.C. 153.12-.14 when contracting for the construction of an addition to a joint township district hospital, the board is not required to award such a contract to the lowest and best bidder (although the contract price cannot exceed the estimate by more than ten per cent). I am aware that, as a practical matter, this conclusion presents a certain anomaly. In this regard, R.C. 153.12 appears to assume that contracts subject to the terms of R.C. 153.12-.14 shall be awarded to the lowest and best bidder, as stated; for example, in R.C. 153.52, since R.C.

153.12 contemplates many of the other procedures of competitive bidding such as estimates of costs, advertisements to solicit bids, and bid openings. In this instance, however, a contract otherwise subject to the terms of R.C. 153.12-.14 need not be awarded to the lowest and best bidder because such contract is not specifically included within the terms of R.C. 153.50 and 153.52. Although I may disagree with this result as a matter of public policy, I find that the clear and unambiguous language of R.C. 153.50 and R.C. 153.52 is not amenable to an opposite interpretation. However, given the strong public policy reasons that favor competitive bidding in those instances in which public moneys are expended, the joint township district hospital board, having complied fully with R.C. 153.12-.14, should give serious consideration to awarding the contract in question to the lowest and best bidder, notwithstanding the absence of a statutory requirement to that effect.

Based upon the foregoing it is my opinion, and you are advised that:

1. A joint township district hospital board is required to comply with the provisions of R.C. 153.12-.14 when awarding a contract for the construction of an addition to an existing joint township district hospital.
2. A joint township district hospital board is not required to comply with the provisions of R.C. 153.50-.571 when awarding a contract for the construction of an addition to an existing joint township district hospital.