

OPINION NO. 80-038**Syllabus:**

1. The five thousand dollar provision of R.C. 307.86 is applicable to purchases or leases of materials or equipment for force account projects undertaken by the county engineer pursuant to R.C. 5543.19.
2. R.C. 5543.19(C) requires that equipment and materials to be purchased or leased for each separate force account project be obtained in compliance with the provisions of R.C. 307.86.
3. As to each force account project, the five thousand dollar threshold requirement for competitive bidding provided in R.C. 307.86 applies separately to each purchase or lease which reasonably and in good faith constitutes a separate and distinct contract or order.

To: David Tobin, Columbiana County Pros. Atty., Lisbon, Ohio

By: William J. Brown, Attorney General, July 3, 1980

I have before me your request for an opinion concerning R.C. 5543.19, which authorizes a county engineer to proceed by force account, and R.C. 307.86, which requires that anything to be purchased or leased at a cost in excess of five thousand dollars be obtained through competitive bidding. The specific questions raised in your request are as follows:

Is the \$5,000.00 provision of Revised Code Section 307.86 applicable at all to Revised Code Section 5543.19?

If the \$5,000.00 provision of Revised Code Section 307.86 is applicable to Revised Code Section 5543.19, then is this \$5,000.00 limit on a per annum, per project or per purchase basis relative to the force account projects of the County Engineer?

In regard to your first question, R.C. 5543.19(C) defines "force account" to mean "that the county engineer will act as contractor, using labor employed by him using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code" (emphasis added). R.C. 307.86 provides, in pertinent part, that "[a]nything to be purchased, [or] leased, . . . at a cost in excess of five thousand dollars, except as otherwise provided in section . . . 5543.19. . . shall be obtained through competitive bidding." (Emphasis added.) As noted in your inquiry, the Court of Appeals for Morrow County in Wyandot Blacktop, Inc. v. Morrow County, No. 564 (Ct. App. Morrow County Feb. 14, 1980), recently interpreted R.C. 307.86 and 5543.19 as requiring leases or purchases of equipment and materials for force account projects to be obtained in compliance with R.C. 307.86. The court held that "where a county engineer is authorized by the board of commissioners to proceed by force account. . . , any material for the project costing in excess of \$2,000 [now \$5,000], must be purchased in compliance with the competitive bidding procedures mandated by R.C. 307.86 et seq." In accordance with that decision, I conclude that the five thousand dollar provision concerning competitive bidding which is contained in R.C. 307.86 is applicable to force account projects. In response to your first question, then, it is my opinion that the five thousand dollar provision of R.C. 307.86 is applicable to purchases or leases of materials or equipment for force account projects undertaken pursuant to R.C. 5543.19.

I turn now to a discussion of your second question, in which you inquire how the five thousand dollar limit in R.C. 307.86 is to be interpreted with regard to

purchases or leases of materials and equipment for force account projects. The Court of Appeals in Wyandot did not consider this question, nor am I aware of any other Ohio cases in which this specific question has been considered. Therefore, the question as to whether the intent was for the five thousand dollar limit in R.C. 307.86 to apply to purchases or leases for force account projects on a per annum, per project, or per purchase basis must be determined primarily from the language of R.C. 5543.19 and R.C. 307.86.

R.C. 5543.19, which authorizes the county engineer to proceed by force account, provides as follows:

(A) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads by force account.

In determining whether he may undertake construction or reconstruction, including widening and resurfacing, of roads by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. When the total estimated cost of the work exceeds ten thousand dollars per mile, the county commissioners shall invite and receive competitive bids for furnishing all labor, materials and equipment necessary to complete the work in accordance with sections 307.86 to 307.92, inclusive, of the Revised Code.

(B) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of bridges and culverts by force account.

In determining whether he may undertake such construction, reconstruction, improvement, maintenance, or repair of bridges or culverts by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. When the total estimated cost of the work exceeds forty thousand dollars, the board of county commissioners shall invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work, in accordance with section 307.86 to 307.92, inclusive, of the Revised Code. The county engineer shall obtain the approval required by section 5543.02 of the Revised Code.

(C) "Force account," as used in this section means that the county engineer will act as contractor, using labor employed by him using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code and excludes subcontracting any part of such work unless done pursuant to sections 307.86 to 307.92, inclusive, of the Revised Code.

The term "competitive bids" as used in this section requires competition for the whole contract and in regard to its component parts, including labor and materials. Neither plans nor specifications shall be drawn to favor any manufacturer or bidder unless required by the public interest. (Emphasis added.)

Divisions (A) and (B) of R.C. 5543.19 require the county engineer to cause to be made an estimate of the cost of each project to be undertaken. Pursuant to divisions (A) and (B), the county engineer must prepare a separate estimate for each separate project to be undertaken rather than a single estimate as to the cost of all projects to be undertaken. Consequently, the provisions of R.C. 5543.19(A) and (B) must be viewed as being separately applicable to each individual project.

As previously discussed, division (C) of R.C. 5543.19 has been interpreted as requiring that materials and equipment to be purchased or leased for force account projects be obtained in compliance with R.C. 307.86. Wyandot Blacktop, Inc. v. Morrow County, supra. In construing a statute, each provision of the statute must be interpreted in light of the other provisions of the same statute. Suez Co. v. Young, 118 Ohio App. 415, 195 N.E. 2d 117 (1963). Division (C) of R.C. 5543.19 must, therefore, be interpreted with reference to divisions (A) and (B), which require compliance as to each separate force account project. Consequently, R.C. 5543.19(C) must be interpreted as requiring that the materials and equipment needed for each separate force account project be obtained in compliance with R.C. 307.86. The five thousand dollar provision of R.C. 307.86 may not, therefore, be viewed as imposing a per annum limitation on expenditures for equipment and materials to be used in force account projects. The question as to whether R.C. 307.86 was intended to impose a per project or per purchase limitation on such expenditures, however, must be determined in light of the language of that section.

R.C. 307.86 provides in pertinent part as follows:

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 section 307.92 of the Revised Code, at a cost in excess of five thousand dollars, except as otherwise provided in section 307.02, 307.861, 3501.301, 3505.13, 4115.31 to 4115.35, 5543.19, 5713.01, or 6137.05 of the Revised Code, shall be obtained through competitive bidding. (Emphasis added.)

The plain language of R.C. 307.86, "[a]nything to be purchased, [or] leased. . .at a cost in excess of five thousand dollars," indicates that the five thousand dollar limitation was intended to apply to each individual purchase or lease rather than to all purchases or leases to be made in one year or for one project. A harmonious construction of the provisions of R.C. 307.86 and R.C. 5543.19, therefore, leads to the conclusion that anything to be purchased or leased for one individual force account project must be obtained through competitive bidding if the cost of the purchase or lease would exceed five thousand dollars.

In order to determine what constitutes a "purchase" or "lease" for the purposes of R.C. 307.86, or how the contracting authority is to determine if the cost of the proposed purchase or lease exceeds five thousand dollars, the provisions of R.C. 307.86 must be examined.

There is no clear indication in the language of R.C. 307.86 as to what constitutes a "purchase" or "lease," nor does there appear to be any authority which has interpreted the phrase "[a]nything to be purchased [or] leased. . .at a cost in excess of five thousand dollars" as that phrase is used in R.C. 307.86. The courts, however, in a number of cases have considered the effect to be given similar statutory provisions requiring that purchases or expenditures in excess of a specified amount be made in compliance with the requirements of competitive bidding statutes. See State ex rel. Kuhn v. Smith, 25 Ohio Op. 2d 203, 194 N.E. 2d 186 (C.P. Monroe County 1963) (school repairs may not be done piecemeal to evade the \$4000 limitation as to competitive bidding in R.C. 3313.46); State ex rel. Ashland County v. Snyder, 2 Ohio N.P. (n.s) 261 (C.P. Ashland County 1904) (competitive bidding

requirements cannot be evaded by the elimination of work that would normally be included in a bridge contract); Wing v. City of Cleveland, 9 Ohio Dec. Reprint 551 (C.P. Cuyahoga County 1885) (\$500 limitation in competitive bidding statute may not be circumvented by purchasing fire hose in separate orders of less than \$500 each).

In each of the aforementioned cases, the issue presented to the court was whether the contract in question was sufficiently large to come within the amount specified in the statute as requiring competitive bidding. The court in Kuhn, 25 Ohio Op. 2d at 206, 194 N.E. 2d at 189, concluded that the paramount question to be answered was whether the work or purchase involved must be regarded as being included in one contract, which exceeds the statutory amount for which competitive bidding is required, or whether the purchase or work may be regarded as several smaller contracts, each of which is for a lesser amount than the statutory requirement for competitive bidding. In answering that question, the court stated as follows:

When it is apparent that the work has been split up for the purpose of evading the statute, the courts have generally held the contracts to be invalid. On the other hand, if the public officials responsible for letting the contract appear to have acted in good faith, multiple contracts may be upheld even though the total involved in them in the aggregate is greater than the amount specified in the statute.

Kuhn, 25 Ohio Op. 2d at 206, 194 N.E. 2d at 189 (quoting Annot., 53 A.L.R. 2d 498, 499 (1950)).

It would appear from the decisions of the courts in the aforementioned cases that the nature of the proposed expenditure is the controlling factor in determining whether competitive bidding is required pursuant to a statute, such as R.C. 307.86, which provides a threshold amount in excess of which competitive bidding is required. In construing such a statute, the threshold limitation provided in the statute should be interpreted as relating separately to any purchase or lease which may reasonably and in good faith be deemed to constitute a separate contract or purchase order. The purchase or lease contemplated may not be split into separate contracts or orders for the purpose of evading the requirements of the statute. If, however, the purchase or lease contemplated is of such a nature that it reasonably and in good faith requires division into separate parts, then separate contracts or orders may be made without competitive bidding, if each separate contract or order is for a lesser amount than the statutory requirement for competitive bidding.

There is nothing in the plain language of R.C. 307.86 which would indicate that the legislative intent was to have the phrase "[a]nything to be purchased, [or] leased" interpreted differently than similar provisions in other competitive bidding statutes have been interpreted. Consequently, it is my opinion that the five thousand dollar provision in R.C. 307.86 must be viewed as applying separately to each purchase or lease made on behalf of the county which reasonably and in good faith constitutes a separate and distinct contract or order.

In specific regard to a force account project, then, the nature of the equipment and material to be leased or purchased would determine if the cost is in excess of five thousand dollars and competitive bidding is therefore required. As previously discussed, the provisions of R.C. 307.86 apply separately to each individual force account project. Thus, as to each separate and distinct force account project, the five thousand dollar threshold for competitive bidding would be separately applicable to each purchase and/or lease of material and equipment which reasonably and in good faith constitutes a separate contract or order.

The provisions of R.C. 307.86 may not be evaded either by artificially dividing the work to be accomplished in any one year into separate force account

projects, or by making separate contracts or placing separate orders for material and equipment needed for any one force account project. If the work to be undertaken in any one year is similar in nature such that it would reasonably constitute one project, then the work may not be divided into separate force account projects to circumvent the requirements of R.C. 307.86. Ludwig Hommell & Co. v. Woodsfield, 115 Ohio St. 675, 155 N.E. 386 (1927) (contract to furnish electrical supplies for one year and to give credit for old meters in exchange was held invalid under competitive bidding statute with \$500 limit because total transactions for year exceeded \$500; separate orders made during the year were not viewed as individual contracts). See generally Miller v. McKinnon, 20 Cal. 2d 83, 124 P. 2d 34 (1942); Horrabin Paving Co. v. Creston, 221 Iowa 1237, 262 N.W. 480 (1935) (where the evidence reveals that the proposal and specifications are for one project, the statute may not be circumvented by division of the work into separate projects); 1937 Op. Att'y Gen. No. 540, p. 896, 900 (the county engineer may make emergency repairs not in excess of \$200.00 [now \$1000] by force account, but may not circumvent the requirements of R.C. 315.13 by dividing what is one project into many smaller projects).

Similarly, if the equipment and material to be purchased or leased for any single force account project may reasonably be obtained as part of one contract or order, and may be so obtained at a reasonable cost, the requirements of R.C. 307.86 may not be evaded by placing separate orders or by entering into separate contracts each of which is for an amount less than five thousand dollars, but the cost of which in the aggregate is in excess of five thousand dollars. Wing, supra.

In conclusion, it is my opinion, and you are advised, that:

1. The five thousand dollar provision of R.C. 307.86 is applicable to purchases or leases of materials or equipment for force account projects undertaken by the county engineer pursuant to R.C. 5543.19.
2. R.C. 5543.19(C) requires that equipment and materials to be purchased or leased for each separate force account project be obtained in compliance with the provisions of R.C. 307.86.
3. As to each force account project, the five thousand dollar threshold requirement for competitive bidding provided in R.C. 307.86 applies separately to each purchase or lease which reasonably and in good faith constitutes a separate and distinct contract or order.