



Ohio Legislative Service Commission

Bill Analysis

Wendy H. Gridley
Michael Burns

S.B. 85

128th General Assembly
(As Introduced)

Sens. Stewart, Seitz

BILL SUMMARY

- Authorizes counties, conservancy districts, sanitary districts, and regional water and sewer districts to award multi-year, professional service contracts, not through competitive bidding, but through direct negotiation or requests for proposals or qualifications, for the engineering, repair, sustainability, water quality management, and maintenance of a water storage tank and appurtenant facilities.
- Specifies that a contract entered into under the special contracting procedure must include certain terms and conditions.

CONTENT AND OPERATION

Special contracting procedure

Political subdivisions that operate public waterworks generally are required to enter into contracts for services above a certain cost, typically \$25,000, by competitive bidding. The bill creates a special contracting procedure as an exception to this competitive bidding requirement (R.C. 9.29(A)). It authorizes a county, a conservancy district, a sanitary district, and a regional water and sewer district to enter into a multi-year, asset management professional service contract for the engineering, repair, sustainability, water quality management, and maintenance of a water storage tank and appurtenant facilities it owns, controls, or operates, not through competitive bidding, but by direct negotiation or through requests for proposals or qualifications, but only if the contract contains the terms and conditions specified by the bill (R.C. 9.29(A)(1),

6101.161, 6103.101, 6115.201, and 6119.101).¹ (These terms and conditions are explained below.)

The bill also purports to authorize a municipal corporation, through its director of public service, mayor, city manager, board of trustees of public affairs, village administrator, or other contracting officer, commission, board, or authority, to enter into a contract under the bill "as authorized by ordinance of the municipal corporation's legislative authority" (R.C. 9.29(A)(2)). However, because of municipal home rule,² it is doubtful that the bill actually will apply to municipal corporations. Essentially the bill creates a special contracting procedure as an alternative to competitive bidding. But municipal contracting procedure appears to be a matter of local self-government that, under Ohio Constitution, art. XVIII, § 3, prevails to the exclusion of state statutes affecting contracting procedure. See *National Electric Contractor's Assn. v. Mentor*, 108 Ohio App.3d 373 (1995). And, perhaps more significantly, the bill concerns the operation of water storage tanks and appurtenant facilities. These water storage tanks and appurtenant facilities are public utilities. And the operation of municipal public utilities appears to be a matter committed to municipal control that, under Ohio Constitution, art. XVIII, § 4, prevails to the exclusion of state statutes affecting the operation of public utilities. See *McCann v. Defiance*, 167 Ohio St. 313 (1958). In short therefore, while the bill purports to extend its special contracting procedure to municipal corporations, in actuality it appears likely to be irrelevant to them.

Required terms and conditions of contracts entered into under the special contracting procedure

As mentioned above, a contract entered into under the bill's special contracting procedure specifically must include several terms and conditions:

(1) The contract must "prohibit" the county, conservancy district, sanitary district, or regional water and sewer district from being required to make total payments under the contract in a single year that exceed the water utility charges it receives during that year.

¹ Actually, the bill is ambiguous whether the specified political subdivisions are required or rather merely authorized to follow its special contracting procedure insofar as contracting with regard to water storage tanks and appurtenant facilities is concerned. The provisions of the bill making its special contracting procedure available to the political subdivisions use language of obligation ("shall comply with [the special contracting procedure]") (R.C. 6101.161, 6103.101, 6115.201, and 6119.101). But the special contracting procedure itself uses language of mere authorization ("may enter into . . . a . . . contract") (R.C. 9.29(A)). In any event, once a political subdivision forms the intent to enter into a contract under the bill, the terms of the contract are limited to those specified in the bill.

² Ohio Constitution, art. XVIII, §§ 3 and 4.

(2) The contract must require that work performed under the contract be done under the supervision of a licensed professional engineer who certifies that the work will be performed in compliance with all applicable codes and engineering standards.

(3) The contract must provide that if, upon the date of its commencement, the water storage tank or appurtenant facilities require engineering, repair, sustainability, water quality management, or service to bring the tank or facilities into compliance with federal, state, or local requirements, then the party contracting with the county, conservancy district, sanitary district, or regional water and sewer district must provide the required engineering, repair, sustainability, water quality management, or service.

(4) The contract must require that the cost of work necessary to ensure compliance with federal, state, or local requirements (under term (3)) be itemized separately and charged to the county, conservancy district, sanitary district, or regional water and sewer district, with payments spread over a period of three years from the date the contract commenced.³ (R.C. 9.29(B).)

HISTORY

ACTION	DATE
Introduced	03-24-09

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³ Because availability of the special contracting procedure depends upon the contract including the required terms and conditions, terms (3) and (4) conceivably could have the effect of making the special contracting procedure unavailable if the condition the terms contemplate does not exist—that is, if engineering, repair, sustainability, water quality management, or service is not necessary to bring the water storage tank or appurtenant facilities into compliance with federal, state, or local requirements. If that should be the case, then the otherwise applicable competitive bidding requirements would apply.