

OPINION NO. 90-051**Syllabus:**

1. Pursuant to R.C. 307.88(B), the board of county commissioners, by unanimous vote of the entire board, may permit a contracting authority to exempt a bid on a contract for a portion of the work in the construction of a public improvement from the requirement of a performance bond if the estimated cost of the contract is in excess of \$10,000 but less than \$25,000.
2. Pursuant to R.C. 307.88, a performance bond is not required on a contract pursuant to R.C. 307.86 to 307.92 for the construction,

demolition, alteration, repair or reconstruction of an improvement where the amount of the bid is less than \$10,000.

To: William R. Swigart, Fulton County Prosecuting Attorney, Wauseon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 13, 1990

You have requested my opinion on the following questions:¹

1. May a board of county commissioners, pursuant to R.C. 307.88(B), exempt a bid on a contract for a portion of the work in the construction of a public improvement project from the requirement of a performance bond if the estimated cost of the contract is in excess of \$10,000 but less than \$25,000?
2. Is a performance bond on a contract pursuant to R.C. 307.86 to 307.92 for the construction, demolition, alteration, repair or reconstruction of a public improvement required where the amount of the bid is less than \$10,000?

As a preliminary matter, I note that you have indicated that by use of the term "performance bond" you mean a bond which indemnifies the county or other contracting authority² against damage occasioned by the contractor's failure to fully perform a contract according to its terms and which guarantees the payment of subcontractors, materialmen, and laborers for labor performed or material furnished in pursuance of the contract. For purposes of this opinion, therefore, the term "performance bond" will refer to this type of bond.

In order to answer your questions, I must first examine R.C. 153.54, which concerns bids for public improvement contracts. In general, R.C. Chapter 153 sets forth the various procedural requirements which govern the award of contracts for the construction, reconstruction, alteration, and repair of state and county buildings and various other public improvements. 1987 Op. Att'y Gen. No. 87-079. With respect to your question in particular, R.C. 153.54 requires, *inter alia*, that "[e]ach person bidding for a contract with the state or any political subdivision, district, institution, or other agency thereof, excluding therefrom the department of transportation, for the construction, demolition, alteration, repair, or reconstruction of any public improvement is required to file with his bid a bid guaranty...." R.C. 153.54(A). The bid guaranty may be filed in either of two forms. It may take the form of a bond in accordance with division (B) of R.C. 153.54 for the full amount of the bid. Division (B) requires that such bond be conditioned to provide that, if the bid is accepted, the bidder will enter into a proper contract in accordance with the bid and project specifications and, further, that such bond be conditioned to indemnify the state, political subdivision, district, institution, or agency against all damage occasioned by the bidder's failure "to perform the contract according to its provisions and in accordance with the plans, details, specifications, and bills of material therefor and to pay all lawful claims of subcontractors, materialmen, and laborers for labor performed or material furnished in carrying forward, performing, or completing the contract...." R.C. 153.54(B)(2).

The alternative form of bid guaranty is a certified check, cashier's check, or letter of credit (pursuant to R.C. Chapter 1305) in an amount equal to ten per cent of the bid and in accordance with division (C) of R.C. 153.54. R.C. 153.54(A)(2). R.C. 153.54(C) requires that the certified check, cashier's check or letter of credit

¹ With your concurrence, I have reworded your questions for ease of analysis.

² "Contracting authority" is defined, for purposes of R.C. 307.86 to 307.91, as "any board, department, commission, authority, trustee, official, administrator, agent, or individual which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office or board thereof." R.C. 307.92.

"shall be conditioned to provide that if the bid is accepted, the bidder will, after the awarding or the recommendation for the award of the contract...enter into a proper contract in accordance with the bid, plans, details, specifications, and bills of material." Division (C) also provides that if the bidder enters into the contract, he shall at that time file, in the amount of the contract, a bond which indemnifies the governmental entity with respect to full performance of the contract and guarantees payment of all lawful claims in the same manner as the bond required by R.C. 153.54(B). Thus, the bond required by 153.54(C) is a performance bond, and the bond required by R.C. 153.54(B) is also, *inter alia*, a performance bond.

While R.C. 153.54 is concerned with all bids for contracts for public improvements (except contracts of the department of transportation), R.C. 307.88 only applies to bids submitted pursuant to sections 307.86 to 307.92 of the Revised Code. In general, R.C. 307.86 to 307.92 regulate purchases, leases and other contracts exceeding ten thousand dollars that are made by a county or any person or entity "which has the authority to contract for or on behalf of the county or any agency, department, authority, commission, office or board thereof." R.C. 307.92 (defining "contracting authority" with respect to a county). R.C. 307.88 sets forth the requirements of bids submitted pursuant to sections 307.86 to 307.92 of the Revised Code:

(A) Bids submitted pursuant to sections 307.86 to 307.92 of the Revised Code shall be in a form prescribed by the contracting authority and filed in a sealed envelope at the time and place mentioned in the advertisement. The bids received shall be opened and tabulated at the time stated in the notice. Each bid shall contain the full name of each person submitting the bid. Except as otherwise provided in division (B) of this section, if the bid is in excess of ten thousand dollars and for a contract for the construction, demolition, alteration, repair, or reconstruction of an improvement, it shall meet the requirements of section 153.54 of the Revised Code. If the bid is in excess of ten thousand dollars and for any other contract authorized by sections 307.86 to 307.92 of the Revised Code, it shall be accompanied by a bond or certified check, cashier's check, or money order on a solvent bank or savings and loan association in a reasonable amount stated in the advertisement but not to exceed five per cent of the bid, conditioned that he shall, if his bid is accepted, execute a contract in conformity to the invitation and his bid.

(B) The board of county commissioners may, by a unanimous vote of the entire board, permit a contracting authority to exempt a bid from any or all of the requirements of section 153.54 of the Revised Code if the estimated cost is less than twenty-five thousand dollars. If the board exempts a bid from any but not all of these requirements, the bid notice published in the newspaper pursuant to section 307.87 of the Revised Code shall state the specific bid guaranty requirements that apply. If the board exempts a bid from all requirements of section 153.54 of the Revised Code, the notice shall state that none of the requirements of that section apply.

Thus, a bid in excess of ten thousand dollars and for a contract for the construction, demolition, alteration, repair, or reconstruction of an improvement must meet the requirements of R.C. 153.54 unless the provisions of division (B) are applicable. Division (B) permits the board of county commissioners to allow a contracting authority to exempt a bid from any or all of the requirements of R.C. 153.54 if the estimated cost of the contract is less than twenty-five thousand dollars.

As discussed previously, a performance bond is among the requirements of R.C. 153.54. R.C. 153.54(B) and (C). R.C. 307.88(B) permits the board of county commissioners, by unanimous vote of the entire board, to allow a contracting authority³ to exempt a bid in excess of ten thousand dollars for the construction,

³ Pursuant to R.C. 307.92, the board of county commissioners may itself be the "contracting authority."

demolition, alteration, repair or reconstruction of an improvement from any or all of the requirements of R.C. 153.54 if the estimated cost of the contract is less than twenty-five thousand dollars. Thus, I conclude that the board of county commissioners may permit a contracting authority to exempt a bid in excess of ten thousand dollars for the construction, demolition, alteration, repair or reconstruction of an improvement from the requirement of a performance bond if the estimated cost of the contract is less than twenty-five thousand dollars.

Your second question asks whether a performance bond on a contract pursuant to R.C. 307.86 to 307.92 for the construction, demolition, alteration, repair or reconstruction of a public improvement is required where the amount of the bid is less than ten thousand dollars. As I noted above, R.C. 307.88, which regulates bids submitted pursuant to R.C. 307.86 to 307.92, requires that a bid in excess of ten thousand dollars for a contract for the construction, demolition, alteration, repair or reconstruction of an improvement must meet the requirements of R.C. 153.54, which requirements include a performance bond, unless the exception contained in division (B) of R.C. 307.88 is applicable. However, R.C. 307.88 does not contain a similar requirement for such bids which are less than ten thousand dollars. The general rule of statutory construction known as *expressio unius est exclusio alterius* holds that the naming of a specific class implies the exclusion of those not named. *Craftsman Type Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983); *Kroger v. Bowers*, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965). Application of such rule to R.C. 307.88 leads to the conclusion that only bids submitted pursuant to R.C. 307.86 to 307.92 which are in excess of ten thousand dollars and for the construction, demolition, alteration, repair or reconstruction of any public improvement must meet the requirements of R.C. 153.54; such bids which are ten thousand dollars or less need not meet the requirements of R.C. 153.54.

R.C. 153.54 itself, however, contains language which is broad enough to include any bid, regardless of the amount, for a contract with any political subdivision for the construction, demolition, alteration, repair or reconstruction of any public improvement. Thus, an apparent conflict exists between R.C. 307.88 and R.C. 153.54.

In order to determine the intention of the legislature with respect to these statutes and to resolve the conflict between them, it is useful to examine their legislative histories. R.C. 153.54 was enacted by Amended Senate Bill 157, 1979-1980 Ohio Laws, Part I, 414 (eff. August 1, 1980). The purpose of Am. S.B. 157 was, in part, "to establish uniformity in the bid guaranties for all public improvement projects except those of the Department of Transportation." (Preamble to Am. S.B. 157). As enacted by Am. S.B. 157, the requirements of R.C. 153.54 apply to "[e]ach person bidding for a contract with the state or any political subdivision...excluding therefrom the department of transportation, for the construction, demolition, alteration, repair, or reconstruction of any public improvement...." R.C. 153.54(A).

In addition to the enactment of R.C. 153.54, Am. S.B. 157 amended several statutes that regulate competitive bidding, including R.C. 307.88 and 307.89. Prior to its amendment, R.C. 307.88 provided as follows:

Bids submitted pursuant to sections 307.86 to 307.92, inclusive, of the Revised Code shall be in a form prescribed by the contracting authority and filed in a sealed envelope at the time and place mentioned in the advertisement. The bids received shall be opened and tabulated at the time stated in the notice. Each bid shall contain the full name of each person or company submitting the bid. If the bid is in excess of six thousand dollars⁴ it shall be accompanied by a bond or certified check on a solvent bank in a reasonable amount stated in the advertisement but not to exceed five per cent of the bid, conditioned that he shall, if his bid is accepted, execute a contract in conformity to the invitation and his bid.

⁴ The six thousand dollar limit was amended to ten thousand dollars in 1987. 1987-1988 Ohio Laws, Part II, 2042 (Am. H.B. 59, eff. Oct. 1, 1987).

1967-1968 Ohio Laws, Part II, 2623 (H.B. 428, eff. December 9, 1967). This version of R.C. 307.88, thus, required a bond to guarantee the execution of a contract upon the acceptance of a bid, but did not require a performance bond. However, prior to its amendment by Am. S.B. 157, R.C. 307.89 required a performance bond⁵ for all contracts for the construction, erection, alteration or repair of public improvements. Thus, Am. S.B. 157 removed from R.C. 307.89 the provision for a performance bond for such contracts and amended R.C. 307.88 to provide that bids in excess of six thousand (now ten thousand) dollars for such contracts must meet the requirements of R.C. 153.54. Since one of the requirements of R.C. 153.54 is a performance bond, the effect of Am. S.B. 157 was to require a performance bond when a bid submitted pursuant to R.C. 307.86 to 307.92 exceeded six thousand (now ten thousand) dollars.

Am. S.B. 157, therefore, enacted a general law, R.C. 153.54, to provide uniformity with respect to bid guaranties for public improvement contracts, except those of the Department of Transportation. Additionally, Am. S.B. 157 amended, *inter alia*, R.C. 307.88 and R.C. 307.89, which sections specifically provide for bids submitted pursuant to R.C. 307.86 to 307.92. Although R.C. 153.54 was enacted and R.C. 307.88 was amended by the same bill, R.C. 307.88 and R.C. 153.54 are irreconcilable to the extent that R.C. 307.88 excepts from the requirements of R.C. 153.54 bids less than ten thousand dollars which are submitted pursuant to R.C. 307.86 to 307.92 for contracts for the construction, demolition, alteration, repair and reconstruction of improvements. R.C. 153.54, however, includes such bids within its operation. R.C. 307.88 is a special provision as it is limited to bids submitted pursuant to R.C. 307.86 to 307.92. Since R.C. 153.54 and the amendments to R.C. 307.88 were enacted concurrently, the special provisions of R.C. 307.88 must prevail over the general provisions of R.C. 153.54 to the extent that they conflict. R.C. 1.51; *State ex rel. Myers v. Chiaramonte*, 46 Ohio St. 2d 230, 348 N.E.2d 323 (1976). Therefore, a bid submitted pursuant to R.C. 307.86 to 307.92 that is less than ten thousand dollars and for a contract for the construction, demolition, alteration, repair or reconstruction of an improvement need not meet the requirements of R.C. 153.54 and, thus, no performance bond is required for a contract awarded pursuant to such a bid. This finding is compelled, moreover, by the fact that the General Assembly made specific changes to the language of R.C. 307.88 when it enacted Am. S.B. 157. Had the legislature intended to amend R.C. 307.88 to require that bids of less than ten thousand dollars meet the requirements of R.C. 153.54, such amendment could have been enacted.

Accordingly, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 307.88(B), the board of county commissioners, by unanimous vote of the entire board, may permit a contracting authority to exempt a bid on a contract for a portion of the work in the construction of a public improvement from the requirement of a performance bond if the estimated cost of the contract is in excess of \$10,000 but less than \$25,000.
2. Pursuant to R.C. 307.88, a performance bond is not required on a contract pursuant to R.C. 307.86 to 307.92 for the construction, demolition, alteration, repair or reconstruction of an improvement where the amount of the bid is less than \$10,000.

⁵ The bond required by R.C. 307.89 prior to its amendment was the bond set forth in R.C. 153.57, which was substantially the same as its present form. See 1917 Ohio Laws 643 (S.B. 39, approved Mar. 30, 1917) (as G.C. 2365-4, subsequently recodified as R.C. 153.57, 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953)).