Wendy H. Gridley *Legislative Service Commission*

S.B. 167

124th General Assembly
(As Introduced)

Sens. McLin, Hagan, Herington, DiDonato

BILL SUMMARY

- Permits the Controlling Board to consider a request that is not on the Board's proposed agenda only if Board members unanimously agree to consider the request.
- Increases the required majority to pass most Controlling Board actions, from four to five of the Board's seven members.
- Requires the retention of Controlling Board minutes for eight years.
- Limits the liability of a state official for failing to let bids competitively when competitive selection is required, as long as the failure was not due to bad faith, the official did not gain personally, and the state received full value; the limit is $10,000.
- Requires state agencies to advertise upcoming public improvement contracts or purchases of supplies or services on the Internet, according to rules adopted by the Department of Administrative Services.

CONTENT AND OPERATION

Controlling Board functions

In general

The Controlling Board consists of seven members: three from each house of the General Assembly and a president. The president is either the Director of Budget and Management or the Director's designee. The Board's main functions are to ensure that the legislature's intentions are carried out--particularly with respect to appropriation acts and other matters involving the state's finances--and to oversee purchasing by state agencies--particularly with respect to waiving

statutory competitive selection processes. The Board's legislative oversight role consists mainly of considering requests by state agencies for fund transfers or for release of funds that have been appropriated but cannot be spent without the Board's approval, and authorizing the spending of excess revenue. (Secs. 127.12, 127.14, 127.16, and 127.17.)

Supermajority required to take action

Currently, any action of the Controlling Board must be carried by an affirmative vote of a simple majority of the seven members (i.e., four affirmative votes). The bill generally increases the required majority to five affirmative votes. That supermajority does not apply, however, when the Board approves the addition of items to the agenda as explained below or when a law otherwise provides. (Sec. 127.13(D) and (E).)

Additions to the agenda: unanimous approval required

Under current law, the Controlling Board must meet at least once each month. The Board's president is required by law to prepare a proposed agenda for each meeting and distribute it to the other members at least seven days before the meeting. The Board also may require that requests by certain entities be added to the agenda of a future meeting.[1] Regarding other matters of procedure, the Board itself may adopt rules, but those rules currently do not govern the preparation of the agenda. (See Ohio Administrative Code Rule 126:1-1-01.) According to the Controlling Board Manual, the Board "may agree to consider additional items," but the manual gives no indication as to whether a vote is required to arrive at such an agreement. Nevertheless, the Board's action on a request that does not appear on a proposed agenda would not, for that reason alone, necessarily be invalid, according to an observation made by the Ohio Supreme Court in 1981.[2]

The bill specifies how an item not appearing on the president's proposed agenda may be added to the agenda in the course of a meeting. The Board may consider an additional request only if there is unanimous approval of the Board membership to consider that request. (Sec. 127.13(D).)

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[1] *The entities are the offices of the statewide elected officers, the Senate, the House of Representatives, and the Supreme Court (sec. 127.13).*

[2] *"Ordinarily, the Controlling Board must give the seven-day notice. However, the General Assembly indicated in . . . [section 127.13] awareness through the use of the phrase "proposed agenda" that in some circumstances notice is not practical. Clearly a proposed agenda can be altered. Thus the board is allowed, where an exigency exists, to make a decision without providing such notice."* State, ex rel. Meshel, v. Keip *(1981), 66 Ohio St.2d 379, 389.*

Retention of Board minutes for eight years

Under the bill, the secretary of the Controlling Board is required to keep the minutes of each meeting and must retain them for at least eight years after the meeting (sec. 127.19).

Limitation on state official's liability for using improper purchasing procedures

Covered matters

Under current law, state agencies must obtain prior approval from the Controlling Board for any purchase from or real estate lease agreement with a single supplier that exceeds specified statutory dollar thresholds unless the purchase or lease is made by a competitive selection procedure. In the case of purchases, the threshold is $50,000; in the case of real estate leases, the threshold is $75,000. (Sec. 127.16(B).)

Under current law, if any person authorizes *a purchase* in violation of this requirement, that person is liable to the state for the amount of any state funds spent on the purchase. Current law does not expressly indicate that a person is liable for those funds in the case of a real estate lease authorization. The bill, however, imposes the same liability for authorizing real estate lease agreements in violation of the Board prior approval requirement (sec. 127.16(C)).

New liability provisions

The bill limits the liability of a person authorizing a purchase or real estate lease agreement in violation of the requirement to obtain Controlling Board prior approval for unbid agreements, but only under certain specified circumstances. It also requires persons authorizing these improper agreements to cease spending money as soon as they realize the violation.

Specifically, when a state agency (presumably in the person of one of its officers or employees) unwittingly makes an improper agreement, it must not spend any money under the agreement or, if it already has, it must immediately stop spending the money. (Presumably, this cessation requirement applies only after the state agency realizes that the agreement required the Board's prior approval.) The agency also must promptly request the Board to approve the agreement retroactively, and both the head of the agency and the person authorizing the agreement must appear personally before the Board. In appearing before the Board, they must explain why the Board's prior approval was not requested and must indicate whether the agency ceased to spend money (as required under the bill) as soon as it realized that the agreement violated the prior approval requirement. The Board may approve the agreement retroactively, but if

it does not, the person who authorized it generally is liable for the amount of state funds spent on the purchase or lease. This liability, however, may be limited if all three of the following conditions are satisfied: there is no proof that the agreement was made in bad faith; the person did not improperly gain from the purchase or lease; and the state received "full value" for the money spent under the agreement. Under these conditions, the liability is limited to the lesser of $10,000 or the amount of the purchase or lease.[3] (Sec. 127.16(C).)

Advertising state purchases, contracts on the Internet

The bill requires the Director of Administrative Services to adopt rules requiring state agencies to publish notices of upcoming purchases or public improvement contracts on the Internet. The requirement applies to state agencies that are required by law to solicit requests for proposals or to use competitive bidding or competitive selection in making purchases or contracting for public improvements. The Internet notice must be made no later than the time the purchase or contract is advertised by other legal means (such as publication or posting), and must include the same information as required for those other means. The Internet notice must be in addition to, rather than in lieu of, any other required means of notification. (Sec. 125.80.)

The Director's rules may permit a state agency to publish the Internet notice "by itself" (perhaps, on its own site) or provide that the Department of Administrative Services will publish the Internet notice on behalf of an agency. The rules may establish a web site and require "all" notices to be posted on that site (presumably by either an agency or DAS), and may establish one or more formats for "all" notices (this may mean establish formats for notices, not that all formats must be used for all notices). The rules must be adopted within 90 days after the bill's effective date. (Sec. 125.80.)

The Internet publication requirement applies to any state agency purchase of supplies or services, however arranged--including by outright purchase, rent, lease, or lease purchase (see sec. 125.01(F), not in the bill)--and to any state agency contract for a public improvement, as long as the agency is required by law to follow competitive selection or bidding procedures or to solicit requests for proposals in order to make the purchase or enter the contract. For the purposes of the bill, a "public improvement" essentially means construction, reconstruction, improvement, enlargement, alteration, demolition, or repair of a building, highway, structure, or other public work project. "State agency" includes every organized body, office, or agency established by law for the exercise of any

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[3] *It is not clear that there is any liability if an agency does not "realize" a violation has occurred.*

function of state government (see sec. 1.60, not in the bill), and also state colleges and universities. (Sec. 125.80(A) to (C).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	09-27-01	p. 912

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