

OPINION NO. 76-023

Syllabus:

A county, acting through its Board of County Commissioners or its hospital commission, when constructing hospital facilities is not required to use competitive bidding or other contracting procedures found in R.C. 307.86 *et seq* where: (1) such construction is financed by issuance of revenue bonds pursuant to R.C. 140.06 which bonds are not repaid with tax monies but through lease payments made by a non-profit hospital agency; and (2) the lease between the county and the hospital agency pursuant to R.C. 140.05 provides the method and procedures by which such construction shall take place.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, March 24, 1976

I have before me your request for an opinion which reads in part as follows:

"Must a County, acting through its Board of County Commissioners or its Hospital Commission, which is financing hospital facilities through the issuance of bonds pursuant to Section 140.06 of the Revised Code, which facilities are to be leased to a "non-profit hospital agency" as that term is defined in Section 140.01 of the Revised Code, follow the provisions with respect to public bidding of contracts set forth in Section 307.86 *et seq.* of the Revised Code or other contracting procedures applicable to the County?"

R.C. Chapter 140. was enacted in 1971 for the stated purpose of enhancing the availability, efficiency and economy of hospital facilities and the services rendered thereby. R.C. 140.02. Broadly speaking, the Chapter authorizes hospital agencies and various governmental bodies to cooperate in utilizing various facilities and services. More specifically, it authorizes two or more hospital agencies to enter into an agreement for the acquisition of hospital facilities. R.C. 140.03. Furthermore, it authorizes a public hospital agency to lease to or from any hospital agency a facility to be used for the promotion of effective health services. R.C. 140.05.

None of the provisions of Chapter 140 has been the subject of reported decisions or opinions from this office.

R.C. 140.01, which contains definitions for various terms used in the Chapter, provides in part as follows:

"As used in Chapter 140. of the Revised Code:

"(A) 'Hospital Agency' means any public hospital agency or any nonprofit agency.

"(B) 'Public Hospital Agency' means any county,

county hospital commission established pursuant to section 339.14 of the Revised Code, municipal corporation, joint township hospital district or state or municipal university or college, operating or authorized to operate a hospital facility."

I understand that the instant situation involves a county acting in the capacity of a public hospital agency. The county plans to issue revenue bonds pursuant to R.C. 140.06 the proceeds of which will be used to build a hospital facility. The county will simultaneously enter into a lease pursuant to R.C. 140.05 with a non-profit hospital agency for the construction and rental of a hospital facility. The county will pay the debt service on the bonds with lease payments received from the hospital agency under the lease. No tax monies will be used by the county to build the hospital.

Furthermore, I understand that the public hospital agency, if it is not required to follow the competitive bidding procedure normally applicable to counties, can avail itself of such cost saving innovations as "fast-track construction." This technique enables a contractor to start construction before the building plans are complete thereby minimizing the impact of further increases in the construction index. It is apparent, therefore, that the public hospital agency may, if excused from competitive bidding, realize a substantial financial savings.

A county is, of course, normally required to follow competitive bidding procedure in the construction of any building. R.C. 307.86. A county hospital commission is normally bound by the same procedure. R.C. 339.14. It has been suggested, however, that a lease entered into between a public hospital agency and a hospital agency pursuant to R.C. 140.05 can include whatever methods or procedures for construction the parties to such a lease deem acceptable. The statutory basis for this contention is set forth in R.C. 140.03, which authorizes an agreement between two or more hospital agencies for the acquisition and use of hospital facilities. This section provides in pertinent part as follows:

"(B) An agreement entered into under authority of this section shall, where appropriate, provide for:

". . . .

"(2) Unless provided for by lease pursuant to section 140.05 of the Revised Code, the method by which such hospital facilities are to be acquired, constructed, or otherwise improved and by which they shall be managed, occupied, maintained, and repaired, including the designation of one of the hospital agencies to have charge of the details of acquisition, construction, or improvement pursuant to the contracting procedures prescribed under the law applicable to one of the participating public hospital agencies."
(Emphasis added.)

The import of this provision is not completely clear. I would therefore be reluctant to conclude that the operation of R.C. 140.03(B)(2), in and of itself, modifies the procedure that a public hospital agency is otherwise required to follow in letting contracts. An examination of relevant statutes,

however, strongly supports the position that R.C. 140.03(B)(2) does allow the suspension of otherwise applicable contract procedure if the details of construction are provided for in a lease entered pursuant to R.C. 140.05 and the cost of the construction is paid from revenue bonds issued pursuant to R.C. 140.06 and not from tax monies.

Chapter 140 is unlike most provisions of Ohio law because it contains an explicit statement of legislative purpose in R.C. 140.02. It is not necessary to extensively quote the language of the statute. It is sufficient to note that it expressly states that the law was enacted to enhance the efficiency and economy of hospital facilities in the state. Moreover, the authority under Chapter 140 is in addition to and alternatives for other provisions in the Revised Code for the construction of hospital facilities. It is of primary importance in construing a statute to effectuate the purpose for which it was enacted. E.g., Columer v. Kenton, 111 Ohio St. 211 (1924). Any doubt that may arise as to the operation of R.C. Chapter 140, should, therefore, be resolved in favor of economy and efficiency.

It is important to realize that the General Assembly clearly contemplated that a lease may be executed before actual construction of a facility is begun. This is best evidenced by R.C. 140.05, which provides in pertinent part as follows:

". . . .

"(C) Such lease may provide for rentals commencing at any time agreed upon, or advance rental, and continuing for such period therein provided, notwithstanding and without diminution, rebate, or setoff by reason of time of availability of the hospital facility for use, delays in construction, failure of completion, damage or destruction of the hospital facilities, or for any other reason."

Once it is apparent that a lease may actually antedate the existence of the hospital facility, the inclusion of provisions in the lease for the manner of construction seem quite reasonable. A public hospital agency is authorized by R.C. 140.05(A) to include in the lease "such terms and conditions as are agreed upon by the parties" to the lease.

Moreover, it seems logical to conclude that the General Assembly intended to vest greater discretion in a public hospital agency concerning the mode and manner of construction, where, as here, the lease requires the tenant to assume the full burden of the building's cost. It is undisputed that the purpose of competitive bidding is to afford a certain measure of protection to taxpayers. E.g., Pincelli v. Bridge Corp., 94 Ohio L. Abs. 165 (1964). It is, therefore, critical to realize that tax monies are not involved in the present situation. R.C. 140.06, which authorizes the issuance of revenue bonds, expressly states that these obligations are not general obligations. The holders or owners of the bonds, therefore, have no right to tax revenues. It is clear that the cost of the facility will be borne not by the lessor-public hospital agency, but by the lessee-non-profit corporation. Rental payments under the lease will be used to

retire the bonds. Therefore, the policy considerations which provide the basis for the competitive bidding requirement have no application to the present situation.

In addition, statutes governing the procedure to be followed by analagous public entities lend further support to the conclusion that general public contract procedure is not controlling. R.C. Chapter 165, for instance, authorizes the state, a county or a municipal corporation, to issue revenue bonds for the construction of certain facilities. The bonds may not be repaid by monies raised by taxation and are payable solely from the rentals, revenues and other income, charges and monies derived from the lease, rental, sale or other disposition of the facility. R.C. 165.03. Accordingly, R.C. 165.14 expressly provides that the issuing public authority is not bound by competitive bidding requirements, but may, in its sole discretion, determine the manner in which the facility shall be constructed. The General Assembly has extended the same latitude to the Higher Educational Facility Commission created pursuant to R.C. Chapter 3377. The Commission is authorized under R.C. 3377.05 to issue bonds to pay for the cost of constructing facilities for use by institutions of higher education. The principal of and interest on these bonds are payable solely from the revenues derived from the lease, sale or other disposition of the facilities to educational institutions. R.C. 3317.16 provides, therefore, that the Commission is not bound by public competitive bidding requirements.

Thus, public bodies have, under substantially identical circumstances, been excused from generally applicable public contract procedure. There is no discernable reason why the present situation should be treated differently.

In light of the foregoing it is my opinion and you are so advised that a county, acting through its Board of County Commissioners or its hospital commission, when constructing hospital facilities is not required to use competitive bidding or other contracting procedures found in R.C. 307.86 et seq where: (1) such construction is financed by issuance of revenue bonds pursuant to R.C. 140.06 which bonds are not repaid with tax monies but through lease payments made by a non-profit hospital agency; and (2) the lease between the county and the hospital agency pursuant to R.C. 140.05 provides the method and procedures by which such construction shall take place.