

OPINION NO. 87-045**Syllabus:**

1. Pursuant to R.C. 5513.02(B), the director of the Ohio Department of Transportation must comply with R.C. 125.11(B) when purchasing goods under the authority conferred by R.C. 5513.01-.04.
2. R.C.125.11(B) requires that bids for the award of contracts for the sale of goods be evaluated under the criteria established by rules of the Director of the Ohio Department of Administrative Services promulgated pursuant to R.C. 125.09(C)(1)-.09(C)(7).
3. For purposes of R.C. 125.11 and R.C. 125.09, a product is "mined in Ohio" if it is actually extracted from the earth in this state.
4. By virtue of R.C. 125.09(C)(5) a mined product which is not mined in Ohio is not entitled to a preference in bid evaluation under R.C. 125.11(B), even if the bidder has a significant Ohio economic presence.

To: Warren J. Smith, Director, Ohio Department of Transportation, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 17, 1987

I have before me your request for my opinion on the application of Buy Ohio legislation to products mined by a company which operates mines both within Ohio and in another

state. Specifically, you ask: "Do the Buy Ohio Act and the rules promulgated thereunder give a preference to a company which produces mined products from both an Ohio mine and a mine located in a non-border state?"

The Ohio General Assembly enacted the Buy Ohio legislation to give preference to Ohio companies bidding on public contracts.¹ An answer to your question in the context of a specific contract will depend upon the facts and circumstances of the particular bid. A prediction as to the awarding of a particular contract is beyond the scope of my authority. As I said in a previous opinion:

I am not authorized to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity. See generally 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-098; 1984 Op. Att'y Gen. No. 84-067. Further, it is inappropriate for me to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals. See generally 1986 Op. Att'y Gen. No. 86-039; 1983 Op. Att'y Gen. No. 83-087; 1983 Op. Att'y Gen. No. 83-057.

1986 Op. Att'y Gen. No. 86-076 at 2-422. However, an examination of the relevant statutes, and administrative rules which implement those statutes, is an appropriate method for determining which bidders may be considered for a preference under the Buy Ohio laws.

The Buy Ohio requirements apply to the Ohio Department of Transportation (ODOT) pursuant to R.C. 5513.02(B) which provides: "Division (B) of section 125.11 of the Revised Code applies to the purchase of products by the director [of the Ohio Department of Transportation] pursuant to section 5513.01 to 5513.04 of the Revised Code."² (Footnote added.) Thus, ODOT must comply with the requirements of the Buy Ohio legislation when awarding certain contracts. As referred to in R.C. 5513.02(B), the provision which sets forth the requirements for awarding contracts is R.C. 125.11 which provides:

(A) Subject to division (B) of this section, contracts shall be awarded to the lowest and best bidder on each item....

¹ The Ohio Revised Code provisions which constitute the Buy Ohio Act are: R.C. 125.01 (definitions); R.C. 125.04 (determination of supplies, equipment, services, and insurance to be purchased); R.C. 125.08 (bid districts and bid notification lists); R.C. 125.09 (Department of Administrative Services to prescribe conditions of bidding); R.C. 125.11 (awarding of contracts); R.C. 127.16 (powers of controlling board); R.C. 153.012 (preference to Ohio construction contractors); R.C. 5513.02 (purchases by Ohio Department of Transportation). Only those sections relevant to your specific question will be discussed in this opinion.

² R.C. 5513.01 to R.C. 5513.04 concern the specific purchasing authority of the director of ODOT and are considered in this opinion only to the extent necessary to answer your question.

(B) Prior to awarding a contract under division (A) of this section, the department of administrative services or the state department, office, institution, or commission responsible for evaluating a contract for the purchase of goods shall evaluate the bids received according to the criteria and procedures established pursuant to divisions (C)(1) and (2) of section 125.09 of the Revised Code for determining if a product is produced or mined in the United States and if a product is produced or mined in Ohio. The department or other agency shall first reject bids that offer goods that have not been or that will not be produced or mined in the United States. From among the remaining bids, the department shall select the lowest and best bid from among the bids that offer goods that have been produced or mined in Ohio where sufficient competition can be generated within Ohio to ensure that compliance with these requirements will not result in an excessive price for the product or acquiring a disproportionately inferior product. If there are two or more qualified bids that offer goods which have been produced or mined in Ohio, it shall be deemed that there is sufficient competition to prevent an excessive price for the product or the acquiring of a disproportionately inferior product. (Emphasis added).

The use of the word "shall" in R.C. 125.11(B) imposes an affirmative duty on the contracting agency. See State ex rel. City of Niles v. Bernard, 53 Ohio St. 2d 31, 372 N.E.2d 339 (1978); Cleveland Ry. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51 (1919). Accordingly, before a contract may be awarded to the lowest bidder under R.C. 125.11(A), R.C. 125.11(B) demands that the agency evaluate all bids in accordance with criteria established under R.C. 125.09(C) to determine if the product is produced or mined in the United States, and if the product is produced or mined in Ohio.

R.C. 125.09(C) requires that the director of the Department of Administrative Services (DAS) promulgate rules which establish criteria to evaluate bids. That section provides:

(C) The director of administrative services shall, by rule adopted pursuant to Chapter 119. of the Revised Code, prescribe criteria and procedures for use by all state agencies in giving preference to United States and Ohio products as required by division (B) of section 125.11 of the Revised Code. The rules shall extend to:

(1) Criteria for determining that a product is produced or mined in the United States rather than in another country or territory;

(2) Criteria for determining that a product is produced or mined in Ohio;

(3) Information to be submitted by bidders as to the nature of a product and the location where it is produced or mined;

(4) Criteria and procedures to be used by the director to qualify bidders located in states bordering Ohio who might otherwise be excluded from being awarded a bid by operation of this section and section 125.11 of the Revised Code. The criteria and procedures shall recognize the level and regularity of interstate commerce between Ohio and the border states

and provide that the non-Ohio businesses may qualify for award of a contract as long as they are located in a state that imposes no greater restrictions than are contained in this section and section 125.11 of the Revised Code upon persons located in Ohio selling products or services to agencies of that state.

(5) Criteria and procedures to be used to qualify bidders whose manufactured products, except for mined products, are produced in other states or in North America but the bidders have a significant Ohio economic presence in terms of the number of employees or capital investment a bidder has in this state. Bidders with a significant Ohio economic presence shall qualify for award of a contract on the same basis as if their products were produced in this state.

(6) Criteria and procedures for the director to grant waivers of the requirements of division (B) of section 125.11 of the Revised Code on a contract-by-contract basis where compliance with those requirements would result in the state agency paying an excessive price for the product or acquiring a disproportionately inferior product;

(7) Such other requirements or procedures reasonably necessary to implement the system of preferences established pursuant to division (B) of section 125.11 of the Revised Code.

In adopting the rules required under this division, the director shall, to the maximum extent possible, conform to the requirements of the federal "Buy America Act," 47 Stat. 1520, (1933), 41 U.S.C. 10a-10d, as amended, and to the regulations adopted thereunder. (Emphasis added.)

It is noteworthy that while R.C. 125.11(B) requires that the state agency awarding the contract evaluate bids "according to the criteria and procedures established pursuant to divisions (C)(1) and (2) of section 125.09 of the Revised Code...", R.C. 125.09(C) actually contains seven divisions, R.C. 125.09(C)(1)-.09(C)(7), all of which expressly apply to state agencies evaluating bids under R.C. 125.11(B). This raises the issue of whether, in evaluating bids, only the criteria of R.C. 125.09(C)(1) and (2) are to be applied, or whether all of seven divisions of R.C. 125.09(C) are to be considered. In resolving this problem I am persuaded that through the language of R.C. 125.09(C) the General Assembly expressed its intention that DAS promulgate rules to implement all seven of the divisions of that section.³ Moreover, rules of DAS have, in fact, been

³ See also 1983 Op. Att'y Gen. No. 83-093 at 2-359. In discussing an apparent statutory error, I stated that "[t]he means for correcting such an error is set forth in Archibald, 52 Ohio St. at 9-10, 38 N.E. at 316:

When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such defects as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the

promulgated to reflect the criteria listed in divisions (C)(1) through (C)(7). See 1 Ohio Admin. Code Chapter 123. Finally, the summary of the Ohio Legislative Service Commission reflects that the rules of the director of DAS should include the criteria listed in R.C. 125.09(C)(1)-.09(C)(7) in his rules. This also confirms that such was the legislative intent. Legislative Service Commission, Summary of Enactments, Jan. 1983-August 1983, 216-217.

Having concluded that the director of DAS must promulgate rules establishing criteria under R.C. 125.09(C)(1)-.09(C)(7), I next consider the rules themselves. The rules are found in 1 Ohio Admin. Code Chapter 123. Specifically, 1 Ohio Admin. Code 123:5-1-26(C) sets forth the procedures to be used in the evaluation of bids under R.C. 125.09 and R.C. 125.11. It provides:

(C) Procedure for applying domestic Ohio bid preference

(1) Bids will first be evaluated to determine that a bidder's offering is for a "domestic source end product," as defined at 41 C.F.R. section 1-6.101(d). Information furnished by the bidder as provided for in paragraph (D) of this rule shall be relied upon in making the determination. Any bidder's offering that does not meet this requirement shall be rejected, except in those circumstances where the state purchasing administrator determines that certain articles, materials and supplies are not mined, produced or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality.

2) Following the determination at paragraph (C)(1) of this rule, remaining bids and proposals shall be evaluated so as to give preference to Ohio bids or bidders who are located in a border state, provided that the border state imposes no greater restrictions than contained in sections 125.09 and 125.11 of the Revised Code (hereinafter in this chapter, it is required that for a bid from a border state, the border state imposes no greater restrictions than are contained in sections 125.09 and 125.11 of the Revised Code). Where the preliminary analysis of bids identifies the apparent low bid as an Ohio bid or a bid from a border state, the state purchasing administrator shall proceed with evaluation

legislature. The error or mistake, as well as the proper correction, must appear beyond doubt from the fact of the act, or when read in connection with other acts in pari materia. [State ex rel. Fay v. Archibald, 52 Ohio St. 1, 9-10, 38 N.E. 314, 316 (1894)].

See also Stanton v. Frankel Brothers Realty Co., 117 Ohio St. 345, 350, 158 N.E. 868, 870 (1927)('[i]t is a well-settled rule that courts will not permit a statute to be defeated on account of a mistake or error, where the intention of the Legislature can be collected from the whole statute, or where one word has been erroneously used for another, and where the context affords the means of correction. The strict letter of a statute must yield to the obvious intent')."

and award procedure provided for in rule 123:5-1-23⁴ of the Administrative Code.

(3) Where the preliminary analysis identifies the apparent low bid as one other than an Ohio bid or bid from a border state, the state purchasing administrator shall consider the following factors:

(a) Whether the goods or services can be procured in-state in sufficient and reasonably available quantities and of a satisfactory quality;

(b) Whether an Ohio bid has been submitted;

(c) Whether the lowest Ohio Bid, if any, offers a price to the state deemed to be an excessive price;

(d) Whether the lowest Ohio bid, if any, offers a disproportionately inferior product or service.

For purposes of applying these criteria, "excessive price" shall be construed to mean a price that exceeds by more than five per cent the lowest price submitted on a non-Ohio bid.

(4) Where the state purchasing administrator determines that selection of the lowest Ohio bid, if any, will not result in an excessive price or a

4 1 Ohio Admin. Code 123:5-1-23 provides that:

(A) General. Subject to the federal Buy America Act, 41 U.S.C.A. 10a-10d, as amended, and the regulations adopted thereunder and Buy-Ohio evaluation and award criteria set forth in section 125.11 of the Revised Code and covered in rule 123:5-1-26 of the Administrative Code, the contract is to be awarded to the lowest and best bidder, as defined in rule 123:5-1-01 of the Administrative Code. The invitation to bid shall set forth the requirements and criteria which will be used to determine the lowest and best bidder. No bid shall be evaluated for any requirement or criteria that is not disclosed in the invitation to bid.

(B) Product acceptability

The invitation to bid shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

(1) Inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(2) Examination of such elements as appearance, finish, taste, or feel; or

(3) Other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the invitation to bid. Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

disproportionately inferior product or service, the administrator shall propose a contract award to the low Ohio bid at the bid price quoted. The final contract award shall be made following further evaluation and award under rule 123:5-1-23 of the Administrative Code. Where, otherwise, the state purchasing administrator determines it is advantageous to propose the award of contract to other than an Ohio bid or bid from a border state, the administrator shall propose same. The final contract award shall be made following further evaluation and award under rule 123:5-1-23 of the Administrative Code. The administrator shall at all times reserve the right to reject all bids, award partial bids and rebid if it is deemed in the best interest of the state to do so.

Under this rule, the first step in evaluating a bid is to determine whether or not the bidder's offering is for a "domestic source end product" as defined by 41 C.F.R. 1-6.101(d). That regulation provides:

(d) "Domestic source end product" means an unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components....

In the case of a company which produces a mined product in Ohio and in a non-border state, there seems to be little question but that the bidder's offering will qualify as a "domestic source end product."

Once it has been determined that the offering is a "domestic source end product", rule 123:5-1-26(C) requires that the officer evaluating the bid determine if the bid meets the definition of an "Ohio bid," as that term is defined in 1 Ohio Admin. Code 123:5-1-01(I). That rule provides that "' Ohio bid' means a bid received from a bidder offering Ohio products or bidder demonstrating a significant Ohio presence." Under the DAS rules, "Ohio products" are "[w]ith respect to mined products...mined or excavated in Ohio." 1 Ohio Admin. Code 123:5-1-01(K). 1 Ohio Admin. Code 123:5-1-01(S) makes the following provision:

(S) "Significant Ohio economic presence" means business organizations that:

(1) Have sales offices, divisions, sales outlets or manufacturing facilities in Ohio or which facilities demonstrate a significant capital investment to Ohio;

(2) Pay required taxes to the state of Ohio; and

(3) Are registered and licensed to do business in the state of Ohio with the office of the secretary of state.

The definition of "Ohio products" under rule 123:5-1-01(K) is simple, straightforward, and needs no interpretation. For mined products, it requires that the item to be supplied be "mined or excavated in Ohio." The rule therefore imposes a requirement that a mined product be taken from the earth within Ohio. Under the conditions set forth in your letter, any item taken from the earth in Ohio would qualify as an Ohio product. If, however, the product is taken from the earth in another

state, it will not qualify as an Ohio product, and therefore would not be entitled to a preference. If the mined product in question is fungible, and products extracted from the earth in Ohio are comingled with similar products extracted from the earth in another state, it would not appear that the mixed product would qualify as an Ohio product under the rules. I base this conclusion on the language of the rule 123:5-1-01(K) which provides:

(K) "Ohio products" means products which are mined, excavated, produced, manufactured, raised, or grown in the state by a person where the input of Ohio products, labor, skill, or other services constitutes no less than twenty-five per cent of the manufactured cost. With respect to mined products, such products shall be mined or excavated in Ohio. (Emphasis added.)

The rule permits a manufactured product to be considered an "Ohio product" even where up to seventy five percent of the manufactured cost of the item results from products, labor, skill or other services provided from outside Ohio. The rule makes no similar allowance for mined products. Thus, the director of DAS must have intended to require that a mined product would qualify as an "Ohio product" only if it is comprised purely of products extracted from the earth in this state.

If a product cannot qualify as an "Ohio product", the rules do permit a preference to be granted as an "Ohio bid" if the bidder demonstrates a "significant Ohio presence." 1 Ohio Admin. Code 123:5-1-01(I). The rule does not distinguish between bidders providing manufactured products and bidders providing mined products. Under the rule, if the bidder has a "significant Ohio presence" the bid qualifies as an "Ohio bid" and is entitled to the preference. The rule, however, appears to be in conflict with the express language of R.C. 125.09(C)(5). That section authorizes the director of DAS to promulgate rules for establishment of "[c]riteria and procedures to be used to qualify bidders whose manufactured products, except for mined products, are produced in other states or in North America but the bidders have a significant Ohio economic presence...(emphasis added)." The language of this section is plain. A preference is to be given to bidders with a significant Ohio presence only for manufactured goods. Mined products are expressly exempted from this provision.

If, in the case which is the subject of your opinion request, the bidder has a "significant Ohio presence" as defined by rule 123:5-1-01(S), it would be entitled to be classified as an "Ohio bid". However to give preference to a bidder supplying a mined product which is not mined in Ohio, solely on the basis of a "significant Ohio presence", runs contrary to the language of R.C. 125.09(C)(5). Accordingly, I must decide whether the rule or the statute controls. An administrative agency enjoys only such authority as may be conferred upon it by statute. State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947). The authority of an agency to promulgate rules can not be extended by the agency. Davis v. State ex rel. Kennedy, 127 Ohio St. 261, 187 N.E. 867 (1933). Where an agency attempts, through a rule, to extend its authority beyond the limitations imposed by the General Assembly, the rule is invalid. Burger Brewing Co. v. Thomag, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). See also Grandview Racing v. Ohio State Racing Commission, 6 Ohio App.

2d 91, 216 N.E.2d 765 (Franklin Cty. 1966)(holding that a rule of the Ohio Racing Commission which conflicts with a statute is not valid). Granting a preference under the Buy Ohio legislation to a mined product which is mined outside of Ohio on the basis of the economic presence of the bidding company, even though rules 123:5-1-01(I) and 123:5-1-26 dictate that the bid be given preference as an "Ohio bid", contravenes R.C. 125.09(C)(5). Therefore, I am constrained to conclude that a product mined outside of Ohio would not be entitled to a preference under R.C. 125.11(B), even though the bidder might have a significant Ohio presence.

It is, therefore, my opinion, and you are advised that:

1. Pursuant to R.C. 5513.02(B), the director of the Ohio Department of Transportation must comply with R.C. 125.11(B) when purchasing goods under the authority conferred by R.C. 5513.01-.04.
2. R.C.125.11(B) requires that bids for the award of contracts for the sale of goods be evaluated under the criteria established by rules of the Director of the Ohio Department of Administrative Services promulgated pursuant to R.C. 125.09(C)(1)-.09(C)(7).
3. For purposes of R.C. 125.11 and R.C. 125.09, a product is "mined in Ohio" if it is actually extracted from the earth in this state.
4. By virtue of R.C. 125.09(C)(5) a product which is not mined in Ohio is not entitled to a preference in bid evaluation under R.C. 125.11(B), even if the bidder has a significant Ohio economic presence.