

October 18, 2012

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

SYLLABUS:

2012-036

1. A competitive bid submitted to a county contracting authority under R.C. 307.86-.92 is an offer to enter into a public contract with the contracting authority at the specific price and terms stated in the bid.
2. A competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 is an offer to enter into discussions and negotiations with the contracting authority for a public contract.
3. Pursuant to R.C. 307.862(C), information in a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the contract is awarded, unless the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1) and is redacted from the proposal by the contracting authority.
4. Pursuant to R.C. 307.87 and R.C. 307.88, information in a competitive bid submitted to a county contracting authority under R.C. 307.86-.92 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the bid is opened by the contracting authority, unless the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1) and is redacted from the bid by the contracting authority.



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OPINION NO. 2012-036

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

Dear Prosecutor Collins:

You have requested an opinion concerning several aspects of the competitive selection process for awarding county contracts under R.C. 307.86-.92. Specifically, you ask:

1. What is the difference between a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 and a competitive bid submitted to a county contracting authority under R.C. 307.86-.92?
2. When do competitive sealed proposals submitted to a county contracting authority pursuant to R.C. 307.862 and competitive bids submitted to a county contracting authority under R.C. 307.86-.92 become public records that must be made available for public inspection and copying under R.C. 149.43?

Authority of a County Contracting Authority to Receive Competitive Bids

R.C. 307.86 declares that, except as otherwise provided by law, “[a]nything to be purchased, leased, leased with an option or agreement to purchase, or constructed, ... by or on behalf of the county or contracting authority ... at a cost in excess of fifty thousand dollars” must be obtained through competitive bidding.¹ *See also* R.C. 307.861 (before renewing a lease “for electronic data processing equipment, services, or systems, or a radio communications system at a cost in excess of fifty thousand dollars,” a county contracting authority must advertise and receive competitive bids for “a lease under the same terms and for the same period as provided in the bid of the lessor”). A county contracting authority uses the competitive bidding process “to provide a fair and honest process for the awarding of public contracts.” *Rein Constr. Co. v. Trumbull County Bd. of Comm’rs*, 138 Ohio App.

¹ As used in R.C. 307.86-.91, a “contracting authority” is “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.

3d 622, 630, 741 N.E.2d 979 (Trumbull County 2000); *see* 2012 Op. Att’y Gen. No. 2012-031, slip op. at 2-3; 2005 Op. Att’y Gen. No. 2005-029 at 2-299 and 2-300.

When a county contracting authority is required to award a public contract through competitive bidding under R.C. 307.86, the contracting authority must provide notice thereof to the public in the manner set forth in R.C. 307.87. 2012 Op. Att’y Gen. No. 2012-031, slip op. at 2; *see* 2005 Op. Att’y Gen. No. 2005-029 at 2-299. The notice must include certain statutorily prescribed information, such as a description of the subject of the proposed contract, the time and place for filing and opening bids, the location where specifications can be obtained, the terms of the proposed purchase, and the existence of any system of preferences for products mined and produced in Ohio and the United States. R.C. 307.87(B); *see* 2005 Op. Att’y Gen. No. 2005-029 at 2-299. The notice required by R.C. 307.87 thus serves as an invitation by a county contracting authority to receive bids for a public contract. *See* R.C. 307.87(B); R.C. 307.88(A).

If a person agrees to the terms set forth in a notice, the person may submit to the county contracting authority a bid for the public contract described in the notice. *See* R.C. 307.87(B)(3); R.C. 307.88(A). The bid must be in the form prescribed by the county contracting authority and, if required, meet the requirements of R.C. 153.54:²

Bids submitted pursuant to [R.C. 307.86-.92] shall be in a form prescribed by the contracting authority and filed in the manner and at the time and place mentioned in the notice. 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. If the bid is in excess of fifty thousand dollars and for a contract for the construction, demolition, alteration, repair, or reconstruction of an improvement, it shall meet the requirements of [R.C. 153.54]. If the bid is in excess of fifty thousand dollars and for any other contract authorized by [R.C. 307.86-.92], it may 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 notice but not to exceed five per cent of the bid, conditioned that the bidder, if the bidder’s bid is accepted, shall execute a contract in conformity to the invitation and the bid.

R.C. 307.88(A).

A person who submits a bid to a county contracting authority for a public contract may have his bid accepted if it is the “lowest and best” bid and may be awarded the public contract at the

² Except as provided in R.C. 307.88, R.C. 9.334, and R.C. 153.693, a person submitting a bid to a county contracting authority for a public contract is required to file a bid guaranty with his bid. R.C. 153.54.

specific price and terms stated in the person's bid.³ R.C. 307.90(A); *see Cocca Dev. LTD v. Mahoning County Bd. of Comm'rs*, Case No. 08 MA 163, 2010-Ohio-3166, 2010 Ohio App. LEXIS 2643, ¶45 (Mahoning County); *see also* R.C. 153.54(D) (setting forth the penalties when a county contracting authority "accepts a bid but the bidder fails or refuses to enter into a proper contract in accordance with the bid, plans, details, and specifications within ten days after the awarding of the contract"); R.C. 307.89 ("[w]hen a bid is accepted for a contract other than for the construction, demolition, alteration, repair, or reconstruction of an improvement, the contracting authority shall, as a condition to entering a contract with the successful bidder, require faithful performance of all things to be done under the contract and may require, as a condition to entering a purchase contract, lease, or lease with option or agreement to purchase, the bond provided for by [R.C. 153.57], with good and sufficient surety in an amount not to exceed the amount of the bid").

Pursuant to the language of R.C. 307.88 and R.C. 307.90, therefore, a competitive bid submitted to a county contracting authority under R.C. 307.86-92 is an offer to enter into a public contract with the contracting authority at the specific price and terms stated in the bid. *See* R.C. 9.31 (in certain circumstances a bidder for a contract with a county contracting authority "may withdraw his bid from consideration if the price bid was substantially lower than the other bids"); *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 600, 653 N.E.2d 646 (1995) (as recognized by the court of appeals in this case, "[n]egotiating material aspects of contracts after the bid opening is violative of the sanctity and integrity of competitive bidding" (internal quotation marks omitted)); *Chillicothe City Sch. Dist. Bd. of Educ. v. Sever-Williams Co.*, 22 Ohio St. 2d 107, 258 N.E.2d 605 (1970) (syllabus, paragraph 3) ("[t]he possible abuses of amending or changing bids after a formal opening of sealed bids ... endangers the sanctity of sealed bids"); *Rein Constr. Co. v. Trumbull County Bd. of Comm'rs*, 138 Ohio App. 3d at 630 ("[a]llowing one party to amend or change its bid after all proposals have been formally opened endangers the sanctity of the sealed bid process"); *Roth Produce Co. v. Ohio Dep't of Admin. Servs.*, 160 Ohio Misc. 2d 117, 2010-Ohio-6393, 940 N.E.2d 672, ¶15 (C.P. Franklin County) ("[n]egotiating material aspects of a contract after a bid opening may violate the integrity of competitive bidding"); *Black's Law Dictionary* 183 (9th ed. 2009) (a "bid" is "[a] submitted price at which one will perform work or supply goods.... **competitive bid.** A bid submitted in response to public notice of an intended sale or purchase"). *See generally Greater Cincinnati Plumbers Contractors' Ass'n v. City of Blue Ash*, 106 Ohio App. 3d 608, 614, 666 N.E.2d 654 (Hamilton County 1995) (the use of "design-build bidding" constitutes competitive bidding since contractors "compete with each other in terms of price and design. Factors such as quality, service, performance and record are also part of the competitive process. The city's discretion in awarding a contract to the best design and cost is similar to the discretion provided under general state law to accept the 'lowest and best bidder'").

³ R.C. 9.312(C) states that a county contracting authority "required by law to award contracts by competitive bidding may by ordinance or resolution adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder." A county contracting authority may also "reject all bids." R.C. 307.90(A).

Authority of a County Contracting Authority to Accept Competitive Sealed Proposals

In contrast to the competitive bidding process described in R.C. 307.86-.92, the competitive sealed proposal process set forth in R.C. 307.862 is more open.⁴ See 2005 Op. Att’y Gen. No. 2005-029 at 2-305 (request for proposals or negotiated contract is a more open selection process than competitive bidding). See generally 2006 Op. Att’y Gen. No. 2006-027 at 2-239 n.4 (“[t]he term ‘competitive bidding’ refers to a strict procedure of providing public notice and then accepting bids for specified goods or defined services”). As explained above, when a public contract is awarded through competitive bidding, a county contracting authority is required to either accept or reject the specific price and terms stated in a bid. The county contracting authority may not enter into discussions or negotiations with a person who submits a bid to amend or change the price or terms of the person’s bid. See *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d at 600-01; *Chillicothe City Sch. Bd. of Educ. v. Sever-Williams Co.*, 22 Ohio St. 2d 107 (syllabus, paragraph 3); *Rein Constr. Co. v. Trumbull County Bd. of Comm’rs*, 138 Ohio App. 3d at 630-31; *Roth Produce Co. v. Ohio Dep’t of Admin. Servs.*, 160 Ohio Misc. 2d 117, at ¶15.

In the competitive sealed proposal process, a county contracting authority solicits requests for proposals. See R.C. 307.862(A)(2), (4). A county contracting authority evaluates the proposals, determines which proposal is the most advantageous to the county, and awards a public contract to the

⁴ Competitive bidding is not required under R.C. 307.86-.92 when a “county contracting authority determines that the use of competitive sealed proposals would be advantageous to the county and the contracting authority complies with [R.C. 307.862].” R.C. 307.86(M). See generally *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 600-02, 653 N.E.2d 646 (1995) (recognizing that the request for proposals method of procurement is not competitive bidding); *Cocca Dev. LTD v. Mahoning County Bd. of Comm’rs*, Case No. 08 MA 163, 2010-Ohio-3166, 2010 Ohio App. LEXIS 2643, ¶¶45-53 (Mahoning County) (explaining the difference under Ohio law between traditional competitive bidding and the request for proposals process); *United Brotherhood of Carpenters and Joiners of Am. Union No. 1581 v. Beilharz Architects, Inc.*, Case No. 4-06-07, 2006-Ohio-6925, 2006 Ohio App. LEXIS 6828, ¶16 (Defiance County) (stating that “requesting proposals is a different process than advertising for bids under the competitive bidding statutes”); *Yellow Cab of Cleveland, Inc. v. Greater Cleveland Reg’l Transit Auth.*, 72 Ohio App. 3d 558, 560, 595 N.E.2d 508 (Cuyahoga County 1991) (“[t]he [request for proposals] method [of procurement] is not competitive bidding”); 2012 Op. Att’y Gen. No. 2012-031, slip op. at 1 n.3 (“[i]n lieu of using a competitive bidding process to award a contract, a county contracting authority may use a competitive sealed proposal process to award the contract”). The competitive sealed proposal process set forth in R.C. 307.862 may not, however, be used to award a contract for the “construction, design, demolition, alteration, repair, or reconstruction of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, waterworks,” or other structure or work of any nature by a county contracting authority. R.C. 307.862(G).

person submitting that proposal.⁵ See R.C. 307.862(A)(9), (11); R.C. 307.862(E); see also R.C. 307.862(A)(6) (a county contracting authority that uses the competitive sealed proposal process to award a public contract is required to “[r]ank each proposal using the factors and criteria the contracting authority develops pursuant to division (A)(1) of this section”).⁶ See generally 2006 Op. Att’y Gen. No. 2006-027 at 2-239 n.4 (a qualifications-based competitive selection process for awarding contracts that encourages professional design firms to submit statements of qualifications allows “a certain amount of discretion in the selection of a contractor”).

When evaluating competitive sealed proposals, a county contracting authority is required to do the following:

(7) If necessary, conduct discussions with offerors for the purpose of ensuring full understanding of, and responsiveness to, the requirements specified in the request for proposals, and accord fair and equal treatment with respect to any opportunity for discussion with offerors to provide any clarification, correction, or revision of proposals;

...;

(9) Negotiate with the offeror who submits the proposal that the contracting authority determines is the most advantageous to the county based on the rankings performed by the contracting authority pursuant to division (A)(6) of this section and including any adjustment to those rankings based on discussions conducted pursuant to division (A)(7) of this section;⁷

⁵ R.C. 307.862(F) sets forth the circumstances in which a county contracting authority may cancel or reissue a request for proposals.

⁶ R.C. 307.862(A)(1) requires a county contracting authority that uses the competitive sealed proposal process to award a public contract to “[d]evelop factors and criteria to receive and evaluate each proposal, specify the relative importance of each factor or criterion in writing, and describe the evaluation procedures the contracting authority shall follow when awarding [the] contract to an offeror.” See generally R.C. 307.862(B)(6) (a county contracting authority’s request for proposals must include “[t]he factors and criteria the contracting authority [will] consider in evaluating proposals received”); R.C. 307.862(B)(10)(b) (a county contracting authority’s request for proposals must include a statement “[t]hat the contracting authority reserves the right to reject, in whole or in part, any proposal that the county contracting authority has determined, using the factors and criteria the contracting authority develops pursuant to division (A)(1) of this section, would not be in the best interest of the county”).

⁷ R.C. 307.862(D) provides that, if a county contracting authority “terminates negotiations with an offeror, the contracting authority shall negotiate with the offeror whose proposal is ranked the next most advantageous to the county according to the factors and criteria developed pursuant to division (A)(1) of this section.”

(10) Conduct negotiations with only one offeror at a time[.] (Footnote added.)

R.C. 307.862(A); *see also* R.C. 307.862(D) (a county “contracting authority may terminate negotiations with an offeror at any time during the negotiation process if the offeror fails to provide the necessary information for negotiations in a timely manner or fails to negotiate in good faith”). *See generally* R.C. 307.862(B)(3) (a county contracting authority’s request for proposals must include “[i]nstructions governing communications between an offeror and the contracting authority, including, but not limited to, the name, title, and telephone number of the person to whom questions concerning the request for proposals should be directed”); R.C. 307.862(B)(10)(c) (a county contracting authority’s request for proposals must include a statement “[t]hat the contracting authority may conduct discussions with offerors who submit proposals for the purpose of clarifications or corrections regarding a proposal to ensure full understanding of, and responsiveness to, the requirements specified in the request for proposals”).

R.C. 307.862 establishes a process whereby a person may discuss and negotiate the price and terms of a public contract with a county contracting authority. *See Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d at 600 (the request for proposals process “did not contemplate the execution of a contract based upon a simple acceptance by the [county solid waste management district] of the successful bidder’s original proposal. Rather, the [request for proposals] contemplated an award solely of the opportunity to *further* negotiate to reach a possible contract with the [d]istrict”); *Cocca Dev. LTD v. Mahoning County Bd. of Comm’rs*, 2010-Ohio-3166, at ¶53 (“[i]t is clear from the plain language of the [request for proposals] before us that [the county] contemplated negotiations following the issuance of the [request for proposals]”); *Roth Produce Co. v. Ohio Dep’t of Admin. Servs.*, 160 Ohio Misc. 2d 117, at ¶15 (negotiating material aspects of a contract is perfectly proper in the request for proposals process). *See generally Ohio Ass’n of Consulting Eng’rs v. Voinovich*, 83 Ohio App. 3d 601, 606, 615 N.E.2d 635 (Franklin County 1992) (a “fee proposal does not become the contract price but, rather, as provided in the rules, a contract is later negotiated for a fair and reasonable compensation with the firm finally found to be the most qualified”); 1998 Op. Att’y Gen. No. 98-027 at 2-143 and 2-144 (a “fee proposal is not a competitive bid and does not become the contract price. Rather, the contract is negotiated for a fair and reasonable compensation”). To be considered for a public contract under R.C. 307.862, a person must submit a competitive sealed proposal. *See generally* R.C. 307.862(B)(8) (a county contracting authority’s request for proposals must include “[t]he date and time by which, and the place to which an offeror must deliver the offeror’s proposal to the contracting authority in order to be considered for the contract”). Thus, a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 is an offer to enter into discussions and negotiations with the contracting authority for a public contract.

Application of R.C. 149.43 to Competitive Sealed Proposals and Competitive Bids

Your second question asks when competitive sealed proposals submitted to a county contracting authority pursuant to R.C. 307.862 and competitive bids submitted to a county contracting authority under R.C. 307.86-92 become public records that must be made available for public inspection and copying under R.C. 149.43. Pursuant to R.C. 149.43(B), a public office is required to

make its public records available to any person for inspection at all reasonable times during normal business hours, and, upon request, to make copies of such records, at cost, within a reasonable period of time.

For purposes of R.C. 149.43, the term “public record” includes “records kept by any public office, including ... [a] county” office. R.C. 149.43(A)(1); *see* R.C. 149.011(A) (“[a]s used in [R.C. Chapter 149], except as otherwise provided[,]” the term “public office” means any “political subdivision”); 2012 Op. Att’y Gen. No. 2012-029, slip op. at 15-16 (the common, ordinary meaning of the term “political subdivision” includes counties). Given that a county contracting authority is a board, department, commission, authority, trustee, official, administrator, agent, or individual that 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, a contracting authority is a “public office” that must comply with the inspection and copying requirements of R.C. 149.43(B) with regard to its “records.”⁸ *See generally State ex rel. Strothers v. Wertheim*, 80 Ohio St. 3d 155, 157, 684 N.E.2d 1239 (1997) (the Cuyahoga County Ombudsman Office, which is a private, nonprofit corporation monitoring Cuyahoga County government to ensure accessibility, quality, and effectiveness, “is a ‘public office’ and thus subject to the Public Records Act,” R.C. 149.43); 2011 Op. Att’y Gen. No. 2011-012 at 2-101 (a county board of elections is a public office for purposes of R.C. Chapter 149); 2007 Op. Att’y Gen. No. 2007-042 at 2-421 n.9 (the office of county coroner is a public office for purposes of R.C. Chapter 149); 2007 Op. Att’y Gen. No. 2007-034 at 2-353 (the office of county prosecuting attorney is a public office that is subject to R.C. 149.43); 1999 Op. Att’y Gen. No. 99-006 at 2-36 (a county emergency medical services organization is a public office for purposes of R.C. Chapter 149).

As used in R.C. 149.43, the term “records” means:

⁸ Absent a showing by clear and convincing evidence that a private entity serving as a county contracting authority is the functional equivalent of a public office, the private entity is not subject to the requirements of R.C. 149.43(B). *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d 456, 2006-Ohio-4854, 854 N.E.2d 193. Insofar as a county prosecuting attorney may only advise the board of county commissioners and other county officers and boards, *see* R.C. 309.09(A), we assume for the purpose of this opinion that a private entity serving as a county contracting authority is the functional equivalent of a county office. *See generally* 2012 Op. Att’y Gen. No. 2012-029, slip op. at 9-10 (“[a]t the county government level, the Attorney General may advise ‘the prosecuting attorneys of the several counties respecting their duties in all complaints, suits, and controversies in which the state is, or may be a party.’ R.C. 109.14. Pursuant to R.C. 309.09(A), a prosecuting attorney is the legal adviser of the board of county commissioners and all other county officers and boards. A prosecuting attorney does not, however, have a duty or the authority to determine the legal obligations of a private company that conducts oil and gas drilling operations or operates a wind farm. As a prosecuting attorney may only advise county officers of their statutory obligations, we must limit our analysis of your second question to whether the county must comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-.92, and R.C. 4115.03-.16” (citations omitted)).

any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in [R.C. 1306.01], created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.011(G). Under this definition, if a competitive sealed proposal or competitive bid received by a county contracting authority under R.C. 307.86-92 “serves to document the organization, functions, policies, decisions, procedures, operations, or other activities” of the contracting authority, the proposal or bid is a “record” of the county for purposes of R.C. 149.43 and thus a public record that must be made available for public inspection and copying in accordance with the provisions of R.C. 149.43. *See* 2012 Op. Att’y Gen. No. 2012-028, slip op. at 2.

As explained earlier, when a county contracting authority uses the competitive bid process or competitive sealed proposal process to award a public contract, persons submit bids or proposals, respectively, to the contracting authority. R.C. 307.862; R.C. 307.87; R.C. 307.88. A county contracting authority reviews the bids or proposals and awards the public contract to the person submitting the winning bid or proposal. *See* R.C. 307.862; R.C. 307.90. A bid or proposal submitted to a county contracting authority under R.C. 307.86-92 serves to document the procedure by which the contracting authority awards the public contract, and so the bid or proposal is a “record,” as defined in R.C. 149.011(G), that constitutes a public record that must be made available for public inspection and copying in accordance with the provisions of R.C. 149.43. *See State ex rel. Seballos v. Sch. Emp. Ret. Sys.*, 70 Ohio St. 3d 667, 640 N.E.2d 829 (1994) (a proposal submitted for a public contract is a public record); *Brookville Equip. Corp. v. The Cincinnati Enquirer*, Case No. C-120434, 2012-Ohio-3648, 2012 Ohio App. LEXIS 3251 (Hamilton County) (same as the previous parenthetical); *State ex rel. Watson v. Dir. of the Ohio Dep’t of Rehab. and Corr.*, Case No. 11AP-3, 2011-Ohio-6386, 2011 Ohio App. LEXIS 5253 (Franklin County) (bids or proposals for a public contract received by a state agency are public records); *State ex rel. Fisher v. PRC Pub. Sector, Inc.*, 99 Ohio App. 3d 387, 650 N.E.2d 945 (Franklin County 1994) (a proposal submitted to a state agency for a public contract is a public record). *See generally* 2012 Op. Att’y Gen. No. 2012-028, slip op. at 3-4 (information the Unemployment Compensation Review Commission (UCRC) receives and uses to make determinations in an unemployment compensation appeal serves to document a primary function of the UCRC and is a public record for purposes of R.C. 149.43); 2011 Op. Att’y Gen. No. 2011-012 at 2-101 (“[a] provisional ballot envelope ... serves to document an essential function of a board of elections and the decisions a board makes in determining the validity of a particular provisional ballot” and “is a ‘record’ pursuant to R.C. 149.011(G)”).

Release of Competitive Sealed Proposals and Competitive Bids

Although competitive sealed proposals and competitive bids submitted to a county contracting authority under R.C. 307.86-92 are included within the general definition of the term “public record,” as used in R.C. 149.43, “the General Assembly has excluded from the meaning of ‘public record’ certain types of information, even though they are kept by, and may document the functions of, a

public office.”⁹ 2007 Op. Att’y Gen. No. 2007-026 at 2-272; *see* R.C. 149.43(A)(1). For example, R.C. 149.43(A)(1) provides that the following records are not public records for purposes of R.C. 149.43: medical records, trial preparation records, confidential law enforcement investigatory records, intellectual property records, donor profile records, and records the release of which is prohibited by state or federal law. As a general matter, with the exception of the exemption for “[r]ecords the release of which is prohibited by state or federal law,” R.C. 149.43(A)(1)(v), none of the exceptions established by the General Assembly applies to information that typically will be a part of a proposal or bid submitted to a county contracting authority under R.C. 307.86-92.

The General Assembly has specified when a county contracting authority may make a competitive sealed proposal or competitive bid submitted to it under R.C. 307.86-92 available for public inspection and copying under R.C. 149.43. First, R.C. 307.862(C) states that, with respect to the competitive sealed proposal process, “[i]n order to ensure fair and impartial evaluation, proposals and any documents or other records related to a subsequent negotiation for a final contract that would otherwise be available for public inspection and copying under [R.C. 149.43] *shall not be available until after the award of the contract.*” (Emphasis added.) Thus, a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the contract is awarded.

Pursuant to R.C. 307.87 and R.C. 307.88, competitive bids for a public contract are not opened by a county contracting authority until the time and at the place designated in the notice soliciting bids for the contract. *See* R.C. 9.312(A). In other words, a county contracting authority may not open a bid and make it public until the time and place specified in the public notice provided by the contracting authority. This practice ensures that all bidders or potential bidders have access to the same information regarding the proposed public contract and serves “to provide a fair and honest process for the awarding of public contracts.” *Rein Constr. Co. v. Trumbull County Bd. of Comm’rs*, 138 Ohio App. 3d at 630; *see* 2012 Op. Att’y Gen. No. 2012-031, slip op. at 2-3; 2005 Op. Att’y Gen. No. 2005-029 at 2-299 and 2-300. Accordingly, pursuant to R.C. 307.87 and R.C. 307.88, a

⁹ As observed by one Ohio Attorney General, if “personal information about private citizens in the possession of a public office does not serve ‘to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office,’ R.C. 149.011(G), the information is neither a ‘record’ of that office nor a ‘public record’ of that office for purposes of R.C. 149.43.” 2004 Op. Att’y Gen. No. 2004-045 at 2-391; *accord State ex rel. Beacon Journal Publ’g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002); *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000); *see* 2007 Op. Att’y Gen. No. 2007-026 at 2-271; 2005 Op. Att’y Gen. No. 2005-047. For nearly every circumstance this exception will not apply to competitive sealed proposals and competitive bids submitted to a county contracting authority under R.C. 307.86-92 because the proposals and bids will not contain personal information about private citizens that does not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the county.

competitive bid submitted to a county contracting authority under R.C. 307.86-92 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the bid is opened by the contracting authority.

Information in a competitive sealed proposal or competitive bid submitted to a county contracting authority under R.C. 307.86-92 may contain information “the release of which is prohibited by state or federal law.”¹⁰ R.C. 149.43(A)(1)(v). In such a situation, a county contracting authority is prohibited from releasing the information that is subject to the prohibition set forth in state or federal law. *See* R.C. 149.43(B)(1); 2012 Op. Att’y Gen. No. 2012-028. A county contracting authority must, however, “make available all of the information” in a proposal or bid “that is not exempt.” R.C. 149.43(B)(1). This means that, prior to making a proposal or bid available for public inspection and copying under R.C. 149.43, a county contracting authority must review the proposal or bid and redact from it all information that is prohibited from being released by state or federal law.¹¹ R.C. 149.43(A)(1)(v); R.C. 149.43(B)(1); *see State ex rel. Seballos v. Sch. Emp. Ret. Sys.; Brookville Equip. Corp. v. The Cincinnati Enquirer; State ex rel. Fisher v. PRC Pub. Sector, Inc.; see also State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland*, 63 Ohio St. 3d 772, 591 N.E.2d 708 (1992).

Therefore, in response to your second question, pursuant to R.C. 307.862(C), information in a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862

¹⁰ Ohio courts have determined that the Uniform Trade Secrets Act, R.C. 1333.61-.69, may, in certain circumstances, prevent a county contracting authority from releasing trade secrets that are incorporated into a competitive sealed proposal or competitive bid submitted to the contracting authority under R.C. 307.86-92. *See State ex rel. Seballos v. Sch. Emp. Ret. Sys.*, 70 Ohio St. 3d 667, 640 N.E.2d 829 (1994); *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland*, 63 Ohio St. 3d 772, 591 N.E.2d 708 (1992); *Brookville Equip. Corp. v. The Cincinnati Enquirer*, Case No. C-120434, 2012-Ohio-3648, 2012 Ohio App. LEXIS 3251 (Hamilton County); *State ex rel. Watson v. Dir. of the Ohio Dep’t of Rehab. and Corr.*, Case No. 11AP-3, 2011-Ohio-6386, 2011 Ohio App. LEXIS 5253 (Franklin County); *State ex rel. Fisher v. PRC Pub. Sector, Inc.*, 99 Ohio App. 3d 387, 650 N.E.2d 945 (Franklin County 1994). If a proposal or bid contains information that constitutes a trade secret, the information is not a public record that a county contracting authority may make available for public inspection and copying under R.C. 149.43 unless the submission of the information to the contracting authority constitutes a waiver of the trade secret protection granted by R.C. 1333.61-.69. *See State ex rel. Seballos v. Sch. Emp. Ret. Sys.; State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland; Brookville Equip. Corp. v. The Cincinnati Enquirer; State ex rel. Watson v. Dir. of the Ohio Dep’t of Rehab. and Corr.; State ex rel. Fisher v. PRC Pub. Sector, Inc.*

¹¹ A county contracting authority’s notice that it will receive competitive sealed proposals or competitive bids for a public contract may include a statement that the proposals or bids will be made available for public inspection and copying after the contracting authority has an opportunity to review the proposals or bids and redact from the proposals or bids all information that is prohibited from being released by state or federal law. *See* R.C. 149.43(B)(1); R.C. 307.862; R.C. 307.87.

becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the contract is awarded, unless the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1) and is redacted from the proposal by the contracting authority. Further, pursuant to R.C. 307.87 and R.C. 307.88, information in a competitive bid submitted to a county contracting authority under R.C. 307.86-92 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the bid is opened by the contracting authority, unless the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1) and is redacted from the bid by the contracting authority.¹²

Conclusions

Based on the forgoing, it is my opinion, and you are hereby advised as follows:

1. A competitive bid submitted to a county contracting authority under R.C. 307.86-92 is an offer to enter into a public contract with the contracting authority at the specific price and terms stated in the bid.
2. A competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 is an offer to enter into discussions and negotiations with the contracting authority for a public contract.
3. Pursuant to R.C. 307.862(C), information in a competitive sealed proposal submitted to a county contracting authority pursuant to R.C. 307.862 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the contract is awarded, unless the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1) and is redacted from the proposal by the contracting authority.
4. Pursuant to R.C. 307.87 and R.C. 307.88, information in a competitive bid submitted to a county contracting authority under R.C. 307.86-92 becomes a public record that must be made available for public inspection and copying under R.C. 149.43 after the bid is opened by the contracting authority, unless the information falls within one of the exceptions to the definition of the term

¹² If a county contracting authority requests additional financial information from an apparent low bidder, the contracting authority “shall keep” the additional financial information “confidential, except under proper order of a court.” R.C. 9.312(A). Also, “[t]he additional financial information is not a public record under [R.C. 149.43].” *Id.* For this reason, additional financial information received by a county contracting authority pursuant to R.C. 9.312(A) after opening competitive bids is not a public record that must be made available for public inspection and copying under R.C. 149.43.

“public record” set forth in R.C. 149.43(A)(1) and is redacted from the bid by the contracting authority.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial 'M' and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General