



# THE BUCKEYE INSTITUTE

## The Buckeye Institute Policy Brief

### Competition Saves Taxpayer Money on Water and Sewer Line Repair

By Daniel J. Dew

#### Introduction

Last year, the toxic, undrinkable water in Flint, Michigan and Sebring, Ohio made national headlines and focused needed attention on the country's aging water and sewer lines.<sup>1</sup> Every mile of America's 1.2 million miles of water supply mains will suffer a break roughly every six years, and given the age and disrepair of much of this infrastructure many state and local governments will need to fix and replace miles of water lines—and soon.<sup>2</sup>

Taxpayers, of course, foot the bill for infrastructure repair, and replacing water and sewer systems is extraordinarily expensive. Regrettably, local ordinances often limit competition on public infrastructure construction and repair contracts, which then spikes the already high costs even further.<sup>3</sup> An ordinance in Columbus, Ohio, for example, requires all water pipelines to be built with a more expensive material. Nearby Delaware County, Ohio, on the other hand, has no such requirement, preferring an open bid process that creates competition among various material providers. By limiting competition and effectively mandating a self-imposed monopoly, Columbus taxpayers paid nearly \$100,000 more per mile of pipe than their neighbors in Delaware County.<sup>4</sup>

Ohio's General Assembly may soon prohibit Ohio localities from imposing monopolistic requirements when spending state dollars on projects. If local politicians want to require spending more of their local revenues for inferior products or workmanship, then they can face the local voters at the next election. But when local governments spend state dollars on local projects the state can and should require localities to spend state funds efficiently and wisely. The fiscally prudent policy under consideration in the Statehouse would require county engineers to consider any bid that uses safe and structurally sound materials when state funds are spent on local projects.

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<sup>1</sup> Lucy Westcott, "**With Lead in the Water, Could Sebring, Ohio Become the Next Flint?**", *Newsweek*, Jan. 27, 2016.

<sup>2</sup> Charles Fishman, "**13 Things You Probably Don't Know About the US Water System**," *National Geographic*, Aug. 12, 2014.

<sup>3</sup> Bonner R. Cohen, *Seizing the Initiative: How States Can Help Themselves in Rehabilitating Underground Water Infrastructure*, American Legislator, April 2, 2015.

<sup>4</sup> BCC Research, *Comparison of Water Main Pipeline Installation Lengths and Costs in Ohio*, Feb. 25, 2016.

## Competition Protects Taxpayers

Free competitive markets raise quality and lower prices. When governments impose regulations and ordinances that give any business or industry a competitive advantage, they negate the market incentives for industries to lower costs and provide better products.

Competitive bidding for public projects functions no differently. Businesses should make their best proposal for the work required, and the government should select the bid providing the best value for the taxpayers. The best value may not always be the cheapest bid, but taxpayers can make government officials explain the selection and justify the cost. Indeed, Ohio recognizes the value of competitive bids and state law requires government contracts be open to competitive bidding in most situations.<sup>5</sup> As the Ohio Supreme Court has explained, competitive bids on government projects “protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts.”<sup>6</sup>

Monopolistic ordinances and requirements have the opposite effect. When, for instance, localities are forced to use union labor on public projects, taxpayers pay the price. Locally mandated Project Labor Agreements (PLA) often stipulate that any contractor whose bid is accepted agrees to follow union-dictated practices, which forecloses competition from non-union shops and thereby increases construction costs 12-18 percent.<sup>7</sup> Similar competition-killing policies plague the nation’s water pipeline projects. Some local governments have limited market competition for water and sewer line materials. As noted, Columbus, Ohio, for example, paid \$97,680 more per mile of pipe than Delaware County by requiring all pipe to be made of a more expensive material rather than allow competitive bids using other materials.<sup>8</sup>

By closing the door on open competition, municipalities risk over-paying for products and labor both now and in the future—just as more and more of the nation’s water pipelines are in critical need of repair. Communities may soon face the unwelcome, but avoidable choice of paying too much for waterline repairs or finding their tap water undrinkable.

## Let the Professionals Do Their Jobs

Competitive bids on public infrastructure and waterline projects help ensure that local officials are empowered to do their jobs for the communities they serve. County engineers, for example, should be authorized to decide which materials and which designs are best for any given community project. But local ordinances that limit competition or require certain materials on certain projects artificially restrict the options available to the professionals. Instead of allowing the professional engineers to design and engineer as necessary, professional politicians—pretending to know better than the experts—too often take it upon themselves to foreclose construction and design options through local ordinances and regulations that may or may not be in the best interest of the project or community.

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<sup>5</sup> OHIO REV. CODE ANN. § 307.86.

<sup>6</sup> *Cementech v. City of Fairlawn*, 109 Ohio St. 3d 475, at 477.

<sup>7</sup> Tom Lampman, *One Step to Restore Competition to Public Works Bidding*, The Buckeye Institute, April 21, 2015.

<sup>8</sup> BCC Research, *Comparison of Water Main Pipeline Installation Lengths and Costs in Ohio*, Feb. 25, 2016.

In the waterline repair context, some opponents of competitive bidding worry that open bids may make county engineers liable for not selecting the lowest bidder or for any failure resulting from their selections of non-traditional pipe materials. Both concerns are misplaced.

Engineers may worry that absent a restrictive ordinance, the county may be required to choose the lowest bid. But that is not the case. Ohio law instructs that contracts be awarded to the “lowest and *best* bidder.”<sup>9</sup> Thus, if, in the engineer’s professional opinion, the lowest bid is not also the best bid, the engineer may legally select the better product or service even at the higher price.<sup>10</sup> Furthermore, should an engineer violate a competitive bid statute, the Ohio Supreme Court has held that “the rejected bidder cannot recover its lost profits as damages”<sup>11</sup> and the engineer may not be held personally liable. Indeed, county engineers enjoy immunity from suit when replacing or repairing waterlines. In 2012, the Ohio Supreme Court held that construction or replacement of a sewer and water system is a government function for which political subdivisions—such as county engineers—may not be sued.<sup>12</sup>

Contrary to the concerns of some anti-competition advocates, county engineers and other professionals should be empowered by state and local authorities to do their jobs and perform their roles in a free and open market, free from political influence that would artificially limit engineering and construction options available to the professionals.

### **Helping Spend State Tax Dollars Wisely**

Elected officials have a duty to spend tax revenues wisely and efficiently. When the state sends its tax dollars to local governments for local projects, the state legislature should require common sense practices to keep state taxpayers from subsidizing local government waste. One such practice, for example, would require local officials to consider all bids proposing safe materials for any project paid for with state funds. Fiscal responsibility demands it.

Some may fear that such a requirement would violate local home rule, but Ohio law already requires competitive bidding on any project more than \$50,000.<sup>13</sup> Thus, requiring consideration of all safe materials on projects using state dollars is actually more consistent with home rule authority than the current competitive bidding statute. Under the proposed policy, local governments could still limit materials for projects that only spend local tax revenues.

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<sup>9</sup> OHIO REV. CODE ANN. § 735.05 (Emphasis added).

<sup>10</sup> *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St. 3d 590, at 603.

<sup>11</sup> *Cementech v. City of Fairlawn*, at 477.

<sup>12</sup> *Coleman v. Portage County Eng’r*, 133 Ohio St. 3d 28, at 33-36.

<sup>13</sup> OHIO REV. CODE ANN. § 307.86.

## **Conclusion**

As communities and local governments take steps to address their aging water and sewer lines, they would do well to learn from the painful lessons of Flint, Michigan and Sebring, Ohio. And as they look to repair and replace expensive infrastructure, local leaders should avoid ordinances and regulations that needlessly limit competition, flexibility, and the know-how of the trained professionals tasked with fixing the problems. Instead, localities should consider all materials deemed safe for water supply lines, and should encourage cost-saving competition among suppliers and contractors as they safeguard taxpayer dollars against waste, fraud, and abuse.

## About the Author



Daniel J. Dew is the legal fellow at The Buckeye Institute's Legal Center. In this capacity, Dew focuses on legal policies that promote freedom and the public good.

An expert on criminal justice reform, Dew has worked on policies that increase Ohioans' safety, makes the criminal justice system fairer, and saves taxpayer dollars. Dew was a leading voice in reforming Ohio's civil asset forfeiture policies and worked closely with Ohio's Criminal Justice Recodification Committee on developing proposals to reform the state's criminal code.

Prior to his position at Buckeye, Dew was a visiting legal fellow at the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies and an associate attorney at Ford, Gold, Kovoov & Simon. He also represented energy companies in contract negotiations.

Dew earned his law degree from Cleveland Marshall College of Law, and his undergraduate degree from Utah State University.



**THE BUCKEYE INSTITUTE**

88 East Broad Street, Suite 1120

Columbus, Ohio 43215

(614) 224-4422

[BuckeyeInstitute.org](http://BuckeyeInstitute.org)

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