

**OPINION NO. 72-051****Syllabus:**

1. A board of library trustees may sell the real estate which is now owns.

2. The bidding requirements of Section 3375.41, Revised Code, apply to an arrangement by which a library board of trustees seeks to sell real estate to a contractor, who is to erect a building thereon according to plans and specifications provided by the board, and who will sell the completed building back to the board, even though the board has no legal commitment to buy the building.

3. The statute does not require voter approval on the type of activity proposed.

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To: Daniel T. Spitler, Wood County Pros. Atty., Bowling Green, Ohio  
By: William J. Brown, Attorney General, June 23, 1972

Your request for my opinion sets forth the following proposal for the construction of a county public library:

"The Board would sell at its fair market value, the property which it presently owns to a developer (the developer is in the general contracting business), which would thereafter construct a building in accordance with plans and specifications previously approved by the Board. This would be the extent of the Board's involvement in the construction process. The developer alone would contract for the demolition of existing buildings and the construction of the new facility. Similarly, all subcontractors and materialmen would be paid directly by the developer from its own resources.

"Upon completion of construction, the land and building would be offered for sale and the Library Board could purchase the facility (under a land contract or otherwise), but it would be under no legal obligation to do so."

The questions you advance on the basis of the above facts may be stated as follows:

"1. Whether, under the facts set forth, the Board of Library Trustees can lawfully sell the parcel or property which it now owns and subsequently, enter into a contract for the purchase (under a land contract or otherwise) of a building constructed on the previously transferred parcel?

"2. Whether a County Board of Library Trustees, which intends to purchase a building to be used as a main library, must, under any circumstances, follow the procedure outlined in Section 3375.41 of the Revised Code?

"3. Whether the entire matter must be submitted to the electorate for approval?"

The pertinent powers of a board of library trustees are set forth in Sections 3375.33 and 3375.40, Revised Code, and are qualified by Section 3375.41, Revised Code.

The board's authority to sell property is granted by Section 3375.33, supra, which states that:

"The boards of library trustees appointed pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22, and 3375.30 of the Revised Code are bodies politic and corporate, and as

such are capable of suing and being sued, contracting, acquiring, holding, possessing, and disposing of real and personal property, and of exercising such other powers and privileges as are conferred upon them by law."

This Section contains no language requiring the taking of bids when selling property; nor is there any language that would limit the board to the disposal of surplus property only. Therefore, it appears that a board of library trustees of a county library district has broad discretion in determining how and when it can sell its real property. This view has been recognized in Drury's Ohio School Guide (3rd ed.), Section 9.04, at page 237, and is consistent with the holding in Miller v. Akron Public Library, 60 Ohio L. Abs. 364 (1951).

As to the second part of the two-step library acquisition program, to take place at a later date, the proposal calls for the board of trustees to purchase the new library building which is to be erected on the property previously sold to the developer. The powers of library boards of trustees to purchase property are set out in Section 3375.40, supra, which provides in part as follows:

"Each board of library trustees appointed pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22, and 3375.30 of the Revised Code may:

" \* \* \* \* \*

"(C) Purchase or lease buildings or parts of buildings and other real property and purchase automobiles and other personal property necessary for the proper maintenance and operation of the free public libraries under its jurisdiction and pay the purchase price therefor in installments or otherwise;

"(D) Purchase, lease, lease with an option to purchase, or erect buildings or parts of buildings to be used as main libraries, branch libraries, or library stations pursuant to section 3375.41 of the Revised Code;

" \* \* \* \* \*

(Emphasis added.)

In order to give meaning to both Subsections (C) and (D) of Section 3375.40, supra, Subsection (C) should be read as applying to the acquisition of property incidental to the operation of a library, whereas Subsection (D) grants authority to acquire and construct buildings to be used as main libraries, branches and stations.

Since the current proposal contemplates the acquisition of a main library facility, it is the authority granted in Section 3375.40 (D), supra, that is controlling. This Subsection contains specific reference to the restrictions of Section 3375.41, supra, which states that:

"When a board of library trustees appointed

pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22, and 3375.30 of the Revised Code determines to build, repair, or enlarge a library or make any improvements or repairs, the cost of which will exceed five thousand dollars, except in cases of urgent necessity or for the security and protection of library property, it must proceed as follows:

"(A) The board shall advertise for a period of four weeks for bids in some newspaper of general circulation in the district and if there are two such papers, the board shall advertise in both of them. If no newspaper has a general circulation in the district, the board shall advertise by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk on the record of proceedings of the board.

"(B) The sealed bids must be filed with the clerk by twelve noon of the last day stated in the advertisement.

"(C) The bids shall be opened at the next meeting of the board, shall be publicly read by the clerk, and shall be entered in full on the records of the board; provided, that the board may by resolution provide for the public opening and reading of such bids by the clerk, immediately after the time for filing such bids has expired, at the usual place of meeting of the board, and for the tabulation of such bids and a report of such tabulation to the board at its next meeting.

"(D) Each bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check upon a solvent bank, as the board requires, payable to the order of the board, in an amount to be fixed by the board or by an officer designated for such purpose by it. Such bond or check shall be in no case less than five per cent of the amount of the bid and conditioned that if the bid is accepted a contract will be entered into and the performance of it properly secured.

"(E) When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

"(F) None but the lowest responsible bid shall be accepted. The board may reject all the bids or accept any bid for both labor and material for such improvement or repair which is the lowest in the aggregate.

"(G) The contract must be between the board and the bidders. The board shall pay the contract price for the work in cash at the times and in the amounts as provided by sections 153.46, 153.47, and 153.48 of the Revised Code.

"(H) When two or more bids are equal, in whole or in part, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

"(I) When there is reason to believe there is collusion or combination among the bidders, the bids of those concerned in such collusion or combination shall be rejected." (Emphasis added.)

Although Section 3375.41, supra, is a qualification of the authority granted in Section 3375.40 (D), supra, it does not follow that bidding is required for all activities authorized by Section 3375.40 (D), supra. On the contrary, the language of Section 3375.41, supra, indicates a more limited application, with bidding required only where the board has determined to "build, repair, or enlarge a library, or make any improvements or repairs, the cost of which will exceed \$5,000." Thus, a board, in deciding to purchase a building which has already been constructed, need not follow the procedure outlined in Section 3375.41, supra. It would appear possible, then, that each of the transactions you propose would, if viewed individually, be possible without compliance with the bidding procedure.

However, in applying Sections 3375.40 and 3375.41, supra, to the proposal you have advanced, it is necessary to consider both the purposes of the bidding requirements, and the possibility that the court, in attempting to give effect to these purposes, would ignore the individualized steps of the building plan and treat it simply as a unitary arrangement for the construction of a library. It should be noted that the language of Section 3375.41, supra, when read in conjunction with Section 3375.40 (D), supra, makes it clear that the bidding requirements apply not only to contracts for the construction of a building, but also to contracts for the purchase or lease of a building to be constructed. The chief characteristic of all these arrangements is that they involve buildings to be constructed in the future.

With this in mind, I would refer you to the purpose of competitive bidding as they are described in 43 Am. Jur. at page 767:

"The purpose of the provisions so generally found in Constitutions, statutes, city charters, and ordinances requiring that contracts with public authorities be let only after competitive bidding are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies, to protect the public from collusive contracts, to prevent favoritism, fraud, extravagance, and improvidence in the procurement of

these things for the use of the state and its local self-governing subdivisions, and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers."

In light of the language used in the pertinent Sections, it appears that Section 3375.41, *supra*, is an attempt by the legislature to realize these benefits in cases where a library board of trustees is directly involved in planning the construction of a building for which it will, by one method or another, be paying.

Where an attempt is made to evade these requirements, the following rule of conduct is recognized in 43 Am. Jur. at page 768:

"Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold."

This rule has been applied in an Ohio case where an attempt was made to avoid the bidding requirement for a project involving more than the statutory limit by splitting into parts what should have been regarded as one contract. In *State, ex rel. Kuhn v. Smith*, 92 Ohio L. Abs. 527, 25 Ohio Op. 2d 203 (1963), the court stated: "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."

While there are no reported cases in point regarding your proposal, the rationale employed in the general rule seems quite applicable to your proposed arrangement. It would be evident, to even the casual observer, that this is a unified plan under which a general contractor is erecting a library building according to plans and specifications provided by the library board, and that purchase of the completed building is merely the final step of the arrangement.

The fact that there is no binding commitment extant between the sale of the land and the purchase of the building is hardly sufficient to justify separate treatment of the individual transactions, since the library board is, and would continue to be, involved in the construction by virtue of having provided the property, plans and specifications for the building; and it is this involvement which requires compliance with bidding procedure. Consequently, adherence to the bidding procedure

established by Section 3375.41, supra, would seem essential in the event that you choose to undertake your current proposal. Miller v. Akron Public Library, 60 Ohio L. Abs. 364 (1951), contains rather specific language concerning the bidding requirement. The court noted past conflicting opinions as to whether bidding was required, but held that since bidding was not mentioned in the newly enacted 1957 legislation, it was not required. The court quoted, at page 368, Section 7630, General Code, defining the powers of boards, which then read as follows:

"4. To purchase, lease or erect buildings or parts of buildings to be used as main libraries, branch libraries or library service."

Please compare the above quoted Section with our present Section 3375.40 (D), supra, which specifically mentions Section 3375.41, supra, which establishes a mandatory bidding requirement and procedure.

Additional matters which must be considered are mentioned in Drury's Ohio School Guide (3rd ed.), Chapter 9, Section 9.05, specifically. See also State, ex rel. Kuhn v. Smith, supra, at pages 527 and 535.

A case presently pending in the Supreme Court, State, ex rel. Kitchen v. Christman (No. 71-474), argued December 15, 1971, involved a municipal corporation and a swimming pool acquisition plan. It can be distinguished in that the municipality enacted an ordinance embodying the plan, the ordinance being enacted under Article XVIII, Section 4, Ohio Constitution, and, arguably, an alternative to Section 721.03, Revised Code. A board of library trustees has no similar argument of avoidance as to Section 3375.41, supra.

Your final question concerns the need to submit the entire matter to the electorate for approval. While there are certain activities which require voter approval, such as the issuance of bonds and notes pursuant to Section 3375.24 Revised Code, there are no such requirements placed on the type of activity you propose. On the contrary, Sections 3375.40 and 3375.41, supra, which are in point, make no such qualification on the grant of authority, though Section 3375.41, supra, does impose a bidding requirement.

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

1. A board of library trustees may sell the real estate which it now owns.

2. The bidding requirements of Section 3375.41, Revised Code, apply to an arrangement by which a library board of trustees seeks to sell real estate to a contractor, who is to erect a building thereon according to plans and specifications provided by the board, and who will sell the completed building back to the board, even though the board has no legal commitment to buy the building.

3. The statute does not require voter approval on the type of activity proposed.