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# COUNTY ADVISORY BULLETIN

**CAB**

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## **HOUSE BILL 120 ALLOWS COUNTIES AND COUNTY CONTRACTING AUTHORITIES TO PURCHASE SERVICES AND SUPPLIES THROUGH REVERSE AUCTIONS ON THE INTERNET**

**Effective Date:** October 26<sup>th</sup>, 2001.

**Revised Code Sections Affected:** Amended 125.01, 125.07, 125.08, 125.10, 125.11 /  
newly-enacted: 9.314, 125.072.

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House Bill 120 of the 124<sup>th</sup> General Assembly, which became effective on October 26<sup>th</sup>, 2001, authorizes boards of county commissioners and other contracting authorities, political subdivisions other than counties, and the Ohio Department of Administrative Services (ODAS), to purchase supplies and services through a competitive reverse auction process via the Internet.

The purpose of this CAB is to inform county commissioners and other county officials, by using a question-and-answer format, of their new rights and responsibilities under House Bill 120.

### **1. Question: What is a competitive reverse auction?**

Answer: A competitive reverse auction is a procedure in which a county or other entity seeking to purchase supplies or services posts via an open environment on the Internet the maximum price that it is willing to pay for the supply or service. Vendors then are instructed to offer bids at or below the price listed by the county, with the county authorized to select a winning bid from those submitted. ORC 9.314 (A) (4).

### **2. Question: What kind of supplies and services can be purchased?**

Answer: Supplies are defined in House Bill 120 to include all property except real property and interests in real property, including but not limited to, equipment, materials, other tangible assets, and insurance. ORC 9.314 (A) (6). Also excepted from the law are buildings and physical structures.

Services are defined to include any furnishing of labor, time, or effort by a person that does not involve the delivery of a specific end product. There is one exception to this: a service as defined under the bill **can** involve the delivery of a report as a specific end product, if the report is merely incidental to the required act. Services furnished under employment agreements or collective bargaining agreements are specifically excluded from the definition of service. ORC 9.314 (A) (5).

### **3. Question: To what entities does the new authority to conduct Internet auctions apply?**

Answer: The new authority applies to counties and also to county contracting authorities, as defined in ORC 307.92. That definition includes “any board, department, commission, 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.” House Bill 120 also applies to political subdivisions other than counties, including municipal corporations, townships, and school districts, and to ODAS..ORC 9.314 (A) (3).

**4. Question: Under what circumstances can a county or county contracting authority conduct a reverse auction via the Internet?**

Answer: A county or contracting authority may purchase services or supplies through a reverse auction via the Internet in any situation where it would be required by the ORC to make those purchases by competitive sealed bidding, if the county or contracting authority determines that a reverse auction via the Internet is “advantageous” to the county or county contracting authority. ORC 9.314 (B).

Reverse auctions also could be used in instances where competitive bidding is not required under ORC 307.86, because counties request proposals or prices for items that do not meet the minimum dollar threshold or in other cases where counties are looking for attractive prices for supplies, equipment and services.

If a county or contracting authority decides to conduct a reverse auction via the Internet, it must adopt rules for the procedures to be used. It must then conduct the auction in accordance with its rules and with the requirements of House Bill 120. ORC 9.314 (C).

**5. Question: What specific items should be included in any rules we may adopt?**

Answer: Rules adopted under House Bill 120 may include any number of provisions related to the use of competitive reverse auctions via the Internet. Among the most important provisions to include are those that will clearly delineate the factors to be considered in purchasing supplies or services, including price, past service record of the vendor, and the ability to deliver the supplies or services that are the subject of each reverse auction.

Other provisions to consider including are 1) the rationale for the program and its potential cost savings; 2) notice procedures in print and electronic form for the reverse auction; 3) the general time periods during which each auction will be posted, subject to revision in a particular case if necessary; 4) procedures for the notification of current vendors of the planned use of reverse auctions; 5) procedures for notifying vendors after bids have been received; 6) requirements for bid bonds and other types of financial security devices, if the county or county contracting authority decides to require these.

**6. Question: How would the bidding process work?**

Answer: A county or contracting authority first would solicit proposals for supplies or services through a request for proposals, with notice given in accordance with rules adopted by the county or contracting authority. The request for proposals prepared by the county or contracting authority must state the relative importance of price and other factors. ORC 9.314 (C).

**7. Question: What specific provisions should be included in these requests for proposals?**

Answer: The most important provision to include in these requests for proposals is one that clearly delineates the basis on which the supplies or services will be purchased. If the requests are not specific and clear about the process that will be used to evaluate bids and select a successful vendor, they are likely to generate dissatisfaction and possible legal action by vendors.

The directions to vendors in the requests for proposals should clearly state the relative importance of price as related to other factors, including the past service record of the vendor and the vendor's ability to deliver or perform the specific supply or service that is the subject of the current auction.

**8. Question: What happens after the proposals are submitted?**

Answer: A county or contracting authority may conduct discussions with responsible entities or individuals who submit proposals that the county or contracting authority determines to be "reasonably susceptible" of being selected for an award. These discussions are intended to ensure full understanding of and responsiveness to solicitation requirements. The county or contracting authority must accord all bidders fair and equal treatment with respect to opportunities for discussions related to the clarification, correction or revision of proposals. ORC 9.314 (D).

A county or contracting authority may award a contract for supplies or services to the bidder whose proposal the county or contracting authority determines to be "most advantageous" to it, taking into consideration price and evaluation criteria listed in the request for proposals. The contract file maintained by the county or contracting authority must contain the basis on which the award is made. ORC 9.314 (E).

**9. Question: How does this "most advantageous" standard compare to standards that now exist in current law?**

Answer: This is a difficult question to answer, given the fact that no courts have yet interpreted the meaning of the phrase "most advantageous" as it appears in House Bill 120. Nor have they determined whether the phrase actually creates a new bidding standard that applies only to Internet reverse auctions. Nor have any courts decided instead that the phrase in fact is one that should be viewed and implemented in light of one or more of the bidding standards that now are contained in statute.

However, the phrase "most advantageous," on its face, does appear to grant contracting authorities more discretion than either of the other two most commonly used bidding standards, which are more clearly delineated in statute and case law: 1) the "lowest responsive and responsible bidder" standard and 2) the "lowest and best bidder" standard.

The “most advantageous” language contained in House Bill 120 is taken verbatim from ORC section 125.071, which authorizes ODAS to make purchases by competitive sealed proposal and in doing so to award contracts to bidders “whose proposal is determined to be most advantageous to the state, taking into consideration factors such as price and the evaluation criteria set forth in the request for proposals.”

With the enactment of House Bill 304 by the General Assembly in 1990, the “lowest responsive and responsible bidder” standard became the optional standard for boards of county commissioners and other local government entities. This standard became the required one for most state agencies in 1988. Before this standard became an option for counties in 1990, counties generally used the “lowest and best bidder” standard in awarding contracts for supplies or services. These are the two standards used by the large majority of Ohio counties today.

The “lowest responsive and responsible bidder” standard requires the contracting authority to consider certain factors in determining whether a bid is responsive and responsible.

A bidder is considered to be “responsive” if the proposal responds to bid specifications in all material respects and if it contains no irregularities or deviations from the specifications that would affect the amount of the bid or give the bidder a competitive advantage over other bidders.

A bidder is determined to be “responsible” by considering certain factors, including the experience of the bidder, his or her financial condition, conduct and performance on previous contracts, the bidder’s facilities, the bidder’s management skills and the bidder’s ability to execute the contract properly.

Under this standard, if a low bidder is found to be both responsive and responsible based on the considerations in the statute, then he or she is awarded the contract. Courts have granted little leeway to contracting authorities to stray from the requirements set forth in ORC 9.312 (C).

More discretion is granted to a contracting authority under the “lowest and best bidder” standard. The statute does not define the meaning of the word “best” but courts have generally held that the contracting authority must award the contract to the bidder they consider best qualified to provide the supplies or perform the service. The contracting authority may decide that the best bidder is not the lowest bidder and the courts will not intervene in this decision unless there is a showing of abuse of discretion or fraud.

ODAS reports to CCAO that in implementing House Bill 120 it intends to use either “the lowest responsive and responsible bidder” standard for supplies and commodities or a “best buy” standard for more complex services that practically will combine price with other evaluation criteria that consider quality of service. This decision appears to indicate that ODAS believes that a contracting authority has the discretion to determine which standard it wants to employ in evaluating bids received via Internet reverse auctions under the

provisions of House Bill 120.

**10. Question: What about performance bonds and other forms of financial security?**

Answer: The rules that a county or contracting authority adopts with regard to conducting reverse auctions via the Internet may require the provision of a performance bond or a similar form of financial security, in an amount and form specified in the rules. ORC 9.314 (F).

A county or contracting authority may wish to require a bid bond, the purpose of which is to protect the county against the possible failure of the vendor to enter into the contract once that vendor has been selected as the successful bidder.

There are pros and cons to requiring a bid bond for any contract that involves the purchase of supplies or services. It is rare for a vendor who has been selected as a successful bidder to walk away from a contract. Furthermore, the proper safekeeping of bid bonds and the return of all bid bonds to unsuccessful bidders is an administrative cost to county government. Bid bonds also drive up the cost of doing business for vendors who incorporate the cost of providing a bid bond into their bid price. With respect to small vendors, a bid bond may act as a disincentive to bid on county government contracts because small vendors have less money to tie up in a bond, certified check, money order, or cashier's check.

On the other hand, the particular circumstances of a bidding situation may compel counties or contracting authorities to require a bid bond. A bid bond might be prudent if there were a lack of alternative vendors available who could perform the contract if the original bidder reneges. It also might be prudent with a vendor involved in a new product or service that has little or no history attached to it.

The situation is different with respect to performance bonds. The purpose of a performance bond is to protect the county or contracting authority against improper or negligent performance of the contract by the vendor that results in financial harm to the county or contracting authority. Although performance bonds carry with them many of the same financial costs to vendors as bid bonds, they are as a general rule more necessary for counties because the risk of financial harm to a county during performance of a contract is much greater than the risk of a successful bidder walking away from a contract.

Remember that the amount and form of performance bonds or other forms of financial security are required to be specified in the rules adopted by the county or contracting authority with regard to the operation of Internet reverse auctions.

**11. Question: Do the requirements for ODAS differ in any respect for the requirements for counties, contracting authorities and other political subdivisions?**

Answer: Yes. ODAS is required, when engaging in reverse auctions via the Internet to

purchase supplies or services, to adhere to the preference provisions under the Buy Ohio law contained in ORC Chapter 125. Counties and contracting authorities are not required to follow the preference provisions of the Buy Ohio law unless they specifically adopted the Buy Ohio guidelines as part of their purchasing policies.. However, counties and contracting authorities that participate under ORC 125.04 in DAS contracts are bound by any the terms and conditions that DAS may impose, including participation in the Buy Ohio program. ORC 125.072.

ODAS also is required, by October 26<sup>th</sup>, 2002, to submit a report to the committees of the Ohio Senate and Ohio House of Representatives with jurisdiction over state purchasing statutes, regarding the effect of reverse auctions on purchases from Ohio businesses, including minority and female business enterprises. Section 3, temporary law.

**12. Question: Is there anything else we should consider about this new process before we move forward?**

Answer: The most important item to consider is the fact that, as in other bidding situations, counties can avoid trouble down the line by making sure all bidders are treated fairly, all specifications and requirements are clearly understood by all bidders, and all procedures listed in the board's rules are applied to all bidders in a forthright and open manner.

There are a number of vendors who currently offer Internet reverse auction services. CCAO has been working with LightGov.com in the development of Internet-based applications for county government. LightGov.com offers Internet reverse auction programs that can be adapted for county use. They also have a program for the auction of surplus personal property iva the Internet as has been authorized by House Bill 226 of the 124<sup>th</sup> General Assembly, effective January 25<sup>th</sup>, 2002. CCAO will publish a county advisory bulletin on House Bill 226 in the near future. In addition, CCAO has a list of other potential providers of Internet reverse auction services.

For more information on House Bill 120, please contact Doug Putnam or Brad Cole of CCAO at 614-221-5627.