

Auditor of State Bulletin

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All School District Treasurers and Superintendents
All Township Clerks and Trustees
All Village Fiscal Officers, Council Members, and Clerks
All Public Libraries

FROM: Betty Montgomery
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SUBJECT: Unresolved Findings for Recovery Database (ORC Section 9.24)

Senate Bill 189 was recently enacted and contained a provision modifying an existing provision of law (ORC section 9.24), that prohibits a state agency or political subdivision from awarding a contract for goods, services, or construction, paid for in whole or in part with state funds, to a person with an unresolved finding for recovery issued by the Auditor of State.

Background

House Bill 95, the State of Ohio Operating Budget for fiscal years 2004-05, initially enacted ORC 9.24. On January 1, 2004, a database of unresolved findings for recovery was made available to the public via the Auditor of State's web site (www.auditor.state.oh.us). For more specific information about the original statute and the basic concepts of the findings for recovery database, please refer to Auditor of State Bulletin 2003-009.

From the time ORC 9.24 took effect, numerous legal and implementation questions were raised by state agencies and political subdivisions that were attempting to comply with the law. As a result of these questions, the Auditor of State took two

separate actions. First, legal guidance on a number of issues was requested of the Attorney General. These requests ultimately resulted in a single formal legal opinion (“AG Opinion 2004-014”) issued by the Attorney General on April 15, 2004. This opinion may be obtained from the Auditor of State’s web site or from the Attorney General’s web site at www.ag.state.oh.us). Second, the Auditor requested that the Ohio General Assembly consider amending ORC 9.24 to clarify its intent with regard to several issues. An amendment was ultimately included in Senate Bill 189. This Bulletin discusses specific issues related to the Attorney General opinion and Senate Bill 189.

Definition of “contract”

AG Opinion 2004-014 addresses the meaning of the term “contract” as used in ORC 9.24:

For purposes of R.C. 9.24, a contract is awarded when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. A purchase arrangement that does not involve competitive contracting procedures does not constitute the awarding of a contract and is not subject to R.C. 9.24.

Consequently, pursuant to this opinion, ORC 9.24 only applies to contracts which have been subjected to a competitive contracting process. This does not include transactions made via other means such as purchase orders, credit cards, debit cards, etc.

One question that has frequently been raised is the applicability of ORC 9.24 to purchases made off the state term schedule. The Ohio Department of Administrative Services (DAS) establishes a state term schedule of vendors with whom it has contracted to provide specific goods or services at negotiated prices. Under certain circumstances, state agencies and political subdivisions may make purchases off the state term schedule. Under such an arrangement, before placing a vendor on the state term schedule, DAS engages in a contracting process as described in AG Opinion 2004-014 and consequently, is required to comply with ORC 9.24. State agencies and political subdivisions that purchase off the state term schedule, however, do not engage in their own contracting processes and are not subject to the provisions of ORC 9.24.

In addition to the limitation described above, newly enacted ORC 9.24 (G)(1)(a) states that the only contracts subject to the provisions of the statute are those contracts in which the cost for the goods, services, or construction exceeds \$25,000. Division (G)(1)(b) provides an exception to this rule and applies the statute to a contract awarded to any person who, in the previous fiscal year, received contracts from the state agency or political subdivision, the aggregate of which exceeded \$50,000. Consequently, state agencies and political subdivisions should immediately review their contracts awarded in the previous fiscal year in order to identify persons to whom this aggregating provision applies. *In summary, ORC 9.24 applies only to contracts which are the subject of a competitive contracting process and which either exceed \$25,000 or meet the aggregating criteria described above.*

Senate Bill 189 also clarifies the following points in regard to the contracting process:

- The prohibition in ORC 9.24 applies to renewals of contracts which otherwise meet the criteria described above.
- The contract is considered to be awarded when it is entered into or executed, irrespective of whether the parties to the contract have exchanged any money.
- The provisions of ORC 9.24 do not apply to the awarding by a state agency or political subdivision of employment contracts. Please note that AG Opinion 2004-014 clarifies that independent contractor relationships, if they meet the other criteria for being a “contract,” *are* subject to the provisions of ORC 9.24.

Definition of “state funds”

The prohibition against awarding contracts pursuant to ORC 9.24 is limited to contracts “paid for in whole or in part with state funds.” AG Opinion 2004-014 explains that the term “state funds” means “moneys, other than federal funds, that are held in the state treasury and appropriated by the General Assembly in accordance with Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision.”

This opinion further advises that if state funds are commingled with local funds, a contract paid with those funds would be presumed to include both state *and* local funds. In contrast, if a political subdivision segregates its funds and pays for a contract with only local funds, the contract would not be subject to ORC 9.24.

Finally, Senate Bill 189 provides that for the purposes of ORC 9.24, the term “state funds” does not include funds that the state receives from another source and passes through to a political subdivision, such as federal funds.

Definition of “political subdivision”

The requirements of ORC 9.24 apply to both state agencies and political subdivisions. Senate Bill 189 clarifies that the definition of “political subdivision” is the definition provided in ORC 9.82:

“Political subdivision” means a county, city, village, township, park district, or school district.

Senate Bill 189 further states that the provisions of ORC 9.24 only apply if the political subdivision has received more than \$50,000 of state money in the current fiscal year or the preceding fiscal year.

Definition of “person”

Again, ORC 9.24 prohibits awarding certain types of contracts to a person with an unresolved finding for recovery. It is important to understand that the statutory definition of “person,” found in ORC 1.59, includes not only individuals, but also corporations,

business trusts, estates, trusts, partnerships, or associations. However, it was unclear in the initial version of ORC 9.24 whether a finding for recovery issued against a corporation also applied to individuals within the corporation, and vice versa. Senate Bill 189 clarifies that the term “person” applies only to the person actually named in the finding for recovery.

Applicability to pre-2001 findings for recovery

Senate Bill 189 specifies that the prohibition against awarding contracts applies only to those persons with unresolved findings for recovery that were issued after January 1, 2001. In addition, aside from checking the Auditor of State’s database, a state agency or political subdivision may obtain other proof that the person has no unresolved finding for recovery. However, because compliance with ORC 9.24 is ultimately the responsibility of the state agencies and political subdivisions, the Auditor of State’s office recommends that they continue to check the database before awarding a contract that is subject to ORC 9.24.

Additional exclusions from ORC 9.24

In addition to the clarifications described throughout this Bulletin, Senate Bill 189 imposes several additional limitations upon the applicability of ORC 9.24:

Bonding companies, insurance companies, self-insurance pools, joint self-insurance pools, risk management programs, or joint risk management programs are exempt unless a court has entered a final judgment against the company and the judgment has not yet been satisfied. These entities will no longer appear in the Auditor of State’s database until notification of a final judgment is received from the Attorney General.

Medicaid provider agreements (ORC Chapter 5111) or payments or provider agreements under disability assistance medical assistance (ORC Chapter 5115) are exempt. In addition, if federal law dictates that a specified entity provide the goods, services, or construction for which a contract is being awarded, the entity is exempt, regardless of whether that entity has an unresolved finding for recovery.

Auditor of State Database Updates

In addition to the statutory changes and clarifications provided in Senate Bill 189 and Attorney General Opinion 2004-014, the Auditor of State has made changes to the findings for recovery database since it was first unveiled on January 1, 2004 as a result of suggestions from users.

First, we have added a component to our web site allowing users to download the entire database into a comma delineated file, which can then be printed. Please note that the web site also contains a notation of when the database was last updated. This feature allows users, if they previously downloaded the database, to know whether that version is still up-to-date or whether they should download a more current version.

In addition, the web site allows users to perform a certified search for the purpose of compliance with ORC 9.24. If the person does not appear in the database, the user is given the option of printing a certification page that may be used to verify compliance with ORC 9.24. The certification page has been modified in two ways. First, the language was changed to more accurately reflect the purpose of the certification page and the manner in which it is to be used. Specifically, the certification page returns a list of possible matches, based on letter combinations from the search parameters that were entered. **Unless the name you searched for actually appears on the list of possible matches, that person is not included in the Auditor of State's database and is not prohibited by ORC 9.24 from being awarded a contract.** If the person's name does appear on this list of possible matches, the person does have an unresolved finding for recovery and is prohibited from receiving a contract (subject to the exceptions discussed throughout this Bulletin).

In addition to this change, we removed the sections of the certification page requiring the user's signature. An initialed copy of the certification page is sufficient to demonstrate compliance with ORC 9.24 for audit purposes. Please note that the law does not require state agencies and political subdivisions to use the certification page. The certification page was developed by the Auditor of State as a method for a state agency or political subdivision to document the fact that it has checked the database and found no matches. However, any documentation which sufficiently demonstrates compliance with ORC 9.24 will be acceptable for audit purposes.

In conclusion, please note that this Bulletin does not provide a comprehensive overview of ORC 9.24. Instead, it is meant as a supplement to Auditor of State Bulletin 2003-009. These bulletins – along with the findings for recovery database, the revised version of ORC 9.24, and Attorney General Opinion 2004-014 – may be accessed via the Auditor of State's web site at www.auditor.state.oh.us.

Questions concerning this Bulletin or the Auditor of State's database should be directed to the Auditor of State's Office at 1-800-282-0370. Questions regarding the resolution of findings for recovery or Attorney General Opinion 2004-014 should be directed to the Attorney General's Office at (614) 644-1234. Legal questions about compliance with ORC 9.24 should be directed to your legal counsel.

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