

December 3, 2021

The Honorable Michael T. Gmoser
Butler County Prosecuting Attorney
Government Services Center, 11th Floor
P.O. Box 515, 315 High Street
Hamilton, Ohio 45012-0515

SYLLABUS:

2021-028

County fees collected by county officials through financial transaction devices must comply with the requirements of R.C. 301.28. The procedural requirements of R.C. 301.28 cannot be circumvented by relying upon the competitive bidding process in sections R.C. 307.86 or 307.862 or by contracting with a third-party vendor who uses their own financial-transaction-device processor.



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OPINION NO. 2021-028

The Honorable Michael T. Gmoser
Butler County Prosecuting Attorney
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P.O. Box 515, 315 High Street
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Dear Prosecutor Gmoser:

You have requested an opinion regarding the use of financial transaction devices by county officials—specifically credit card transactions, pursuant to R.C. 301.28. I have framed your question as follows:

Can a county official avoid the procedural requirements of R.C. 301.28 by relying upon the competitive bidding processes in R.C. 307.86 and R.C. 307.862, or by contracting with a third-party vendor who uses their own financial-transaction-device processor to collect and remit payment to county officials?

For the reasons that follow, I find that the requirements set forth in R.C. 301.28 must be adhered to when a county permits payment of county expenses by financial transaction devices. In addition, a county official can neither rely on other sections of the Revised Code nor rely on a service vendor using their own financial-transaction-device processor to circumvent procedures and requirements set forth in R.C. 301.28.

I

R.C. 301.28 governs the ability of a county official to accept payment of county expenses through the use of financial transaction devices. As used in the statute, “county official” includes certain county offices who are authorized to accept fees. *See* R.C. 301.28(A)(3). “County expenses,” with limited exceptions, “includes fees, costs, taxes, assessments, fines, penalties, payments, or any other expense a person owes or otherwise pays to a county office under the authority of a county official[.]” *Id.* at (A)(2); *see id.* at (A)(3) (expands what “county expenses” may include). And the term “financial transaction device” “includes a credit card, debit card, charge card, or prepaid or stored value card, or automated clearinghouse network credit, debit, or e-check entry that includes, but is not limited to, accounts receivable and internet-initiated, point of purchase, and telephone-initiated applications or any other device or method for making an electronic payment or transfer of fund.” *Id.* at (A)(1). So, when a financial transaction device is used to pay county expenses to a county office under the control of a county official, R.C. 301.28 dictates the procedure that must be followed.

Turning to the procedure set forth in R.C. 301.28, subdivision (B) states: “*Notwithstanding any other section of the Revised Code* and except as provided in division (D) of this section, a board of county commissioners may adopt a resolution authorizing the acceptance of payments by financial transaction devices for county

expenses.” (Emphasis added). The resolution must include: (1) the specific county officials and county offices under the county officials that are authorized to accept payment by financial transaction devices; (2) a list of county expenses that may be paid for by a financial transaction device; (3) specific identification of the authorized financial transaction devices; (4) the amount, if any, authorized as a surcharge or convenience fee established in division (E); and (5) a specific provision outlining the penalty set forth in division (G) for returned or dishonored payments. *See id.* The resolution shall “designate the county treasurer as an administrative agent[.]” *Id.* The county treasurer acting as the administrative agent shall solicit proposals “within guidelines established by the board in the resolution and in compliance with the procedures provided in division (C) of this section, from financial institutions, issuers of financial transaction devices, and processors of financial transaction devices, to make recommendations about those proposals to the board, and to assist county offices in implementing the county’s financial transaction devices program.” *Id.* However, if the county treasurer declines the responsibility of administrative agent, the board of county commissioners shall perform the duties of the administrative agent. *Id.* In addition, if the county treasurer acts as the administrative agent and then fails to carry out the duties, the board of county commissioners may pass a resolution to take on the role of administrative agent. *See id.*

When a board of county commissioners adopts a resolution of the sort discussed above, a copy of the resolution shall be sent to each county official within the

county who is authorized by the resolution to accept payment by financial transaction devices. R.C. 301.28(D). Before the county official begins accepting financial transaction devices, a county official shall provide written notice to the board of county commissioners stating the county official's intent to implement the resolution within the official's office. *Id.* "Each county office subject to the board's resolution adopted under division (B) of this section may use *only* the financial institutions, issuers of financial transaction devices, and processors of financial transaction devices with which the board of county commissioners contracts, and each such office is *subject to the terms of those contracts.*" *Id.* (Emphasis added).

Turning to R.C. 301.28(C), the subdivision provides the procedure that the county must follow "whenever it plans to contract with financial institutions, issuers of financial transaction devices, or processors of financial transaction devices for the purposes of this section." When choosing a provider, "[t]he administrative agent shall *request proposals from at least three* financial institutions, issuers of financial transaction devices, or processors of financial transaction devices, as appropriate in accordance with the resolution adopted under division (B) of this section." *Id.* (Emphasis added). But "[p]rior to sending any financial institution, issuer, or processor a copy of any such request, the county shall advertise its intent to request proposals in a newspaper of general circulation in the county once a week for two consecutive weeks or as provided in section 7.16 of the Revised Code." *Id.* Once the requested proposals are received, "the administrative agent shall review them and make a recommendation to the board of

county commissioners on which proposals to accept.” *Id.* Upon receiving the administrative agent’s recommendation, “[t]he board of county commissioners shall consider the agent’s recommendation and review all proposals submitted, and then may choose to contract with any or all of the entities submitting proposals, as appropriate.” *Id.* For all unchosen proposals, the board must send a rejection notice that states both the reason for rejection and indicate which proposals were chosen with inclusion of a copy of the terms and conditions for the successful bids. *See id.*

II

The procedural parts of R.C. 301.28 are clear. A county official wishing to contract for outside services for matters associated with payment of county expenses by financial transaction devices must comply with all parts of R.C. 301.28. So, once a county passes a resolution authorizing payment of county expenses by financial transaction devices, county officials must adhere to the procedure and requirements outlined in R.C. 301.28. *See* R.C. 301.28(D). For new contracts, the administrative agent established under R.C. 301.28(B) must comply with division (C) when entering into a new contract with a financial institution, issuer of financial transaction devices, or processor of financial transaction devices.

Because the administrative agent *must* comply with division (C) when entering into a contract, he or she *cannot* instead enter into a contract through the competitive-bidding process outlined in R.C. 307.86 and R.C. 307.862. The reason is that the procedures and

requirements stated in R.C. 301.28 pertain specifically to county expenses being paid by financial transaction devices. R.C. 307.86 and R.C. 307.862, on the other hand, are statutes that deal with the general acquisition of items and services. The use of general statutes to circumvent requirements stated in a directly-applicable statute stands against the ultimate goal of statutory construction, which is to give effect to the General Assembly's intent. *E.g.*, *Stevens v. Ackman*, 91 Ohio St.3d 182, 193, 743 N.E.2d 901 (2001); *See* R.C. 1.51.

This conclusion is bolstered by the fact that R.C.301.28(B) says its requirements—including its requirement that administrative agents comply with division (C)—apply “notwithstanding” the provisions in any other section. “Notwithstanding” means “without prevention or obstruction from or by; in spite of.” *State ex rel. PIA Psychology Hosp., Inc. v. Ohio Certificate of Need Rev. Bd.*, 60 Ohio St.3d 11, 17, 573 N.E.2d 14 (1991), quoting *State ex rel. Carmean v. Bd. of Edn. of Hardin Cty.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960). When the General Assembly uses “notwithstanding” in a statute, it conveys an intent for that statute to take precedence over any contrary statute. *See Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35; *see also State ex rel. Carmean v. Bd. of Edn. of Hardin Cty.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960). So is here: R.C. 301.28 alone governs the circumstances in which it applies.

Finally, a county cannot free itself from the obligation to comply with R.C. 301.28 by contracting with a third-party vendor to both establish a credit card payment

system and collect such payment on behalf of the county under R.C. 307.86 or 307.862. The reason is simple: a service vendor acts as a “processor of financial transaction devices” when the vendor accepts payment by credit card, processes the payment, and then remits the payment to the county official. *See* 2012 Op. Att’y Gen. No. 2012-016, at 2-130 fn.4 (Paragraph one of syllabus overruled by statutory amendment. *See* 2015 Op. Att’y Gen. No. 2015-033) (“The private company serves as a processor of financial transaction devices because the kiosks and e-commerce payment system are used to process financial transaction devices”). *see also* Webster’s New World Dictionary 1160 (5th Ed.2014) (“processor” means “a person or thing that processes”). Since the service vendor acts as a “processor of financial transaction devices,” the requirements of R.C. 301.28 would still apply and would still need to be followed.

Conclusion

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

County fees collected by county officials through financial transaction devices must comply with the requirements of R.C. 301.28. The procedural requirements of R.C. 301.28 cannot be circumvented by relying upon the competitive bidding process in sections R.C. 307.86 or 307.862 or by contracting with a third-party vendor who uses their own financial-transaction-device processor.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping initial "D" and a long, sweeping tail on the "y".

DAVE YOST
Ohio Attorney General