OPINION NO. 91-002

Syllabus:

1. Where the Auditor of State has obtained a release and permit from the Department of Administrative Services under R.C. 125.06 to obtain professional services pursuant to contract for ten thousand dollars or more, he must, absent Controlling Board approval, follow the competitive bidding requirements of R.C. 125.07 and related provisions. If the Auditor, using money that has been appropriated directly to his office, makes such purchase from a particular supplier other than a state agency for ten thousand dollars or more within a fiscal year, R.C. 127.16(B)(1) requires that such purchase be made through competitive bidding; compliance with the competitive bidding requirements imposed by R.C. Chapter 125 will satisfy the competitive bidding requirement of R.C. 127.16(B)(1).

2. Pursuant to R.C. 127.16, where the Auditor of State, using money that has been appropriated directly to his office, seeks to obtain professional services from a particular supplier other than a state agency pursuant to contract for less than ten thousand dollars, if such purchase of services, when combined with all other purchases of services, equipment, materials or supplies, or any combination thereof, from such supplier during the fiscal year, will amount to ten thousand dollars or more, the Auditor must do so by use of a method of competitive bidding which is reasonable under the circumstances, absent Controlling Board approval.

3. A state officer or employee is not entitled to legal representation by the Attorney General in any civil action instituted by the state against the officer or employee with regard to allegations that he may have authorized a contract in violation of R.C. 127.16(B). Should any other party institute such

civil action in which the state is not a party, the state officer or employee is entitled to such legal representation to the extent provided in R.C. 109.361.

4. Pursuant to R.C. 127.16(B)(1), if a state agency, using money that has been appropriated to it directly, enters into a competitively bid contract for more than ten thousand dollars for the purchase of services, equipment, materials, or supplies, or any combination thereof, with a particular supplier other than a state agency, the agency may not make another purchase from that supplier within the same fiscal year, unless the purchase is competitively bid or approved by the Controlling Board.

5. Where a contract has been awarded by a state agency on a competitively bid basis as required by R.C. 127.16(B), it may be subsequently amended without further competitive bidding or Controlling Board approval only if the amendment does not substantially change the original contract.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, January 8, 1991

I have before me your opinion request in which you ask numerous questions concerning the competitive bidding requirements and procedures imposed by statute upon elected state officials in the procurement of professional services. You also raise several questions concerning the liability of such officials in the event that the requisite competitive bidding procedures are not followed. Your specific questions read as follows:

> 1. This office has considered using a competitive bidding procedure to obtain professional consulting services from public accounting firms on a "requirements" or "as needed" basis. Procurement would be by a Request for Proposals methodology, in the format set forth in the attached draft, Attachment A. The request for proposals (RFP) would be sent to a number of candidate firms which had previously expressed an interest in governmental auditing and consulting contracts. Proposals received from the firms would be evaluated on the basis of predetermined criteria set forth in the RFP and would be ranked in numerical order, from highest to lowest. Would such a methodology meet the competitive bidding requirements of Section 127.16, Revised Code, where:
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> > a. RFPs are sent to eight firms determined to possess the necessary qualifications. All eight firms submit a Proposal and contracts for equal amounts of time, in terms of anticipated minimum and maximum number of hours of service to be procured, are awarded to the five highest ranking firms.
> > b. RFPs are sent to eight firms determined to possess the necessary qualifications. Five firms submit a Proposal and two contracts are awarded, one to the highest ranking firm for a large number of hours and one to the second ranking firm for approximately one-tenth of the number of hours awarded to the first firm. The decision to award contracts to two firms is based upon technical expertise possessed by the second ranking firm, making it more technically qualified for a specific set of projects contemplated by the Auditor of State, although its overall ranking was second.
> > c. Is your answer to situations a and b, above, affected by the inclusion in the RFP of language indicating that the officer reserves the right to make multiple awards, if this is determined to be in the interest of the state?

2. A second draft RFP is enclosed as Attachment B. You will note that this draft differs from Attachment A primarily in that all bidders are ranked in order on the basis of a pre-determined methodology. As individual projects arise, the highest scoring bidder is offered a contract. If he accepts, a contract is executed and the project commences. If he rejects the offer, an offer is then made to the second highest scoring bidder. This process continues until a contract is awarded or the list is exhausted. Does this methodology, if applied as described, satisfy the competitive bidding requirements of Section 127.16, Revised Code?

3. If a state agency makes a determination to adopt a specific methodology for competitive bidding and this methodology is submitted to employees of the office who are directed to use it for the procurement of goods and services, who, for purposes of Section 127.16(C), Revised Code, has authorized the contracts? Is it the individuals signing the contract, the individuals applying the methodology, the individuals approving the results of the methodology, or the elected official formally promulgating the methodology as the official policy of his office? Has a[sic] individual "authorized" a contract if he has signed it without knowledge of the procurement procedures used, in reliance upon representations of other officials? With regard to the immediately preceding question, to what extent is good faith relevant to liability?

4. What elements of a procurement procedure are necessary for it to constitute "competitive bidding" as that term is used in Section 127.16, Revised Code? What characteristics of a procurement procedure would be inconsistent with "competitive bidding", as that term is used in Section 127.16, Revised Code?

5. Under what circumstances is a state officer or employee entitled to legal representation with regard to allegations that he may have authorized a contract in violation of Section 127.16(B), Revised Code?

6. To what extent may a state officer or employee avoid liability pursuant to Section 127.16(C), Revised Code, by obtaining the advice of legal counsel employed by the state as to whether a contract may be authorized without violating the requirements of Section 127.16(B), Revised Code?

7. What measure of damages would be applied in the event that a state officer or employee was found to be in violation of Section 127.16(C), Revised Code? Would the damages assessed be mitigated by the fact that the benefits received by the state were received at a competitive, current market cost? Would the damages assessed be mitigated by the fact that the total amount of the expenditures of state funds pursuant to the contract were thereafter charged to other entities, including but not limited to local governments, thus eliminating any monetary loss to the state?

8. In what respects do the standards as to liability, entitlement to legal counsel, good faith reliance upon the advice of legal counsel as a defense, and the measure of damages applicable to state officers and employees under Section 127.16(B) and (C), Revised Code, differ from those applicable to local government officials under Sections 3.12, 5705.412, and 5705.45, Revised Code?

9. Where a state agency enters into a competitively bid contract for more than ten thousand dollars, may another contract for less than ten thousand dollars be authorized subsequently with the same supplier within the same fiscal year without competitive bidding or controlling board approval without violating Section 127.16(C), Revised Code?

> 10. It has been suggested to this office that a violation of Section 127.16, Revised Code, would occur if the expenditure of state funds appropriated to a state agency to a particular supplier within one fiscal year equalled or exceeded ten thousand dollars, where the contracts in question were not competitively bid or approved by the controlling board, notwithstanding the fact that the contracts were entered into in different fiscal years. Is the amount that a state agency has "purchased" from a particular supplier during a given fiscal year measured by the expenditures of state funds to that supplier during the fiscal year, by contracts "authorized" during the fiscal year, by services received during a fiscal year, or by some other measure?
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> 11. What constitutes a "purchase" for purposes of Section 127.16(B) and (C), Revised Code? Specifically, what legal criteria may appropriately be applied by this office where, in the course of an audit or otherwise, it is necessary that we distinguish between a lease and a purchase? Your attention is directed to Financial Accounting Standards Board Statement No. 13, which establishes criteria for the differentiation of "capital leases", which are, in economic substance, purchases, and "operating leases", [which] do not possess the economic characteristics of purchases.
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> 12. If a contract has been awarded on a competitively bid basis, may it subsequently be amended without further competitive bidding or approval of the controlling board to provide for additional work which the parties could not have reasonably contemplated at the inception of the contract, but which is reasonably related to the object of the contract?

Your first and second questions concern the competitive bidding procedure required by R.C. 127.16 where the Auditor of State seeks to obtain professional consulting services from public accounting firms. R.C. 127.16 states in pertinent part:

> (B)(1) No state agency, using money that has been appropriated to it directly, shall purchase, from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that, when combined with all other such purchases the agency has made from the supplier during the fiscal year, will amount to ten thousand dollars or more, unless the purchase is competitively bid or approved by the controlling board.
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> (2) No state agency, using money that has been appropriated to it directly, shall lease, from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that, when combined with all other such leases the agency has made from the supplier during the fiscal year, will amount to twenty-five thousand dollars or more, unless the lease is competitively bid or approved by the controlling board. However, if the amount of such lease, when combined with all other such leases the agency has made from the supplier during the fiscal year will amount to one hundred thousand dollars or more, it must be competitively bid or approved by at least five members of the controlling board.
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> ....
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> (E) As used in divisions (B) and (C) of this section:
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> (1) "Purchase" includes purchase of the services of professionals regulated pursuant to Title XLVII of the Revised Code;
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> (2) "Lease" includes a rental agreement, lease, lease-purchase, lease with option to purchase, and any similar [contract or] combination thereof.

R.C. 127.16(B)(1) thus prohibits a state agency, using money that has been directly appropriated to it, from purchasing from a particular supplier which is not a state agency, any services, equipment, materials, or supplies, or any combination thereof, that will amount to at least ten thousand dollars when combined with all other such

purchases from the supplier during the fiscal year, unless the purchase is competitively bid or approved by the Controlling Board.

The term "state agency" is not specifically defined in R.C. Chapter 127. R.C. 1.60, however, states: "As used in Title I of the Revised Code, 'state agency,' except as otherwise provided in the title, means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government." With respect to your first two questions, I note that the office of Auditor of State is provided for in Ohio Const. art. III, §2. Pursuant to R.C. 117.02, the Auditor is elected quadrennially for a term of four years. The primary duties of the office of Auditor of State are set forth in R.C. Chapter 117. More specifically, R.C. 117.10 states that the Auditor of State "shall audit all public offices as provided in [R.C. Chapter 117]. He also may audit the accounts of private institutions, associations, boards, and corporations receiving public money for their use and may require of them annual reports in such form as he prescribes." It is clear, therefore, that the office of the Auditor of State is a state agency subject to the terms of R.C. 127.16.

R.C. Chapter 127 prescribes no specific method by which competitive bidding may be accomplished for purposes of that chapter. As a general rule, "[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner." *Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878). Specifically concerning those situations where competitive bidding is required by law, but no particular method is prescribed, the court in *State ex rel. Davies Manufacturing Co. v. Donahey*, 94 Ohio St. 382, 114 N.E. 1037 (1916), set forth the general rule that the contracting authority must use reasonable efforts to secure competitive bidding which must be open to everyone. As I concluded in 1983 Op. Att'y Gen. No. 83-034 (syllabus, paragraph six): "A contract for personal services may be let by competitive bidding, absent applicable statutory provisions, if reasonable action is taken to provide all qualified persons with the opportunity to submit proposals, and if the contract is awarded on the basis of the merit of the proposals." It is clear that the propriety of various methods of bidding for personal services contracts, in the absence of applicable statutory procedures, is a complex factual determination dependent upon whether the awarding authority reasonably exercised his discretion in choosing the method used under the particular circumstances. *See generally Leonard v. Mayfield Heights*, 6 Ohio L. Abs. 739 (Ct. App. Cuyahoga County 1928).

I note, however, that in certain circumstances, other statutory provisions may impose competitive bidding requirements, independent of the requirement set forth in R.C. 127.16(B). For example, in the situation about which you ask, where the Auditor of State seeks to purchase professional services, the provisions of R.C. Chapter 125 must be considered. R.C. 125.02 authorizes the Department of Administrative Services, with certain exceptions, to purchase supplies, materials, equipment, and services for the use of state agencies. Particularly relevant to your concerns is R.C. 125.06 which provides that, absent a release and permit from DAS, a state officer must generally procure or purchase services through DAS. Where DAS makes a purchase of services on behalf of a state agency for at least five thousand dollars, it must, with certain exceptions, do so through competitive bidding. R.C. 125.07. There is, however, a specific exception to the requirements of R.C. 125.06 and .07 with respect to the authority of certain elected state officials. R.C. 125.041 states:

> Nothing in [R.C. 125.02 or 125.04 to 125.08] shall be construed as limiting the attorney general, auditor of state, secretary of state, or treasurer of state in any of the following:
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> (A) The purchase or lease of equipment, materials, supplies, or services for less than ten thousand dollars;
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> (B) The purchase or lease of equipment, materials, supplies, or services for ten thousand dollars or more with the approval of the controlling board;
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> (C) The final determination of the nature or quantity of equipment, materials, supplies, or services to be purchased or leased pursuant to [R.C. 125.06].

Thus, there are instances where the Auditor of State may purchase services other than through DAS. As in the situation about which you ask, where the amount of the contract for services to be purchased by the Auditor is less than ten thousand dollars, R.C. 125.041(A) exempts such purchase from the competitive bidding required by R.C. 125.07. Where the amount of such contract is equal to or greater than ten thousand dollars, the exemption from competitive bidding set forth in R.C. 125.041(A) does not apply, and the Auditor must let the contract through competitive bidding, as required by R.C. 125.07 and related provisions, absent Controlling Board approval. *See Control Data Corp. v. Controlling Board*, 16 Ohio App. 3d 30, 36, 474 N.E.2d 336, 343 (Franklin County 1983) (stating that after a state agency receives a release and permit from DAS under R.C. 125.06 to purchase equipment on its own, the agency "is still bound by the rules governing all purchases by the DAS as set out in R.C. 125.07 and, as such, is required to make all purchases except those acquired pursuant to R.C. 4115.31 and 4115.35 or equal to, or under $5,000, by competitive bidding").[1] In the absence of specific direction in R.C. Chapter 127 as to how competitive bidding is to be accomplished for purposes of that chapter, it would appear that, in the situation you describe, where R.C. Chapter 125 independently imposes competitive bidding requirements upon the contemplated purchase, compliance with R.C. Chapter 125 would be a reasonable method of complying with the competitive bidding requirements of R.C. 127.16(B).

There may, however, be instances in which your office would not be required by R.C. Chapter 125 to engage in competitive bidding as specified therein, yet the contemplated purchase of services would be subject to competitive bidding as required by R.C. 127.16(B)(1). For example, if the Auditor seeks to enter into a contract, using state funds which were appropriated directly to his office, for the purchase of services for less than ten thousand dollars, R.C. 125.041 exempts such purchase from the competitive bidding requirements of R.C. 125.07; should such purchase be from a supplier other than a state agency, and if such purchase, when combined with other purchases of services, equipment, materials or supplies, or any combination thereof, from that supplier during the fiscal year equals or exceeds ten thousand dollars, R.C. 127.16(B)(1) requires the purchase to be made through competitive bidding, absent Controlling Board approval. Where no statutory procedure outside of R.C. 127.16(B) prescribes an appropriate method of competitive bidding, it is necessary to examine common law principles to determine the elements necessary to constitute a reasonable method of bidding for purposes of R.C. 127.16. Such examination will also serve to address your fourth question in which you ask what elements of a procurement procedure may or may not comport with the general principles governing competitive bidding.

The primary concerns expressed in your first two questions involve the sufficiency of notice and specifications given to prospective bidders as related to the basis upon which such contracts may be awarded. I begin by noting that it is inherent in the process of competitive bidding that the work for which a contract is awarded be submitted for competing bids and that the contract be awarded for the matter set forth in the notice and specifications given to the bidders. *Boren & Guckes v. Commissioners of Darke County*, 21 Ohio St. 311 (1871); *Beaver & Butt v. Trustees of the Institution for the Blind*, 19 Ohio St. 97 (1869); *Boger Contracting Corp. v. Bd. of Commissioners*, 60 Ohio App. 2d 195, 200, 396 N.E.2d 1059, 1062 (Stark County 1978) ("[w]here mandatory competitive bidding is required, it is axiomatic that every prospective bidder should have identical information upon which to submit a proposal"). As stated in *State ex rel. Hoeffler v. Griswold*, 35 Ohio App. 354, 360, 172 N.E. 438, 440 (Franklin County 1930), "[i]t is incumbent upon the state in taking bids to apprise prospective contractors of that which they might

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1 Specifically concerning the requirements of R.C. Chapter 125 as related to the proposals you have submitted in your first two questions, I note that since one of the requirements of R.C. Chapter 125 is that an award be made to "*the* lowest responsive and responsible bidder on each item," R.C. 125.11(A) (emphasis added), it would appear that the multiple awards contemplated in your first two questions would not be permitted where R.C. 125.07 applies.

reasonably be expected to do." In order to put all bidders on equal footing, it is essential that the specifications on which bids are to be submitted be sufficient to inform all bidders as to the matter for which, and the bases upon which, the contract will be awarded. *Checie v. Cleveland*, 31 Ohio L. Abs. 1 (Ct. App. Cuyahoga County 1939). *See Dayton ex rel. Scandrick v. McGee*, 67 Ohio St. 2d 356, 423 N.E.2d 1095 (1981) (city's use of unannounced residency criterion as basis on which to award contract to other than lowest bidder as lowest and best bidder was found to constitute an abuse of discretion).

Although R.C. 127.16(B) requires state agencies to engage in competitive bidding in certain instances, it does not specify the standard under which bids are to be evaluated and an award is to be made. *Cf.* R.C. 125.11(A) (stating in part: "Subject to division (B) of this section, contracts shall be awarded to the *lowest responsive and responsible bidder* on each item in accordance with [R.C. 9.312 (criteria for determining lowest responsive and responsible bidder)]" (emphasis added)). Where no statutory criteria for the award of a contract are specified, it appears to be within the discretion of the contracting authority to determine the best bid and so award the contract. *See State ex rel. Aller & Sharp, Inc. v. Taylor*, 32 Ohio L. Abs. 461 (Ct. App. Franklin County 1940). Further, it is apparent that the basis upon which a contract will be awarded should be included in the notice and specifications given to prospective bidders so that the bidders may be accurately informed as to the manner in which their bids will be evaluated. *See* 32 Ohio L.Abs. at 464 ("[i]n situations....where no statutory provision is made for public letting, it is our determination that the contracting authority acting in good faith has the absolute right to determine the best bid and award the contract accordingly"); *Dayton ex rel. Scandrick v. McGee, supra.*

In this regard, I note that the court in *Checie v. Cleveland* set forth several general principles governing the award of a public contract after competitive bidding, as follows:

> "There can be no question that the bid must conform to the specifications and the contract to both."
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> ....
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> "Any contract entered into with the best bidder containing substantial provisions beneficial to him which were not included in the specifications is void for it is not the contract offered to the lowest bidder by the advertisement."
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> ....
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> "This rule should be strictly enforced by the courts, for if the lowest bidder may, by an arrangement with the municipal authorities, have incorporated into his form of contract new provisions beneficial to him or have onerous ones excluded therefrom which were in the specifications upon which the bids were invited, it would emasculate the whole system of competitive bidding."
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> ....
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> "Where a statute requires competitive bidding in awarding contract for public work, each bidder should be compelled to conform to any substantial condition imposed upon other bidders in presenting his proposals so that all bidders should be put on the same footing."
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> ....
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> "This is the policy which prevents the modification of specifications after bids have been presented and the awarding of the contract to one of the bidders based upon such revised specifications."

31 Ohio L. Abs. at 13 (citations omitted).

Whether the methods you propose for the bidding and awarding of contracts that are not subject to a statutory bidding method constitute competitive bidding for purposes of R.C. 127.16 is clearly a factual determination to be made in view of the totality of circumstances and cannot be resolved by means of an opinion of the Attorney General. *See* 1988 Op. Att'y Gen. No. 88-008. I must, however, comment on the propriety of several aspects of the methods proposed in your first two questions where no statutory method of competitive bidding is prescribed. The two

methods described in your first question have a common element in that invitations to bid are sent to a limited number of firms. As discussed in Op. No. 83-034, that particular feature of the proposed methods may be acceptable, if you have acted reasonably under the circumstances in identifying and soliciting all firms qualified to do the work. The problem arises in that under both proposals multiple awards are made. Under Alternative A in the first question, requests for proposals are sent to eight firms which have already been determined to possess the qualifications necessary to do the work. Each of the eight firms submits a proposal and contracts are then awarded to the top five firms. The request for proposals states that approximately 4500 hours of services are to be provided over the course of the contracting period. Although the request for proposals states that the Auditor reserves the right to make multiple awards, the request does not state whether the total number of hours (4500) will be divided among the bidders, or whether more than one contract for 4500 hours of service are to be awarded. The defects apparent under either alternative are the insufficiency of notice to the bidders as to the precise matter upon which bids are being accepted and the resulting failure of the Auditor to award a single contract to the best bidder for the matter on which bids were sought. If five identical contracts are to be awarded and notice is sent to eight firms qualified to do such work, it is clear that all firms so qualified should be eligible to compete on each of the five contracts. *See* Op. No. 83-034 (syllabus, paragraph six). If only one contract is submitted for bids, dividing up the contract among several bidders is not awarding to any of the bidders the matter upon which bids were taken, and clearly avoids the contracting authority's duty to determine the best bid. *See Boynton v. City of Elyria*, 8 Ohio N.P (n.s.) 645 (C.P. Lorain County 1909) (where city sought bids for 1500 parking meters, it could not divide between two bidders the total number of meters to be provided).

Under Alternative B in your first question, requests for proposals are sent to "eight firms determined to possess the necessary qualifications," and two contracts are then awarded for differing numbers of hours. As stated in your request letter, the decision to award two separate contracts "is based upon technical expertise possessed by the second ranking firm, making it more technically qualified for a specific set of projects contemplated by the Auditor of State, although its overall ranking was second." As with Alternative A, the defect in this procedure is that the contracts awarded are not for the precise matter upon which bids were submitted. Where separate contracts are to be awarded, they must be submitted for separate bids.

I must further comment on one feature of the method outlined in your second question. As discussed above, an essential element of competitive bidding is that any system adopted "invite competition and...prevent favoritism and fraud; to attain that object it is essential that the bidders, so far as possible, be placed on equal footing, and be permitted to bid on substantially the same proposition and on the same terms." *Auto Car Co. v. City of Zanesville*, 15 Ohio Op. 104, 106 (C.P. Muskingum County 1939) (citation omitted). Under the method described in your second question, it does not appear that bidders would be required to submit a bid on a definite project. Rather, your office would evaluate the qualifications of the bidders generally and, from such evaluations, compile a list of eligible firms with whom your office may contract for various projects as they arise. Under such a method, the Auditor is not requesting bids for any specific work to be done and no potential contractor is able to submit a bid which may be evaluated against other bids. Since such method appears to base the awarding of a contract solely on the general qualifications of the bidders, rather than on a specific bid, it does not appear to comport with the concept of competitive bidding.

The issues presented in your third, sixth, seventh, tenth and eleventh questions have been submitted for judicial determination in pending litigation. It would, therefore, be improper for me to render advice on questions which are presently awaiting judicial decision. 1972 Op. Att'y Gen. No. 72-097 (syllabus, paragraph two). Similarly, since the answers to your eighth question are dependent upon resolution of the issues presented in your sixth and seventh questions, I must decline to render advice on that question.

Your fifth question asks: "Under what circumstances is a state officer or employee entitled to legal representation with regard to allegations that he may have authorized a contract in violation of [R.C. 127.16(B)]?" Representation of state officers and employees[2] is provided for in R.C. 109.361, which states in relevant part: "Upon the receipt of a written request by any officer or employee, the attorney general shall, except as provided in [R.C. 109.362] and *except for civil actions in which the state is the plaintiff*, represent and defend the officer or employee in any civil action instituted against the officer or employee." (Emphasis added.) Pursuant to R.C. 109.362, the Attorney General is required to determine, in the case of an elected state official, whether the officer acted "manifestly outside the scope of his responsibilities"; in the case of any other officer or employee, whether such person acted "manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 109.362(A). If he does so find, the Attorney General "shall not represent and defend the officer or employee." A further limitation on the Attorney General's representation of a state officer or employee is set forth in R.C. 109.362(B) which provides, with certain qualifications, that the Attorney General shall not represent an officer or employee to the extent that the officer or employee is covered by a policy of insurance purchased by the state. Thus, with the exceptions set forth in R.C. 109.362 and except for civil actions in which the state is the plaintiff, R.C. 109.361 imposes upon the Attorney General the duty to defend or represent a state officer or employee in any civil action brought against such officer or employee, upon receipt of a written request by the officer or employee.

In the situation about which you ask, suit may be brought by the Attorney General, as directed by R.C. 127.16(C), which states: "Any person who authorizes a purchase or lease in violation of [R.C. 127.16(B)] shall be liable to the state for any state funds spent on the purchase or lease, and the attorney general shall collect the amount from the person." Since the Attorney General is responsible under R.C. 127.16(C) to collect such funds on behalf of the state, the action would be brought on behalf of the state. Thus, the exception in R.C. 109.361 for civil actions in which the state is the plaintiff would appear to encompass actions taken by the Attorney General pursuant to R.C. 127.16(C) and thereby preclude the Attorney General from representing or defending the officer or employee against whom the action is taken. I note, however, that the question of the permissibility of the expenditure of state funds in accordance with R.C. 127.16 may arise in civil actions against a state officer or employee other than a suit in which the state is plaintiff; in such circumstance, so long as the provisions of R.C. 109.362 do not apply, the Attorney General would represent the defendant officer or employee, pursuant to R.C. 109.361.

Your ninth question reads as follows:

> Where a state agency enters into a competitively bid contract for more than ten thousand dollars, may another contract for less than ten thousand dollars be authorized subsequently with the same supplier within the same fiscal year without competitive bidding or controlling board approval without violating [R.C. 127.16(C)]?

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2 R.C. 109.36 states in part:

> As used in this section and [R.C. 109.361-.366]:
>
> (A) "Officer or employee" means any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state [or] is employed by the state....
>
> (B) "State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

R.C. 127.16(C) states in pertinent part: "Any person who authorizes a purchase or lease in violation of division (B) of this section shall be liable to the state for any state funds spent on the purchase or lease...." R.C. 127.16(C), thus, requires compliance with the provisions of R.C. 127.16(B) which states:

> (1) No state agency, using money that has been appropriated to it directly, shall *purchase*, from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that, *when combined with all other such purchases the agency has made from the supplier during the fiscal year, will amount to ten thousand dollars or more*, unless the purchase is competitively bid or approved by the controlling board.
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> (2) No state agency, using money that has been appropriated to it directly, shall *lease*, from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that, *when combined with all other such leases the agency has made from the supplier during the fiscal year, will amount to twenty-five thousand dollars or more*, unless the lease is competitively bid or approved by the controlling board. However, if the amount of such lease, when combined with all other such leases the agency has made from the supplier during the fiscal year will amount to one hundred thousand dollars or more, it must be competitively bid or approved by at least five members of the controlling board. (Emphasis added.)

Since your opinion request concerns contracts for more than ten thousand dollars, I will assume that your question is directed only to subdivision (B)(1) of R.C. 127.16. Subdivision (B)(1) applies to a state agency, when making a purchase, using money that has been directly appropriated to it, from any supplier other than a state agency; should the purchase of services, equipment, materials, or supplies, or any combination thereof, "when combined with all other such purchases the agency has made from the supplier during the fiscal year," amount to ten thousand dollars or more, the purchase must be competitively bid or approved by the Controlling Board. The language of R.C. 127.16(B)(1) does not expressly exclude a purchase contract from the monetary limitation set forth therein on the basis that such purchase was competitively bid. Rather, it appears that all purchases previously made in the fiscal year from a supplier other than a state agency, whether or not such purchases were bid competitively, are to be included in determining whether the ten thousand dollar limitation of R.C. 127.16(B)(1) has been reached.[3] Thus, where a state agency, using money that has been appropriated to it directly, makes a purchase of

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3 It has come to my attention, however, that the Department of Administrative Services, which has general authority to make purchases on behalf of most state agencies, R.C. 125.02, has otherwise advised state agencies as to the meaning of R.C. 127.16(B). In Office of State Purchasing, Division of Office Services, Department of Administrative Services, *State Purchasing Procedures Manual* 6.2 (fiscal year 1990), DAS has taken the following position: "Any agency and/or *DEPARTMENT* may not exceed a combined total expenditure of $10,000, with any one vendor in any fiscal year, for non-competitive bid items. Items competitively bid by State Purchasing (one time bids or term contracts) do not apply to the $10,000 total." (Emphasis in original.) Pursuant to this interpretation only those amounts expended under contracts which were not competitively bid are to be considered in determining whether the ten thousand dollar limitation of R.C. 127.16(B)(1) has been reached. Although DAS has so advised state agencies with regard to past transactions, I believe that it would be prudent to read R.C. 127.16(B)(1) more restrictively in the future, and to include all purchases, whether or not competitively bid, in arriving at the ten thousand dollar limitation imposed by R.C. 127.16(B)(1). Because agencies have relied in good faith upon DAS' interpretation, I would strongly advise against making any findings for recovery in an audit for purchases occurring prior to issuance of this opinion which were consistent with DAS' interpretation.

services, equipment, materials, or supplies, or any combination thereof, for more than ten thousand dollars through competitive bidding, R.C. 127.16(B)(1) requires that any subsequent purchase during the fiscal year from that supplier, other than a state agency, be competitively bid or approved by the Controlling Board.

Your final question asks:

> If a contract has been awarded on a competitively bid basis, may it subsequently be amended without further competitive bidding or approval of the controlling board to provide for additional work which the parties could not have reasonably contemplated at the inception of the contract, but which is reasonably related to the object of the contract?

This question appears to arise from the general principle that, "statutes requiring competitive bidding apply only to original contracts and do not apply to modifications to such contracts as long as the modifications are within the scope of the original contract." 1973 Op. Att'y Gen. No. 73-076 at 2-285. Whether additions to a contract may be considered merely a modification of the original contract is clearly a question of fact which must be determined on a case by case basis. *See Meister v. Kilbury*, 9 Ohio L. Abs. 118 (Ct. App. Lucas County 1930).

In the case of *Burke v. City of Cleveland*, 6 Ohio N.P. (n.s.) 225, 230 (C.P. Cuyahoga County 1905), the court analyzed the nature of a board's power to modify a contract where so authorized by statute, as follows:

> A contract comprises the thing to be done or furnished, and the manner of doing or furnishing the same. A modification in the contract clearly may relate to either of these and must relate to one or the other of them. *The essential thing is, that the substantial identity of the subject-matter be not thereby changed.* (Emphasis added.)

Similarly, in *Ampt v. City of Cincinnati*, 6 Ohio N.P. 208, 214 (C.P. Hamilton County 1899), the court stated:

> A modification is a change or an alteration which introduces new elements into the details or cancels some of them, but leaves the general purpose and effect of the subject matter intact. It is such change in a contract as leaves the original thing in operation, so far as its general purpose and effect are concerned. *It must not make any substantially new engagement from the old one.* Therefore, so long as the modifications are made as provided by law, and the changes thus entered into do not substantially affect the general purpose and operation of the old contract, then such modification could be made and would be lawful. (Emphasis added.)

Thus, upon examination of the facts in each situation, it is necessary to determine whether the change or alteration of the contract effects a substantial change to the original contract. If so, for purposes of competitive bidding, it may not be included as part of the original contract. For example, if, after competitive bidding, the Auditor awarded a contract for the provision of professional consulting services for a maximum of five hundred hours, the addition of two hundred hours of work for which additional compensation would be paid would be clearly outside the scope of the original contract and would, thus, not constitute merely a modification of the orginal contract. In specific answer to your question, where a contract has been awarded on a competitively bid basis by a state agency as required by R.C. 127.16(B), it may be subsequently amended without further competitive bidding or Controlling Board approval only if the amendment does not substantially change the original contract.

It is, therefore, my opinion, and you are hereby advised, that:

1. Where the Auditor of State has obtained a release and permit from the Department of Administrative Services under R.C. 125.06 to obtain professional services pursuant to contract for

ten thousand dollars or more, he must, absent Controlling Board approval, follow the competitive bidding requirements of R.C. 125.07 and related provisions. If the Auditor, using money that has been appropriated directly to his office, makes such purchase from a particular supplier other than a state agency for ten thousand dollars or more within a fiscal year, R.C. 127.16 (B)(1) requires that such purchase be made through competitive bidding; compliance with the competitive bidding requirements of R.C. Chapter 125 satisfies the competitive bidding requirement of R.C. 127.16(B)(1).

2. Pursuant to R.C. 127.16, where the Auditor of State, using money that has been appropriated directly to his office, seeks to obtain professional services from a particular supplier other than a state agency pursuant to contract for less than ten thousand dollars, if such purchase of services, when combined with all other purchases of services, equipment, materials or supplies, or any combination thereof, from such supplier during the fiscal year, will amount to ten thousand dollars or more, the Auditor must do so by use of a method of competitive bidding which is reasonable under the circumstances, absent Controlling Board approval.

3. A state officer or employee is not entitled to legal representation by the Attorney General in any civil action instituted by the state against the officer or employee with regard to allegations that he may have authorized a contract in violation of R.C. 127.16(B). Should any other party institute such civil action in which the state is not a party, the state officer or employee is entitled to such legal representation to the extent provided in R.C. 109.361.

4. Pursuant to R.C. 127.16(B)(1), if a state agency, using money that has been appropriated to it directly, enters into a competitively bid contract for more than ten thousand dollars for the purchase of services, equipment, materials, or supplies, or any combination thereof, with a particular supplier other than a state agency, the agency may not make another purchase from that supplier within the same fiscal year, unless the purchase is competitively bid or approved by the Controlling Board.

5. Where a contract has been awarded by a state agency on a competitively bid basis as required by R.C. 127.16(B), it may be subsequently amended without further competitive bidding or Controlling Board approval only if the amendment does not substantially change the original contract.