

OPINION NO. 79-011**Syllabus:**

- 1) The Transportation Research Board of Ohio may lease land located at the Transportation Research Center to a private corporation, solely for purposes consistent with R.C. Chapter 5507, for a nominal sum, under a lease which provides that the corporation will construct and operate transportation research buildings or facilities on such land.
- 2) The corporation may construct transportation research buildings or facilities upon land leased to it by the Transportation Research Board of Ohio, subject to such terms and conditions as the Board deems reasonable and proper. The construction of such buildings and facilities need not be in accordance with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies.

**To: George Arnold, Chairman, Transportation Research Board of Ohio,
Columbus, Ohio**

By: William J. Brown, Attorney General, April 19, 1979

I have before me your request for my opinion with respect to the following questions:

1. Assume that the Transportation Research Bureau adopts a master plan for the utilization of the land at the Transportation Research Center, and further includes in such a plan certain designated areas in which automotive, vehicular and other users complying with Section 5507 of the Ohio Revised Code may locate research facilities, and further assume that proper notice of such a master plan and the area so designated are made known to the public: can the Transportation Research Bureau lease land in said designated areas for nominal sums, i.e. \$1 per year, to said organizations and companies for the purpose of constructing buildings or facilities, according to the building specifications of the Transportation Research Center and in conformity with the general design of the Transportation Research Center and with the prior approval of such construction plans by the Transportation Research Board, with said companies or research organizations being able to use said buildings for a period of time commensurate with the cost of construction of same, and, obviously, solely for the purposes consistent with Section 5507, but with said facilities becoming the property of the Transportation Research Bureau either as of the termination of the leasing agreement or some earlier date?

2. [D]oes such construction, if permitted, need to be bid, and further does the construction activity need to be according to such State procedures as are generally followed by State Agencies in construction of State Facilities?

As you indicate in your letter, the Transportation Research Center of Ohio was created and operates, pursuant to R.C. Chapter 5507, for the purpose of conducting research in automotive, vehicular and related forms of transportation, and for the development of improved highway facilities for vehicular traffic. In order to carry out these functions, the Transportation Research Board of Ohio has been granted, pursuant to R.C. 5507.03, extensive powers and discretionary authority to execute contracts and agreements for the development and operation of transportation research facilities. Moreover, these powers must, pursuant to R.C. 5507.22, be liberally construed. With respect to your first question, R.C. 5507.03 provides in pertinent part as follows:

The transportation research board of Ohio may:

(F) Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to, or contract for operation by, a person or governmental agency, transportation research facilities or projects, and establish rules for the use of such projects or facilities;

(H) Acquire by gift or purchase, hold, and dispose of real and personal property in the exercise of the powers of the board and the performance of its duties under Chapter 5507. of the Revised Code . . .

(J) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and execution of its powers under Chapter 5507. of the Revised Code . . .

(L) Receive and accept from any federal agency, . . . grants . . . and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions are made;

(N) Charge, alter, and collect rentals and other charges for the use or services of any transportation research facility or project as provided in Chapter 5507. of the Revised Code;

(P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 5507. of the Revised Code;

(R) Lease sites for the construction and operation of laboratories or other facilities on land administered by it to the United States government, other governmental agencies and offices, and persons, firms, or corporations. Such leases shall be of such duration and for such consideration as the board determines to be in the best interest of the state.

In my opinion, there can be no doubt that the powers conferred upon the Board pursuant to R.C. 5507.03 are sufficient to enable the Board to carry out the

leasing agreement you have described. In particular, I would call your attention to R.C. 5507.03(R), which expressly authorizes the Board to lease sites for the construction and operation of laboratories or facilities by private parties and to determine the duration of any such lease and the consideration to be received by the Board.

Although the Board possesses the statutory authority to lease sites to a private corporation for the purpose of constructing transportation research facilities, such power must be exercised within the limitations set forth in the Ohio Constitution. My analysis of your question cannot, therefore, be complete without some mention of the limitations imposed upon the authority of a state board to enter into contractual arrangements with private corporations by Ohio Const. art. VIII, §4, set forth below.

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

This issue was recently addressed in State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69 (Franklin County 1974). Plaintiffs in that case sought to enjoin the performance of a lease agreement between a state university and a private corporation under which property belonging to each would be joined for the purposes of a commercial venture. In executing the challenged lease, the university had acted pursuant to R.C. 123.77, which expressly authorized the university to lease surplus lands to private developers. The plaintiffs' argued, however, that the exercise of the university's authority under this statute violated Ohio Const. art. VIII, §4. In response to this particular argument, the court indicated that there was serious doubt as to the constitutionality of the lease since ". . . as construed by the Supreme Court of Ohio, such an arrangement occasioning the joinder of properties of the state and that of the private corporation results in a lending of the credit of the state of Ohio." *Id.* at 76. The court held, however, that the lease did not violate art. VIII, §4, since R.C. 123.77 was authorized by and enacted pursuant to Ohio Const. art. VIII, §13, which provides an exception to the limitations imposed by art. VIII, §4.

Ohio Const. art VIII, §13, which was adopted by the electorate of the state on May 4, 1965, provides in pertinent part as follows:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, . . . it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research . . . Laws may be passed . . . to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution

I have no hesitation in concluding that the provisions of R.C. Chapter 5507. were intended to fall within the purview of this constitutional provision. The intent of the General Assembly is clearly set forth in R.C. 5507.02 as follows:

It is hereby declared to be the public policy of the state, with the establishment, operation, and maintenance of the transportation research center of Ohio and its governing board as provided in Chapter 5507. of the Revised Code through the center's transportation research and development, to be for the health, safety, and general welfare of all inhabitants of the state, to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state. In furtherance of such public policy the transportation research board of Ohio may initiate, acquire, construct, and operate suitable facilities or projects for carrying on transportation research and development or cause the same to be operated pursuant to a lease, sub-lease, or agreement with any person or governmental agency

It is, therefore, my opinion that Ohio Const. art VIII, §4 does not limit the Board's authority to undertake the leasing agreement described in your request.

Your second question concerns the procedures that must be followed in executing the proposed agreement. You ask specifically if bids must be solicited before contracts can be awarded for the construction of the proposed buildings or facilities. In addition, you express a general concern as to whether the procedures generally followed by state agencies in the construction of state facilities are applicable in this particular situation. It is my understanding that your question is premised upon the recent amendment to R.C. 5507.01 enacted pursuant to Am. S.B. 221, effective November 23, 1977. Pursuant to that amendment, the Board is now "subject to all provisions of law generally applicable to state agencies which do not conflict with [R.C. Chapter 5507]."

The procedures a state agency must follow with respect to the construction of state facilities are generally set out in R.C. Chapter 153. These procedures, which include requirements for competitive bidding, for the approval of the Department of Administrative Services, and for the preparation of certain specific documents enumerated in R.C. 153.01, are applicable "[w]henver any building or structure for the use of the state or any institution supported in whole or in part by the state . . . is to be erected or constructed, or whenever additions, alterations, or structural or other improvements are to be made . . . the aggregate cost of which exceeds three thousand dollars . . ." R.C. 153.01. You have indicated that, under the terms of the proposed agreement between the Board and the corporation, the facilities to be constructed will at some future date become the property of the Board. I shall assume, therefore, for the purposes of this opinion, that the facilities are being constructed for the use of the Board. The construction of the facilities will, therefore, be subject to the requirements of R.C. Chapter 153, unless these requirements conflict with the provisions of R.C. Chapter 5507.

R.C. Chapter 5507 is not silent with respect to the manner in which the construction of transportation research facilities may be undertaken. To the contrary, R.C. 5507.03(J) expressly delineates the authority of the Board with respect to such projects. A comparison of R.C. 5507.03(J) with analogous provisions in R.C. Chapter 153 indicates a conflict with respect to several specific items. For example, R.C. 5507.03(J)(1) requires the Board to competitively bid contracts or agreements involving an expenditure of more than two thousand dollars. Pursuant to R.C. 153.02 and R.C. 153.03, there must be competitive bidding if the contract involves an expenditure of more than one thousand dollars. In order to bid a contract, the Board must, pursuant to R.C. 5507.03(J)(1), advertise ". . . for not less than two consecutive weeks in a newspaper of general circulation

in Franklin county, and in such other publications as the board determines" The publication requirement generally applicable to state construction contracts, which is set forth in R.C. 153.07, requires publication ". . . once each week for four consecutive weeks . . . in such newspaper and in such form . . . as the department of administrative services orders." Pursuant to R.C. 5507.03(J)(3), the Transportation Research Board may reject any or all bids. With respect to state construction contracts authorized under R.C. Chapter 153, the rejection of bids is, under R.C. 153.09, subject to the approval of the Department of Administrative Services.

The foregoing illustrations show the existence of conflicts or inconsistencies with respect to several specific items regulating the award of a construction contract under R.C. 5507.03 as compared to the award of similar contracts pursuant to R.C. Chapter 153. Of more general significance to the questions you have raised, however, are the following provisions set forth in R.C. 5507.03(J)(1):

When the cost under any such contract or agreement other than compensation for personal services, involves an expenditure of more than two thousand dollars, the board shall make a written contract with the lowest and best bidder . . . provided, that a contract or lease for a transportation research project or facility constructed and owned by the board or an agreement for cooperation in the acquisition or construction of a transportation research project or facility or any contract for the construction of a transportation research project or facility that is to be leased by the board to persons or governmental agencies and the cost of such project or facility is to be amortized exclusively from rentals or other charges paid to the board by said persons or governmental agencies is not subject to the foregoing requirements and the board may enter into such contract, lease, or agreement pursuant to negotiation and upon such terms and conditions and for such period as it finds to be reasonable and proper in the circumstances and in the best interests of proper operation of or efficient acquisition or construction of such project or facility. (Emphasis added.)

Pursuant to the provisions of this statute, the Board is exempt from the competitive bidding requirements imposed therein when it undertakes certain contracts, leases or agreements relating to the construction or acquisition of transportation research facilities. Included among the types of agreements exempted from the competitive bidding requirements is ". . . an agreement for cooperation in the acquisition or construction of a transportation research project or facility" In my opinion, the proposed agreement described in your request falls within this general class. It is, therefore, exempt from the competitive bidding requirements imposed by R.C. 5507.03(J).

In addition, R.C. 5507.03(J)(1) authorizes the Board to enter into an agreement for cooperation in the acquisition or construction of a transportation research project or facility ". . . pursuant to negotiation and upon such terms and conditions . . . as it finds to be reasonable" Limiting the power of the Board to execute such agreements by requiring conformance with the procedures generally followed by state agencies in the construction of state facilities would conflict with this general provision, which confers upon the Board discretionary authority to negotiate such agreements. It is, therefore, my opinion that the Board may negotiate the terms and conditions of the proposed agreement and in doing so need not follow the procedures generally applicable to state construction contracts.

In specific response to your questions, it is, therefore, my opinion, and you are advised, that:

- 1) The Transportation Research Board of Ohio may lease land located at the Transportation Research Center to a private corporation, solely for purposes consistent with R.C. Chapter 5507, for a nominal sum, under a lease which provides that the corporation will construct and operate transportation research buildings or facilities on such land.
- 2) The corporation may construct transportation research buildings or facilities upon land leased to it by the Transportation Research Board of Ohio, subject to such terms and conditions as the Board deems reasonable and proper. The construction of such buildings and facilities need not be in accordance with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies.