

**OPINION NO. 89-064****Syllabus:**

Where the board of county commissioners, as lessee, has entered into a lease agreement through competitive bidding, pursuant to R.C. 307.86-.92, it may not subsequently agree to an increased lease term of five years in exchange for renovations to the leasehold premises as part of the original lease agreement where such additional five-year term was not included in the notice and specifications on which the bids were based.

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**To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, August 4, 1989**

I have before me your opinion request concerning the leasing of space to house the Trumbull County Department of Human Services. Your specific questions read as follows:

1. Where the board of county commissioners advertises for bids for space for a department of human services and additional renovations are done at [lessor's] expense, is the board of county commissioners authorized to grant an additional five-year option period without bidding due to the extra expense involved and upon approval of the local and state human services agencies?
2. If the additional five-year option is permitted, may the board of county commissioners exercise that option early to allow the lessor to secure proper financing for the improvements?

With respect to these questions, your opinion request provides the following background information:

The Board of Trumbull County Commissioners advertised for bids to lease space to house the Trumbull County Department of Human Services. The bid specification provided for an initial term of five years with an option to extend the lease for an additional term of five years. Although Trumbull County is the contracting authority for the leases, financial reimbursement for lease costs are made by the State of Ohio. Likewise, all leases are subject to state guidelines and state agency approval.

Further, you state that after the board entered into the lease, additional state funds became available for a program which would require additional space and remodeling of the leased premises. As part of the consideration for the leasehold improvements made by the lessor, the board exercised the five-year extension option early. Due to

financial considerations, however, the lessor is unable to make the renovations unless the board agrees to an additional five-year extension of its lease, such additional five-year option not having been contained in the specifications under which bids were originally solicited.

I begin by noting as a general matter that, the board of county commissioners is a creature of statute with those powers and duties assigned to it by the General Assembly. *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). R.C. 307.02 specifically authorizes the board of county commissioners to lease county offices. It is pursuant to this statute that the board of county commissioners is empowered to lease office space for the county department of human services. 1966 Op. Att'y Gen. No. 66-117 (syllabus, paragraph one) ("[R.C. 307.02] authorizes a board of county commissioners to enter into a contract providing for the construction and lease of a building and related parking facilities for the county welfare department [now county department of human services] by other than a lease-purchase agreement. This section specifically authorizes the board to 'lease' or 'lease with option to purchase' such a building").

As held in *Yoder v. County of Williams*, 48 Ohio App. 2d 36, 354 N.E.2d 923 (Williams County 1976), the leasing of premises for housing the county department of human services must be accomplished in accordance with the competitive bidding requirements of R.C. 307.86, which states in part:

*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 [R.C. 307.92],<sup>1</sup> at a cost in excess of ten thousand dollars, except as otherwise provided in [R.C. 713.23(D), R.C. 125.04, R.C. 307.022, R.C. 307.861, R.C. 339.05, R.C. 340.03, R.C. 4115.31-.35, R.C. 5119.16, R.C. 5513.01, R.C. 5543.19, R.C. 5713.01, and R.C. 6137.05] shall be obtained through competitive bidding. (Emphasis and footnote added.)*

Where competitive bidding is required by R.C. 307.86, R.C. 307.87 specifies the manner in which notice shall be given as follows:

(A) Notice shall be published once a week for not less than two consecutive weeks preceding the day of the opening of bids in a newspaper of general circulation within the county for any purchase, lease, lease with option or agreement to purchase, or construction contract in excess of ten thousand dollars. The contracting authority may also cause notice to be inserted in trade papers or other publications designated by it.

*Notices shall state:*

- (1) *A general description of the subject of the proposed contract and the time and place where the plans and specifications or itemized list of supplies, facilities, or equipment and estimated quantities can be obtained or examined;*
- (2) The time and place where bids will be opened;
- (3) The time and place for filing bids;
- (4) The terms of the proposed purchase;
- (5) Conditions under which bids will be received;

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<sup>1</sup> R.C. 307.92 states:

As used in [R.C. 307.86-.91], "contracting authority" means any board, department, commission, authority, 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.

(6) The existence of a system of preference, if any, for products mined and produced in Ohio and the United States adopted pursuant to [R.C. 307.90].

(B) The contracting authority shall also maintain in a public place in its office or other suitable public place a bulletin board upon which it shall post and maintain a copy of such notice for at least two weeks preceding the day of the opening of the bids. (Emphasis added.)

Thus, the notice required by R.C. 307.87 must include "[a] general description of the subject of the proposed contract" and must state the time and place where the plans and specifications or itemized lists of the supplies, facilities, or equipment and an estimate of the quantities needed may be obtained or examined.

As stated in your opinion request, "[t]he bid specification provided for an initial term of five years with an option to extend the lease for an additional term of five years." There was apparently no mention in the bid specification of a second five-year option to extend the lease. It appears that general principles of competitive bidding may preclude the actions you propose.

R.C. 307.87(A) does not describe the necessary detail to be included in the notice to potential bidders or in the plans and specifications or lists available to such bidders. It is, therefore, within the discretion of the contracting authority or, in the situation about which you ask, the county commissioners, to provide sufficient detail so that all bidders will have an equal opportunity to bid. It is fundamental to the concept of competitive bidding that any contract awarded be for the matter set forth in the notice and specifications given to the bidders. *Boren & Guckes v. Commissioners of Darke County*, 21 Ohio St. 311 (1871); *Beaver & Butt v. Trustees of the Institution for the Blind*, 19 Ohio St. 97 (1869); *Boger Contracting Corp. v. Bd. of Commissioners*, 60 Ohio App. 2d 195, 200, 396 N.E.2d 1059, 1062 (Stark County 1978) ("[w]here mandatory competitive bidding is required, it is axiomatic that every prospective bidder should have identical information upon which to submit a proposal"). As stated in *Checie v. Cleveland*, 31 Ohio L. Abs. 1, 13 (Ct. App. Cuyahoga County 1939):

"Any contract entered into with the best bidder containing substantial provisions beneficial to him which were not included in the specifications is void for it is not the contract offered to the lowest bidder by the advertisement."

....  
 "This rule should be strictly enforced by the courts, for if the lowest bidder may, by an arrangement with the municipal authorities, have incorporated into his form of contract new provisions beneficial to him or have onerous ones excluded therefrom which were in the specifications upon which the bids were invited, it would emasculate the whole system of competitive bidding." (Citations omitted.)

Your opinion request states that the lessor in your situation seeks to have the county commissioners agree to a second five-year option to extend the lease agreement and also to exercise such option at the present time. Since, however, the second five-year extension option was not included in the notice and specifications given to bidders prior to awarding the contract, it is beyond the power of the board of county commissioners now to agree to the inclusion and exercise of such option.

The question arises as to whether the inclusion and exercise of a second five-year renewal option by the county commissioners as lessee, in exchange for renovations to the leasehold premises by the lessor, may be considered to be merely a part of the original contract. As stated in 1973 Op. Att'y Gen. No. 73-076 at 2-285: "statutes requiring competitive bidding apply only to original contracts and do not apply to modifications to such contracts as long as the modifications are within the scope of the original contract." Thus, it is necessary to consider whether the changes in the requirements of the lessee and lessor in the situation you describe amount to only a modification of the contract and, thus, fall within the scope of the original contract. In the case of *Ampt v. City of Cincinnati*, 6 Ohio N.P. 208, 214 (C.P. Hamilton County 1899), the court discussed the nature of a modification to a contract as follows:

A modification is a change or an alteration which introduces new elements into the details or cancels some of them, but leaves the general purpose and effect of the subject matter intact. It is such change in a contract as leaves the original thing in operation, so far as its general purpose and effect are concerned. *It must not make any substantially new engagement from the old one.* Therefore, so long as the modifications are made as provided by law, and the changes thus entered into do not substantially affect the general purpose and operation of the old contract, then such modification could be made and would be lawful. (Emphasis added.)

In the situation you describe, the lessor will make renovations to the premises which the county is currently leasing in exchange for the county's agreement to an additional five-year term. Based upon the *Ampt* court's description of a modification in a contract, it appears that, in the circumstances you describe, the matters originally bargained for by the lessor and lessee differ so substantially from the terms of the agreement which the parties now propose, that the contemplated changes would not effect merely a modification of the original lease. Rather, the agreement to, and exercise of, a second five-year extension option by the board of county commissioners in exchange for certain improvements to the leasehold premises would appear to constitute a separate agreement subject to the competitive bidding requirements of R.C. 307.86-92.

In light of my answer to your first question, it is unnecessary to address your second question.

Based on the foregoing, it is my opinion, and you are advised that, where the board of county commissioners, as lessee, has entered into a lease agreement through competitive bidding, pursuant to R.C. 307.86-92, it may not subsequently agree to an increased lease term of five years in exchange for renovations to the leasehold premises as part of the original lease agreement where such additional five-year term was not included in the notice and specifications on which the bids were based.