OPINION NO. 98-027

Syllabus:

1. A township or other public authority that is procuring professional design services pursuant to R.C. 153.65-.71 must initially rank firms on the basis of the qualifications set forth in R.C. 153.65(D), which include the evaluations of previous clients with respect to the control of costs, but do not otherwise include cost considerations or proposed prices.

2. Pursuant to *Ohio Ass'n of Consulting Engineers v. Voinovich*, 83 Ohio App. 3d 601, 615 N.E.2d 635 (Franklin County 1992), *motion overruled*, 66 Ohio St. 3d 1459, 610 N.E.2d 423 (1993), a township or other public authority that is subject to R.C. 153.65-.71 may adopt and implement rules that permit the consideration of a fee proposal as a means for differentiating among firms that, when evaluated on the basis of the factors listed in R.C. 153.65(D), have been found equally most qualified.

To: W. Duncan Whitney, Delaware County Prosecuting Attorney, Delaware, Ohio
By: Betty D. Montgomery, Attorney General, August 24, 1998

We have received your request for a formal opinion on the question whether a township or other public authority may consider a proposed price as one of the factors used to evaluate the qualifications of a professional design firm under R.C. 153.65 to R.C. 153.71. As your request notes, price is not one of the qualifications listed for consideration under R.C. 153.65.

Your letter indicates that the question has arisen in light of *Ohio Ass'n of Consulting Engineers v. Voinovich*, 83 Ohio App. 3d 601, 615 N.E.2d 635 (Franklin County 1992), *motion overruled*, 66 Ohio St. 3d 1459, 610 N.E.2d 423 (1993). In that case, the Franklin County Court of Appeals upheld the validity of rules under which fee proposals are used to determine which professional design firm will be selected if two firms are found to be equally qualified. You ask whether that case might "leave the door open to use price as one of the considerations in evaluating the qualifications of the design firms at the outset."

In order to address your question, let us look first to the statutory provisions governing the procurement of professional design services by townships and other public authorities. R.C. 153.65 to R.C. 153.71 establish a procedure to be followed by public authorities[1] in the procurement of professional design services. By definition, professional design services include services of an architect, landscape architect, professional engineer, or surveyor. R.C. 153.65(C).

The statutes authorize a public authority that plans to contract for professional design services to encourage professional design firms to submit and update statements of qualifications. R.C. 153.66. They permit a public authority to institute prequalification requirements. R.C. 153.68.

The statutes require a public authority that plans to contract for professional design services to publicly announce and provide appropriate notice of all contracts. R.C. 153.67. For each professional design services contract, the public authority must evaluate the statements of qualifications of professional design firms currently on file and statements submitted by other professional design firms specifically regarding that project. The public authority may discuss with the firms "the firms' statements of qualifications, the scope and nature of the services the firms would provide, and the various technical approaches the firms may take toward the project." R.C. 153.69.

Following the evaluation of the qualifications of the various firms, the public authority must "[s]elect and rank no fewer than three firms which it considers to be the most qualified to provide the required professional design services," unless fewer than three qualified firms are available. R.C. 153.69(A). The public authority must then negotiate a contract with the firm "ranked most qualified to perform the required services," at a compensation determined to be fair and reasonable to the public authority. R.C. 153.69(B). Contract negotiations must be directed toward ensuring that there is a mutual understanding of the essential requirements involved in providing the services; determining that the firm will make available the necessary personnel, equipment, and facilities to perform the services in the time allowed; and agreeing upon compensation that is fair and reasonable, considering the estimated value, scope, complexity, and nature of the services. *Id.*

If there is a failure to negotiate a contract with the firm ranked most qualified, the public authority must inform that firm of the termination of negotiations and enter into negotiations with the firm ranked next most qualified, and so on through the rankings until a contract is negotiated. R.C. 153.69(D). The public authority may select and rank additional firms, as necessary, until the negotiation of a contract is achieved. R.C. 153.69(E).

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[1] Public authorities include "the state, or a county, township, municipal corporation, school district, or other political subdivision, or any public agency, authority, board, commission, instrumentality, or special district of the state or a county, township, municipal corporation, school district, or other political subdivision." R.C. 153.65(A).

Public authorities that are covered by the statutes governing the procurement of professional design services are authorized to adopt rules to implement the statutes. R.C. 153.71. The statutes do not apply to emergency projects or projects with an estimated professional design fee of less than twenty-five thousand dollars. R.C. 153.71(A), (B).

Thus, under the statutory scheme a township or other public authority that wishes to contract for professional design services is required to consider the qualifications of professional design firms and to rank the firms in the order of their qualifications. The township or other public authority must then enter into contract negotiations with the most qualified firm. The township or other public authority may adopt rules providing for the implementation of the statutory scheme.

Let us turn now to the question whether, in evaluating the qualifications of professional design firms, a public authority may consider a proposed price as a factor. The statute sets forth the qualifications that may be considered as follows:

> (D) "Qualifications" means all of the following:
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> (1) *Competence* of the professional design firm *to perform the required professional design services* as indicated by the *technical training, education, and experience of the firm's personnel*, especially the technical training, education, and experience of the employees within the firm who would be assigned to perform the services;
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> (2) *Ability of the firm* in terms of its workload and the availability of qualified personnel, equipment, and facilities *to perform the required professional design services competently and expeditiously*;
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> (3) *Past performance* of the firm as reflected by the *evaluations of previous clients with respect to such factors as control of costs, quality of work, and meeting of deadlines;*
>
> (4) Other similar factors.

R.C. 153.65(D) (emphasis added). The statutory list of qualifications thus includes competence of personnel, ability to perform the services competently and expeditiously, past performance, and other similar factors. The proposed price is not named as a factor that may be considered in evaluating qualifications.

The legislation initially enacting these statues stated as its purpose: "to establish qualifications-based competitive selection procedures and policies for the procurement of professional design services." 1987-1988 Ohio Laws, Part II, 3256 (Sub. H.B. 297, eff. May 31, 1988). The evident legislative intent was that selection would be based on qualifications. The listed qualifications do not include price. Hence, the intended process seeks selection of a firm on the basis of its qualifications, rather than on the basis of the proposed price.[2]

The provisions establishing qualifications to be considered in ranking professional design firms reflect economic concerns in only a single respect. The provision designating past performance as a relevant factor includes "evaluations of previous clients with respect

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[2] Similar provisions governing the selection of a construction manager on the basis of statutorily-established qualifications appear in R.C. 9.33-9.333. Similar provisions governing the selection of architects and engineers by the federal government appear in 40 U.S.C.A. §§ 541-544 (West 1986 & Supp. 1998).

to such factors as control of costs." R.C. 153.65(D)(3). The evident meaning of this language is that, in considering the past performance of a particular firm as part of the evaluation of the firm's qualifications, the public authority may take notice of evaluations provided by previous clients of the firm with respect to the firm's control of costs in performing services for those clients. "Control of costs" is commonly understood to refer to a firm's ability to complete a project in an efficient and economical manner, without incurring unnecessary or unanticipated costs. *See, e.g., Webster's New World Dictionary* 309 (2d college ed. 1978) (defining "control" to mean "the act or fact of controlling; power to direct or regulate; ability to use effectively"). Thus, under the statute, a firm's ability to control costs for previous clients is relevant to its qualifications for purposes of determining its ranking. This factor, however, is limited by its terms to "[p]ast performance" of the firm. Hence, it cannot include a firm's proposed price for a prospective contract.

The listed qualifications include "[o]ther similar factors." R.C. 153.65(D)(4). Any such factors must be similar to the qualifications described in R.C. 153.65(D)(1)-(3), which are focused on competence, experience, and the ability to provide expeditious performance. Because the listed qualifications do not include proposed price or cost considerations, those considerations do not constitute "similar factors" and cannot be included as qualifications pursuant to R.C. 153.65(D). *See, e.g., Webster's New World Dictionary* 1327 (2d college ed. 1978) (defining "similar" to mean "nearly but not exactly the same or alike"); *see also Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951) ("when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner").

Your letter suggests that *Ohio Ass'n of Consulting Engineers* might somehow expand the statutory scheme so that price could be used as one of the considerations in evaluating the qualifications of professional design firms for purposes of the initial ranking of the firms. Our review of the case does not indicate that it can be given so expansive an effect.

The *Ohio Ass'n of Consulting Engineers* case concerned administrative rules governing actions by the Ohio Department of Administrative Services, Division of Public Works, and the Ohio Department of Transportation, Division of Planning and Design. *See* 2 Ohio Admin. Code 153:1-1-01 to 153:1-1-06 and 153:2-1-01 to 153:2-1-06; *see also* 4 Ohio Admin. Code 1501-3-01 to 1501-3-06 (similar rules governing Department of Natural Resources). The rules provide that, if more than one firm is determined to be "equally most qualified," then each such firm "shall be asked to submit a lump sum fee proposal" and the firm "submitting the lowest fee proposal shall be determined to be most qualified." 2 Ohio Admin. Code 153:1-1-05(J), (K) and 153:2-1-05(J), (K); *see also* 4 Ohio Admin. Code 1501-3-05(G), (H) (similar rules governing Department of Natural Resources).

The appellants in *Ohio Ass'n of Consulting Engineers* argued that these rules violate the statutes by implementing competitive bidding, rather than the statutory qualifications, as a method of determining the best firms for particular projects. The Franklin County Court of Appeals considered the validity of the rules under the general standard that rules may not be unreasonable or in clear conflict with statutory enactments and may not add to statutorily-delegated powers. *See Carroll v. Dep't of Admin. Servs.*, 10 Ohio App. 3d 108, 460 N.E.2d 704 (Franklin County 1983). The court upheld the validity of the rules, emphasizing that fee proposals are to be sought only after the provisions of R.C. 153.69 have been followed and when there is an inability to differentiate between two or more equally qualified firms. Hence, fee proposals are not used as factors for consideration at the outset but are used only for breaking a tie. Further, the 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 as required by R.C. 153.69(B). The court stated specifically:

> Initially determining the most qualified firms before allowing fee proposals would protect the legislative interest in preventing economic considerations from taking priority, since unqualified or lesser qualified firms would not be permitted to submit sealed fee proposals.

83 Ohio App. 3d at 607, 615 N.E.2d at 639.[3]

The court acknowledged that the rules "do inject some degree of economic consideration into the agencies' decision-making process" but concluded that "the legislative intent is not frustrated by this practice, post-cost control being one of the statutory factors." *Id.* at 606, 615 N.E.2d at 639. The reference to "post-cost control" is to the factor of control of costs for previous clients, which, as discussed above, is a valid matter for consideration in determining a firm's qualifications. *See* R.C. 153.65(D)(3).

The court further noted that it was considering whether the rules were valid on their face. It left open the possibility that there might be a showing of misapplication of the rules under which the agencies would exceed their statutory authority. *Id.* at 607, 615 N.E.2d at 639.

Your question relates to using price as a consideration in evaluating qualifications of design firms "at the outset." The rules considered in *Ohio Ass'n of Consulting Engineers* provide for consideration of a fee proposal only after qualifications established by statute have been evaluated and only if two or more firms have been found "equally most qualified." That case may be used as support for the various public authorities governed by the statutes in question to adopt rules of the same sort as those that the court upheld — that is, rules under which a fee proposal is used as a tie-breaking mechanism to differentiate among equally qualified firms. Thus, pursuant to *Ohio Ass'n of Consulting Engineers v. Voinovich*, a township or other public authority that is subject to R.C. 153.65-.71 may adopt and implement rules that permit the consideration of a fee proposal as a means for differentiating among firms that, when evaluated on the basis of the factors listed in R.C. 153.65(D), have been found equally most qualified.[4]

It does not appear, however, that the *Ohio Ass'n of Consulting Engineers* case can be used as authority for considering price as a factor in initially evaluating the qualifications of professional design firms. In that case, the court considered only the rules there at issue, and concluded that those rules did not conflict with or thwart the statutory scheme. The rules

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[3] A dissenting opinion argues that the statute "does not contemplate nor allow the agency to rank more than one firm as the most qualified." *Ohio Ass'n of Consulting Engineers v. Voinovich*, 83 Ohio App. 3d 601, 609, 615 N.E.2d 635, 641 (Franklin County 1992) (Bryant, J., dissenting), *motion overruled*, 66 Ohio St. 3d 1459, 610 N.E.2d 423 (1993). The dissent would find that "the rules allow the agency to abdicate its responsibility to rank the firms, instead relegating that duty to the competitive bidding process." *Id.*

[4] When the professional design service statutes were initially enacted, and as they were considered in *Ohio Ass'n of Consulting Engineers v. Voinovich*, they applied only to state agencies. *See* 1987-1988 Ohio Laws, Part II, 3256 (Sub. H.B. 297, eff. May 31, 1988). They were subsequently amended to apply generally to public authorities, including townships. *See* 1995-1996 Ohio Laws, Part II, 2907, 2914 (Sub. H.B. 231, eff. Nov. 24, 1995); note 1, *supra*.

and the analysis of the court in *Ohio Ass'n of Consulting Engineers* are based on the premise that the most qualified firms will be determined before fee proposals are considered. This premise is consistent with the express provisions of the statutes and with the firmly-established principle that rule-making authority cannot be used to expand powers beyond those that are granted by statute.

As you have noted, the statutes do not provide for the consideration of price as a factor in the initial ranking of the firms. Therefore, a township or other public authority that is procuring professional design services pursuant to R.C. 153.65-.71 must initially rank firms on the basis of the qualifications set forth in R.C. 153.65(D), which include the evaluations of previous clients with respect to the control of costs, but do not otherwise include cost considerations or proposed prices.

For the reasons discussed above, it is my opinion and you are advised, as follows:

1. A township or other public authority that is procuring professional design services pursuant to R.C. 153.65-.71 must initially rank firms on the basis of the qualifications set forth in R.C. 153.65(D), which include the evaluations of previous clients with respect to the control of costs, but do not otherwise include cost considerations or proposed prices.

2. Pursuant to *Ohio Ass'n of Consulting Engineers v. Voinovich*, 83 Ohio App. 3d 601, 615 N.E.2d 635 (Franklin County 1992), *motion overruled*, 66 Ohio St. 3d 1459, 610 N.E.2d 423 (1993), a township or other public authority that is subject to R.C. 153.65-.71 may adopt and implement rules that permit the consideration of a fee proposal as a means for differentiating among firms that, when evaluated on the basis of the factors listed in R.C. 153.65(D), have been found equally most qualified.