Jennifer A. Parker *Legislative Service Commission*

S.B. 153

125th General Assembly
(As Introduced)

Sen. Jacobson

BILL SUMMARY

- Imposes record keeping, reporting, auditing, and other requirements on persons who receive public money for the provision of services.
- Provides civil remedies for the misuse of such public money.
- Creates the Government Contracting Advisory Council to make recommendations to the Attorney General and Auditor of State with respect to their rule-making functions under the bill.

CONTENT AND OPERATION

Contract required for transfer of public money

(R.C. 9.23(A)(3) and (5) to (7) and (B))

The bill prohibits a governmental entity from transferring public money to a recipient until the legislative authority of the governmental entity has entered into a written contract with the recipient that (1) is signed by the recipient or by an officer or agent of the recipient authorized to legally bind the recipient and (2) embodies all the requirements and conditions set forth in the bill and in rules adopted by the Attorney General and the Auditor of State pursuant to the bill.

For purpose of the bill, "**governmental entity**" is defined as a political subdivision or the state. With respect to the state, the agency by or through which public money is transferred has the rights, powers, and duties otherwise conferred or imposed upon the legislative authority of a political subdivision. "**Recipient**" means an individual, corporation, association, or other person that receives public money. And "**public money**" generally means money received by a recipient, directly or indirectly, from the United States, a governmental entity, or a public office for the provision of services to individuals or to the public. "**Public money**" does *not* include money received by a recipient pursuant to a contract with the

United States, a governmental entity, or a public office under any of the following circumstances:

(1) The recipient receives the money directly or indirectly from the United States, and no governmental entity (that is, neither the state nor a political subdivision) exercises any oversight or control over the use of the money.

(2) The recipient receives the money solely for the sale of goods to a governmental entity or for the maintenance of buildings, grounds, or equipment owned by a governmental entity.

(3) The recipient receives the money solely in return for the performance of (a) medical, therapeutic, or other health-related services provided by a person licensed or certified to provide the services under Ohio law (R.C. Title 47) and provided to individuals who are eligible for the services by reason of age, medical condition, or financial need, *if* the amount received is either a set fee for each time the services are provided or determined in accordance with a fixed hourly rate, (b) services for which payment is calculated on the basis of the recipient's cost of providing the services in accordance with the Revised Code or rules adopted under the Code, (c) ministerial services not requiring the exercise of discretion or special skills, unless the services are performed for the benefit of persons who are eligible for the services by reason of age, medical condition, or financial need and are intended to help promote the persons' health, safety, or welfare, (d) services, other than administrative or management services, that are commonly purchased by the public at an hourly rate or at a set fee for each time the services are provided, or (e) routine business services other than administrative or management services.

Lastly, "**public office**" is defined as any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of Ohio for the exercise of any function of government.

Record keeping, reporting, and audit requirements

(R.C. 9.23(C) and (D))

Under the bill, a recipient that receives public money from a governmental entity must do both of the following:

(1) Keep current and accurate records of the receipt and use of that money in a manner consistent with generally accepted accounting principles and with rules adopted under the bill;

(2) Annually provide the state agency or the legislative authority of the political subdivision with (a) an audit report, if required by the bill (see below), or financial statements, major categories of expenditure of public money, and a

summary of the activities for which the recipient used the money and (b) any other information that may be required by rules adopted under the bill or by the contract entered into pursuant to the bill. These requirements apply unless otherwise explicitly provided in the Revised Code.

Any recipient that receives public money totaling $500,000 or more in any calendar year is required by the bill to have an audit performed for each calendar year in which it receives that amount of public money according to generally accepted auditing standards by an independent public accounting firm. The audit contract between the recipient and the firm must provide that the state is an intended third-party beneficiary of the contract. In addition, the audit must comply with rules adopted by the Auditor of State under the bill. The bill provides that an audit performed pursuant to the federal "Single Audit Act of 1984" is sufficient if the state is an intended third-party beneficiary of the audit contract.

Payment pursuant to direct cost requirements

(R.C. 9.23(A)(1) and (2) and (H))

A recipient is entitled to payment pursuant to a contract entered into under the bill only to the extent that the recipient meets the direct cost requirements of the contract. A recipient is never entitled to payment for more than direct costs for services actually performed plus allowable nondirect costs associated with those direct costs.

The bill defines "**direct costs**" as the costs of providing services that directly benefit a patient or client pursuant to a contract entered into under the bill. "**Allowable nondirect costs**" are determined using the following formula: take the amount of direct costs actually incurred for the provision of services pursuant to a contract entered into under the bill, divide by the minimum percentage of public money that must be used to pay for the recipient's direct costs, as specified in the contract, then subtract the direct costs actually incurred. For example, if the amount of direct costs incurred under a contract is $1,000 and the minimum percentage of the public money received under the contract that must be used for direct costs is 90%, then the allowable nondirect costs the recipient can receive is determined using the formula ($1,000/0.90)-$1,000, or $1,111-$1,000, which yields $111 of allowable nondirect costs.

Records open to inspection; subcontractors

(R.C. 9.23(E) to (G))

The bill requires that the financial records of a recipient, and the financial records of any person with which the recipient contracts for the performance of the

recipient's obligations (hereinafter, "subcontractor"), be open to inspection by the governmental entity and by the state from the time the recipient first applies for payment under the contract. If the recipient is paid before the performance of its obligations under the contract, the financial records of the recipient and of any subcontractor must be open to inspection from the first anniversary of the payment or from any earlier date set forth in the contract. In addition, if the recipient contracts with a subcontractor for the performance of some or all of the recipient's obligations, the recipient is entitled to claim spending by the subcontractor as direct costs only to the extent the subcontractor has spent money on direct costs in the performance of the recipient's obligations *and* only if the subcontractor is subject to the same terms and conditions relating to the performance as the recipient under the contract with the governmental entity.

These provisions do not apply to either of the following:

(1) Any person who is an individual and who contracts with the recipient and personally performs some or all of the recipient's obligations under the recipient's contract with the governmental entity that directly benefit the recipient's patients or clients and that require the exercise of discretion or special skills.

(2) Any person that contracts with the recipient solely for the performance of all or part of the recipient's obligations under the recipient's contract with the governmental entity that directly benefit the recipient's patients or clients and that do not require the exercise of discretion or special skills, *if* the full amount of the person's contract constitutes direct costs for the recipient and is reasonable and customary in the person's trade or profession.

Civil liability for misuse of public money; other remedies

(R.C. 9.23(A)(4), (I), and (J))

A recipient that receives public money from a governmental entity is liable to repay to that entity any public money that is used, by the recipient or by a subcontractor, for anything other than direct or allowable nondirect costs. A governmental entity may bring a civil action for the recovery of that money. In such an action, any subcontractor may be made a party defendant.

If a governmental entity obtains a judgment against a recipient in a civil action and, after reasonable efforts, is unable to collect the full amount of the judgment because the recipient is insolvent, the governmental entity may recover from the subcontractor an amount not exceeding the lesser of (1) the unsatisfied amount of the judgment or (2) the total amount received by the subcontractor from the recipient minus the amount of the total spent by the subcontractor on direct costs for services actually performed and allowable nondirect costs associated with

those direct costs. ("**Insolvent**" means unable to repay public money that has been used for anything other than direct or allowable nondirect costs.)

If a governmental entity obtains a judgment against a recipient or subcontractor and that judgment debtor does not voluntarily pay the judgment amount, the judgment debtor is precluded from contracting with a governmental entity to the extent provided in current law for a debtor against whom a finding of recovery has been issued (R.C. 9.24(A) and (B), not in the bill). In addition, a governmental entity may void a contract between a recipient and subcontractor to the extent that the subcontractor has not yet performed its obligations under the contract or cannot demonstrate that it has expended the money received on direct costs or allowable nondirect costs related to actual expenditures on direct costs.

Under the bill, if a recipient is liable to repay money and the recipient is insolvent, a governmental entity may also void any of the following contracts:

(1) A contract that is made not more than 180 days before the recipient became insolvent and that is between the recipient and a director, trustee, officer, or employee of the recipient or a business in which a director, trustee, officer, or employee of the recipient has a substantial interest, if (a) the recipient has paid substantial value for property received and the property can be returned to the other person or (b) the person with whom the recipient contracted has received public money that the recipient obtained pursuant to a contract entered into under the bill and has used the money for anything other than direct or allowable nondirect costs. In this latter case, the governmental entity may void the contract to the extent that the person has used the money for anything other than direct or allowable nondirect costs, and the person is liable to the governmental entity for that amount.

(2) A contract between the recipient and another person pursuant to which the recipient has paid or agreed to pay money to the other person, to the extent that the other person has not yet performed its obligations under the contract;

(3) A contract that is made not more than one year before the recipient became insolvent and that is between the recipient and a person other than the governmental entity, if the other person has not given or agreed to give consideration of reasonable and substantial value for the consideration given by the recipient.

Rulemaking authority

Attorney General

(R.C. 9.23(K))

The Attorney General is required by the bill to adopt rules governing the terms of any contract between a governmental entity and a recipient pursuant to which a recipient can reasonably anticipate receiving payments of public money totaling $25,000 or more. The rules must require that the contract set forth (1) the minimum percentage of public money that must be used to pay for the recipient's direct costs, (2) the records that must be maintained to document direct costs, (3) a definition of permissible components of direct costs, including a list of expenditures that may never be included in direct costs and a nonexclusive list of expenditures that may be included in direct costs, (4) permissible dispositions of public money received by the recipient but not used for direct costs, (5) permissible methods by which a recipient may keep records of the receipt and use of public money, (6) remedies not inconsistent with those set forth in the bill in the event of a breach of the contract, (7) terms to be included in contracts between recipients and persons other than the governmental entity, including the notice of the remedies available to the governmental entity in cases of the use of public money for anything other than direct or allowable nondirect costs by the recipient, (8) the audit requirements established by the bill and by rules of the Auditor of State, and (9) any other provisions that the Attorney General may by rule require.

The Attorney General is also required to adopt rules for determining when a recipient has become insolvent and for notification to a governmental entity of a recipient's insolvency.

Auditor of State

(R.C. 9.23(L))

The Auditor of State is permitted by the bill to adopt rules governing the form and content of the audit reports the bill requires. The Auditor is also authorized to prescribe a single form of an audit report to be used for all governmental entities. Upon request of a recipient, the Auditor may require all governmental entities to accept a particular audit report.

Government Contracting Advisory Council

(R.C. 9.23(M))

The bill creates the Government Contracting Advisory Council. It requires the Attorney General to consult with the Council when adopting rules relative to

the permissible components of direct costs and to consider any recommendations of the Council when adopting, amending, or repealing those rules. And it permits the Attorney General and Auditor of State to consult with the Council on the performance of any of their rule-making functions under the bill.

The Council is to consist of the following members or their designees:

(1) The Attorney General;

(2) The Auditor of State;

(3) The Director of Aging;

(4) The Director of Development;

(5) The Director of Job and Family Services;

(6) The Director of Mental Retardation and Developmental Disabilities;

(7) The Executive Director of the County Commissioners' Association of Ohio;

(8) The Executive Director of the Ohio Association of Nonprofit Organizations;

(9) The President of the Ohio Grantmakers Forum;

(10) The President of the Ohio United Way;

(11) The President of the Ohio Chamber of Commerce;

(12) The President of the Ohio State Bar Association;

(13) The President of the Ohio Society of Certified Public Accountants;

(14) One additional member appointed by the Attorney General;

(15) One additional member appointed by the Auditor of State.

If any agency or organization represented on the Council ceases to exist in the form it has on the effective date of the bill, the successor agency or organization is to be represented in its place. If there is no successor agency or organization, or if it is not clear what agency or organization is the successor, the Attorney General is to designate an agency or organization to be represented in its place.

The bill designates the Attorney General, or the Attorney General's designee, as the chairperson. The Council is to meet at least once every three years to make recommendations to the Attorney General regarding the adoption, amendment, or repeal of rules relative to the permissible components of direct costs and at other times as requested by the Attorney General or Auditor of State.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	11-20-03	p. 1203

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