

OPINION NO. 91-048**Syllabus:**

1. Where the board of county commissioners has employed a consultant in accordance with R.C. 307.86(F) to assist the board in selecting the insurance coverage to be procured for county personnel under R.C. 305.171, the board may, in the exercise of a reasonable discretion, reject the consultant's recommendation as to the best and lowest bidder.
2. Where the board of county commissioners has established a self-insurance program providing health care benefits for county personnel up to a fixed amount, it may not contract with a third party to procure, on behalf of the county, insurance coverage beyond that provided under the self-insurance plan for county personnel.

To: James A. Philomena, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Lee Fisher, Attorney General, November 13, 1991

I have before me your opinion request concerning the county's procurement of health insurance for its employees. You specifically ask:

1. When the county has employed a professional consultant, under Ohio Revised Code Section 307.86(F), to evaluate proposals for insurance, do the county commissioners have the ability to reject the consultant's determination as to the lowest and best proposal and select alternative coverage without violating the competitive bidding requirements of Ohio Revised Code Section 307.86?
2. Secondly, may the county commissioners employ a third party payer to procure insurance coverages for excess coverages in a self-funded plan without complying with the formal competitive bidding requirements of Ohio Revised Code Section 307.86?

The authority of the board of county commissioners to procure insurance coverage for county personnel derives from R.C. 305.171, which reads in part as follows:

(A) The board of county commissioners of any county may contract, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide benefits...for county officers and employees and their immediate dependents from the funds or budgets from which the officers or employees are compensated for services, issued by an insurance company, a medical care corporation organized under Chapter 1737. of the Revised Code, or a dental care corporation organized under Chapter 1740. of the Revised Code.

(B) The board also may negotiate and contract for any plan or plans of group insurance or health care services with health care corporations organized under Chapter 1738. of the Revised Code and health maintenance organizations organized under Chapter 1742. of the Revised Code....

....
(E) The board of county commissioners may provide the benefits described in this section through an individual self-insurance program or a joint self-insurance program as provided in section 9.833 of the Revised Code.

Pursuant to R.C. 307.86, anything to be purchased by or on behalf of the county or contracting authority¹ at a cost in excess of ten thousand dollars must,

¹ R.C. 307.92 defines the term "contracting authority," as used in R.C. 307.86-91, as meaning "any board, department, commission, authority,

with certain exceptions, be obtained through competitive bidding. See generally *Sentinel Security Systems v. Medkeff*, 36 Ohio App. 3d 86, 521 N.E.2d 7 (Summit County 1987) (applicability of R.C. 307.86 to all county contracting authorities). Specifically concerning the purchase of insurance, however, R.C. 307.86 states:

[C]ompetitive bidding is not required when:

....
 (F) The purchase consists of any form of an insurance policy or contract authorized to be issued under Title XXXIX of the Revised Code or any form of health care contract or plan authorized to be issued under Chapter 1736., 1737., 1740., or 1742. of the Revised Code, or any combination of such policies, contracts, or plans that the contracting authority is authorized to purchase, *and the contracting authority does all of the following:*

- (1) Determines that compliance with the requirements of this section would increase, rather than decrease, the cost of such purchase;
- (2) Employs a competent consultant to assist the contracting authority in procuring appropriate coverages at the best and lowest prices;
- (3) Requests issuers of such policies, contracts, or plans to submit proposals to the contracting authority, in a form prescribed by the contracting authority, setting forth the coverage and cost of such policies, contracts, or plans as the contracting authority desires to purchase;
- (4) Negotiates with such issuers for the purpose of purchasing such policies, contracts, or plans at the best and lowest price reasonably possible. (Emphasis added.)

Thus, where the board of county commissioners intends to purchase insurance in accordance with R.C. 305.171, the board need not make such purchase through competitive bidding, so long as it follows each of the requirements set forth in R.C. 307.86(F)(1)-(4).

Rejection of Consultant's Recommendation

Particularly relevant to your inquiry is R.C. 307.86(F)(2) which requires the board to employ "a competent consultant to assist the contracting authority in procuring appropriate coverages at the best and lowest prices." Concerning the functions of a consultant, my predecessor stated in 1984 Op. Att'y Gen. No. 84-030 at 2-88: "A consultant may be called upon to render his expert advice or opinion on a certain responsibility or task, but, in the process of consulting, he does not actually perform the duty or task himself." The task with which you are concerned is the determination of the best and lowest bidder for the insurance plan to be obtained under R.C. 305.171. The selection of the best and lowest bidder calls for the board to exercise a certain discretion. *State ex rel. Executone of Northwest Ohio, Inc. v. Comm'rs of Lucas County*, 12 Ohio St. 3d 60, 465 N.E.2d 416 (1984). Since the duty about which you ask involves the board's exercise of discretion, such duty may be delegated to another entity only if there exists express statutory authority to so delegate. See 1979 Op. Att'y Gen. No. 79-067 at 2-223 (discussing the power of governmental entities to delegate their statutory duties). R.C. 305.171, quoted in pertinent part above, contains no language authorizing the board of county commissioners to delegate to another entity the power conferred upon it under that section to contract, purchase, or otherwise procure insurance benefits for county personnel. Thus, the duty to determine the lowest and best bidder for the insurance coverage to be obtained for the county remains with the board of county commissioners. Pursuant to R.C. 307.86(F)(2), the consultant's function is merely to "assist" the board in making this decision.²

trustee, official, administrator, agent, or individual which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office, or board thereof." Thus, the board of county commissioners clearly qualifies as a contracting authority, subject to R.C. 307.86.

² I caution, however, that the board's exercise of discretion in selecting the lowest and best bidder remains subject to judicial review for abuse of

Accordingly, the board of county commissioners may, in the exercise of a reasonable discretion, reject the consultant's recommendation as to the best and lowest bidder for a contract of insurance to be purchased pursuant to R.C. 305.171.

Procurement of Insurance by Third Party Payer

Your second question asks whether a third party payer employed by the county to administer the county's self-funded insurance plan may, on behalf of the county, procure insurance for coverage in excess of that provided under the self-funded plan, without going through the competitive bidding procedures established by R.C. 307.86. The problem with this proposal again lies in the fact that only the board of county commissioners may "contract, purchase, or otherwise procure and pay all or any part of the cost" of the types of insurance policies listed in R.C. 305.171 for county personnel. R.C. 305.171 neither expressly nor impliedly authorizes the board of county commissioners to employ another entity to act in their stead in carrying out the provisions of that section.

As discussed in 1984 Op. Att'y Gen. No. 84-066 at 2-214: "[A] board of county commissioners has the express authority to provide insurance, from which may be implied the power to provide administrative services in connection with the insurance coverage provided." This conclusion was based on the following language set forth in Op. No. 84-030 at 2-87, concerning the authority of a board of education to contract for similar services, stating: "The processing of claims and the provision of other administrative services are essential to the actual provision of insurance coverage. An insurance program could not be operated without the accompaniment of such services." In this regard, however, I note that the implied authority to contract for the provision of administrative services in conjunction with a county insurance program provided under R.C. 305.171 does not include the implied authority to contract for a third party to actually procure insurance coverage for the county. As discussed above, the selection of insurance coverage involves a certain amount of discretion, which has been expressly vested by statute in the board of county commissioners. In the absence of express statutory authority, the board of county commissioners may not delegate to another entity the authority to make such selection.

Since the proposal outlined in your second question involves an insurance plan which is, in part, self-funded, it is also necessary to examine R.C. 9.833 which authorizes political subdivisions, including counties, to establish self-insurance programs or joint programs with other subdivisions to provide health care benefits for their officers and employees. R.C. 9.833 states in part:

(C) Except as otherwise provided in division (D) of this section, the following apply to individual or joint self-insurance programs established pursuant to this section:

(1) Such funds shall be reserved as are necessary, in the exercise of sound and prudent actuarial judgment, to cover potential cost of health care benefits for the officers and employees of the political subdivision....

....

(3) A contract may be awarded, without the necessity of competitive bidding, to any person, political subdivision, nonprofit corporation organized under [R.C. Chapter 1702], or regional council of governments created under [R.C. Chapter 167] for purposes of administration of an individual or joint self-insurance program.

In the situation you describe, the county contemplates creating a health care insurance plan to be self-funded up to a fixed amount. Under the proposal, the county would contract with a "third party payer" to administer the plan. Pursuant to

such discretion. See generally *State ex rel. Executone of Northwest Ohio, Inc.*, 12 Ohio St. 3d 60, 61, 465 N.E.2d 416, 417 (1984) ("[r]egarding the term 'abuse of discretion' by a public authority in the letting of a contract subsequent to the taking of bids, this court has recognized that such an abuse includes the utilization of unannounced criteria in selecting a bidder, as well as fraudulent conduct or bad faith" (citations omitted)).

R.C. 9.833(C)(3), the county may, without competitive bidding, award a contract for the administration of the self-insurance plan to a person or to any entity specified in R.C. 9.833(C)(3). See generally 1991 Op. Att'y Gen. No. 91-044 (syllabus) ("[t]he board of county commissioners may contract with an entity other than those enumerated in R.C. 9.833(C)(3) for the administration of a self-insured health care benefit plan for county personnel, so long as it complies with the competitive bidding requirements of R.C. 307.86"). Although the county has authority to contract for the administration of its self-insurance plan, the procurement of insurance coverage beyond the limits of the self-insurance plan is outside the scope of "administration of" the self-insurance plan. The county's awarding of contracts for anything other than the administration of self-insurance programs is not addressed in R.C. 9.833. Thus, as is true of R.C. 305.171, R.C. 9.833 does not authorize the board of county commissioners to delegate to a third party hired by the county to administer the county's self-insurance program the authority to procure health care coverage beyond the limits of the county's self-funded insurance plan for county personnel.

Having concluded that the board of county commissioners may not delegate to another entity its authority to procure the insurance coverages authorized to be obtained for county personnel under R.C. 305.171, I need not address that portion of your question concerning the competitive bidding requirements of R.C. 307.86.

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

1. Where the board of county commissioners has employed a consultant in accordance with R.C. 307.86(F) to assist the board in selecting the insurance coverage to be procured for county personnel under R.C. 305.171, the board may, in the exercise of a reasonable discretion, reject the consultant's recommendation as to the best and lowest bidder.
2. Where the board of county commissioners has established a self-insurance program providing health care benefits for county personnel up to a fixed amount, it may not contract with a third party to procure, on behalf of the county, insurance coverage beyond that provided under the self-insurance plan for county personnel.