



Ohio Legislative Service Commission

Bill Analysis

Phil Mullin

Sub. S.B. 85

128th General Assembly
(As Passed by the Senate)

Sens. Stewart, Seitz, Wagoner, Fedor, Harris, Hughes, Husted, Kearney, D. Miller, Morano, Patton, Sawyer, Smith, Turner, Wilson

BILL SUMMARY

- Authorizes counties, conservancy districts, sanitary districts, regional water and sewer districts, and non-chartered municipal corporations to award multi-year, professional service contracts through direct negotiation or requests for proposals or qualifications in lieu of competitive bidding, 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). (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)). Because of municipal home rule authority,¹ it is likely that the bill will only apply to non-chartered municipal corporations. The bill states that nothing in it is intended to restrict the authority of a municipal corporation under the self-government/police power and public utility home rule provisions of the Ohio Constitution (Sections 3 and 4 of Article XVIII of the Ohio Constitution). So, to the extent that a municipal corporation can elect to competitively bid or enter into some other type of contractual arrangement (including one similar or identical to the one described in the bill) under Sections 3 or 4 of Article XVIII, the bill is not intended to restrict that authority despite the use of mandatory language describing the terms of the contract that the bill purports to authorize.

The bill provides that "any municipal corporation that may be required by law to award contracts in the manner set forth" in specified provisions of law generally requiring competitive bidding for non-chartered municipal corporations, may use the special contracting procedure for the type of contract set forth in the bill.² (R.C. 735.054.)

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 provide that the contracting political subdivision is not required to make total payments under the contract in a single year that exceed the excess of (a) the water utility charges over (b) the operating expenses payable from such charges and the principal, interest, and other debt charges for outstanding debt due in that year.

¹ Ohio Constitution, art. XVIII, §§ 3 and 4.

² The General Assembly generally may impose *procedural* requirements on non-chartered municipal corporations for matters of local self-government. *Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375; *National Electric Contractor's Assn. v. Mentor*, 108 Ohio App.3d 373 (1995). It is not known whether this is true as to the actions of a municipal corporation acting pursuant to its *public utility* home rule authority under Section 4 of Article XVIII. *State ex rel. McCann v. Defiance*, 167 Ohio St. 313 (1958).

(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 political subdivision 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 may be charged to the political subdivision, with payments spread over a period of three years from the date the contract commenced.³ The charges may be paid only after provision is made to pay operating expenses and the principal, interest, and other debt service, including reserves and coverage requirements, for debt due that year. (R.C. 9.29(B).)

HISTORY

ACTION	DATE
Introduced	03-24-09
Reported, S. State & Local Gov't & Veterans Affairs	06-17-09
Passed Senate (32-0)	06-24-09

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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, it appears that the otherwise applicable competitive bidding requirements would apply.