



COUNTY ADVISORY BULLETIN

CAB

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HOUSE BILL 119 OF THE 127TH GENERAL ASSEMBLY AMENDED HOUSE BILL 694 OF THE 126TH GENERAL ASSEMBLY, WHICH LIMITS POLITICAL CONTRIBUTIONS BY INDIVIDUALS, OWNERS OF BUSINESSES, AND CERTAIN FAMILY MEMBERS OF THOSE OWNERS THAT ARE SEEKING OR HAVE BEEN AWARDED PUBLIC CONTRACTS

Revised Code sections affected: 109.96 and 3517.093, both newly enacted, and 3517.13 and 3517.992, both amended

Effective date for amendments made in H.B. 119 (budget bill): September 28, 2007, with some exceptions noted

Effective date for H.B. 694: April 4, 2007

NOTICE

This County Advisory Bulletin is an updated version of Bulletin 01 issued in May 2007. Please note that the changes made in H.B. 199 are italicized for emphasis.

ACT SUMMARY

H.B. 694 expands the political contribution limits under prior law to prohibit a *political subdivision, including a board of county commissioners, from awarding a contract for the purchase of goods or services with a cost aggregating more than \$10,000 in a calendar year* to an individual or organization that makes a political contribution in excess of amounts designated in the act. The act's contribution limits are as follows: (1) \$1,000 for an (a) individual, (b) partner or owner of the partnership or other unincorporated business, (c) owner of more than 20% of a corporation or business trust, (d) shareholder of an association, (e) administrator or executor of an estate, (f) trustee of a trust, or (g) spouse or child of any of the above persons, and (2) \$2,000 for (a) a political action committee (hereafter "PAC") affiliated with a partnership, unincorporated business, corporation, or business trust or, (b) generally, total contributions from any of the above listed persons, including a PAC.

Under the act, this prohibition applies for any contributions in excess of the above described limits for *24 months* prior to the date the contract is awarded. If a board of county commissioners contracts with an individual or organization, the individual organization cannot make political contributions in excess of the contribution limits described above to any of the commissioners during the life of the contract and for one year following the conclusion of the contract.

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8. How do H.B. 694 and H.B. 119 treat existing goods and services contracts *with a cost aggregating more than \$10,000 in a calendar year*?
9. What are the penalties for violating the law?

1. What is the law's general prohibition?

Any of the public officers described below are prohibited from contracting for the purchase of goods or services *with a cost aggregating more than \$10,000 in a calendar year* (hereafter "public contracts") with any of the vendors described below if the vendor makes one or more contributions to the officer or the officer's campaign committee in excess of the contribution limits described below.

Additionally, if any of the public officers described below contract with any of the vendors described below, that vendor is prohibited from making one or more contributions to the officer or the officer's campaign committee in excess of the contribution limitations described below during the life of the public contract and for one year after the contract concludes.

2. Which public officers are subject to the new law?

Public contracts for which any of the following public officers have ultimate responsibility for the award of the contract are subject to the law's requirements and prohibitions: (1)

agencies or departments of the state, (2) political subdivisions of the state, (3) boards of county commissioners, (4) boards of township trustees, (5) municipal legislative authorities, (6) boards of education, (7) other boards, commissions, committees, authorities, councils, boards of trustees, task forces, and other such entities created by law, (8) and the Governor, the chief executive officer of a county operating under an alternative form of government or county charter, or the chief executive officer of a municipal corporation for contracts awarded by a board, commission, committee, authority, council, board of trustees, task force, or other entity appointed by the Governor or chief executive officer, respectively. (R.C. 3517.13(K) and (M).)

Law unchanged by H.B. 694 and H.B. 119 specifies that holders of a public office (hereafter “public officers”) are officers of any state, county, municipal, township, or district office, except an office of a political party, that is filled by an election and the office of a United States senator or representative. (R.C. 3517.01(B)(9).)¹ Thus, members of local boards and commissions who are not elected are not subject to H.B. 694. However, if those members are appointed by another authority that is “ultimately responsible” for the contracts they award, then that appointing officer becomes the public officer ultimately responsible for the award of the contract and thus that appointing officer is subject to H.B. 694.

3. What are the contribution limitations and which vendors are subject to the law?

Any one of the following vendors are subject to the law’s requirements and prohibitions if that one vendor makes one or more political contributions to a public officer or the officer’s campaign committee totaling in excess of \$1,000: (1) an individual, (2) any partner or owner of a partnership or other unincorporated business, (3) an owner of more than 20% of a corporation or business trust, (4) any shareholder of an association, (5) any administrator of an estate, (6) any executor of an estate, (7) any trustee of a trust, (8) a spouse of any of the above described persons, or (9) a child age 7 through 17 of any of the above described persons. (R.C. 3517.13(I)(1)(a), (I)(2)(a), (J)(1)(a), and (J)(2)(a).)

Any combination of contributions from the following vendors are subject to the law’s requirements and prohibitions if that combination of political contributions to a public officer or the officer’s campaign committee totals in excess of \$2,000: (1) an individual, (2) any partner or owner of a partnership or other unincorporated business, (3) any shareholder of an association, (4) any administrator of an estate, (5) any executor of an estate, (6) any trustee of a trust, (7) a spouse of any of the above described persons, (8) a child age 7 through 17 of any of the above described persons, or (9) any PAC that is affiliated with a partnership or other unincorporated business, association, estate, or trust. (R.C. 3517.13(I)(1)(b), (2)(b), and (4).)

¹ Within this bulletin, the term “public officer” was used to make the bulletin easier to read. However, the term actually used in the Revised Code is “holder of a public office.” The Revised Code defines “public office” to mean all of the elected offices described above.

Any combination of contributions from the following vendors are subject to the law's requirements and prohibitions if that combination of political contributions to a public officer or the officer's campaign committee totals in excess of \$2,000: (1) an owner of more than 20% of a corporation or business trust, (2) a spouse of an owner described above, (3) a child age 7 through 17 of an owner described above, or (4) a PAC that is affiliated with a corporation or business trust. (R.C. 3517.13(J)(1)(b), (2)(b), and (4).)

These contribution limitations apply not only when a person holds a public office, but also when that person is a candidate for that office. A person becomes a candidate for a public office by filing a declaration of candidacy, a declaration of intent to be a write-in candidate, or a nominating petition, through party nomination at a primary election, or by filling a vacancy under existing law. (R.C. 3517.13(N)(1).)

For purposes of this law, a PAC is affiliated with an organization if the PAC received, as reported on its most recent campaign finance statement, more than 50% of its contributions from *any combination of the following persons*: (1) partner or owner of a partnership or other unincorporated business, (2) owner of more than 20% of a corporation or business trust, (3) shareholder of an association, (4) administrator or executor of an estate, or (5) trustee of a trust. *H.B. 119 added a provision that a federal PAC that is registered with the Secretary of State is a PAC under Ohio's law. Thus, a federal PAC also could be considered an affiliated PAC if it meets the above criteria.* (R.C. 3517.13(L)(2).)

4. What constitutes a contract?

H.B. 694 specifically repeals the provision in prior law that exempted competitively bid contracts from these political contribution restrictions. Consequently, the law is intended to encompass all bid and unbid contracts for goods or services *with a cost aggregating more than \$10,000 in a calendar year. However, when the threshold was raised from \$500 to \$10,000, the Conference Committee added the word "aggregate" to the language. The new law prohibits a political subdivision from entering into any goods or services contract "with a cost aggregating more than \$10,000 in a calendar year." This new term has caused uncertainty. According to those in the House and Senate who added the changes, the term "aggregate" was intended to aggregate all contracts a political subdivision awards to a single vendor in a calendar year, regardless of whether the contracts are (1) related to one another or (2) awarded by different local entities within a political subdivision. Some experts argue, though, that the language in the budget does not accomplish this intent. Those individuals contend that "aggregate" applies only to the cost of one contract. Thus, if a single contract exceeds \$10,000, then the contract is subject to the law. Under this scenario, contracts for which multiple payments are made would be aggregated, but separate contracts for separate purchases made from the same vendor in a calendar year would not be aggregated.*

While *H.B. 694 and H.B. 119* do not define or further specify what types of agreements or purchases made by a public officer are subject to the law's provisions, *H.B. 119 requires the Secretary of State to adopt rules that determine what constitutes a contract*

for the purchase of goods or services. While we are grateful that the Secretary now has this express authority, we also requested that she have the authority to adopt rules determining who is “the holder of public office having ultimate responsibility for the award of the contract.” We are unsure whether this language permits the Secretary to adopt such rules, though legislative individuals have expressed an expectation that this concept be included in the rule. Until the Secretary adopts rules pursuant to H.B. 119, CCAO recommends that a public officer consider all types of purchases for goods or services with a cost aggregating more than \$10,000 in a calendar year subject to the law’s provisions. Thus, a contract could include such agreements as purchase orders, direct vouchers, and any other contracts with a cost aggregating more than \$10,000 in a calendar year. (R.C. 3517.13(I), (J), and (L)(1)(c).)

5. Does it matter when a political contribution was made?

H.B. 694 and H.B. 119 specify that a public officer is prohibited from awarding a public contract if any of the vendors described above made one or more contributions totaling in excess of the limitations described above within 24 months preceding the award of the contract. (R.C. 3517.13(I)(1), (I)(4)(a), (J)(1), and (J)(4)(a).)

H.B. 694 includes a provision that exempts contributions made prior to January 1, 2007; however, under H.B. 694, this exemption apparently applied only to state contracts. The act contained no provision that specifically exempted contributions made before the effective date of the new law for county contracts. After the passage of H.B. 694, the AFL-CIO, along with the Franklin County commissioners, sued the state alleging that H.B. 694 violated many different facets of law. One of the allegations was that the look back period for local contracts was unconstitutionally retroactive. Judge Bender, the judge presiding over the cases, ruled that contributions made before the law’s effective date, which was April 4, 2007, may not be considered. Likely in response to this decision, the legislature changed H.B. 694 to specify that contributions made before April 4, 2007, were not applicable under the new law. Thus, any contributions made to a public officer, an officer’s campaign committee, or to a person who is a candidate for a public office in excess of the above limitations after April 4, 2007, are subject to the new law. This change from H.B. 119 was given immediate effect, and thus became effective on June 30, 2007. (Section 3 of H.B. 694; Sections 631.04, 631.05, and 631.06 of H.B. 119.)

However, law unchanged by either act specifies that the contribution limitations do not apply to contributions a partner, shareholder, administrator, executor, trustee, or owner of more than 20% of a corporation or business trust made before the person held any of those positions. Similarly, the law does not apply to contributions the spouse of one of the above listed persons made before the person held that position. (R.C. 3517.13(N)(2).)

6. For what amount of time do the contribution limits apply?

The law prohibits a vendor described above from making one or more contributions totaling in excess of the limitations described above to a public officer during the life of the public contract and for one year following the conclusion of that contract. (R.C. 3517.13(I)(2), (I)(4)(b), (J)(2), and (J)(4)(b).)

7. How do public officers comply with the law?

A public officer must not violate the prohibitions described above. A public officer must not award a public contract to a vendor that has made a contribution as described above and must not accept a contribution in excess of the limits described above from a vendor with which the public officer has a current public contract or had a contract expire within the past year.

Before entering into a public contract, H.B. 694 requires a public officer to obtain certification from the vendor (either an individual or organization) that the individual or all persons responsible for the organization, the individual's or responsible persons' spouses and children age 7 to 17, and any affiliated PACs are in compliance with H.B. 694. *H.B. 119 amended this certification requirement so that a political subdivision need only obtain a certification from a vendor once a calendar year instead of for each contract. A political subdivision continues to have the option of obtaining a certification for each contract, but is no longer required to do so.* The act does not specify what type of certification a public officer must obtain; however, attached and below are samples of a form and language a county may use to satisfy the certification requirements of the law. (R.C. 3517.13(I)(3) and (J)(3).)

First, a county may use the attached affidavit to certify that a vendor with which the county is contracting is at the time of the public contract and will throughout the duration of the contract *and the calendar year* comply with the law. We suggest requiring the affidavit for both bid and unbid public contracts into which the county enters.

Second, a county may add the following language to purchase orders stipulating that one of the terms and conditions of fulfilling the purchase order is that the vendor comply with the law:

"If this is a contract for goods or services with a cost aggregating more than \$10,000 in a calendar year, the vendor hereby certifies that all persons identified in Ohio Revised Code sections 3517.13(I)(3) and 3517.13(J)(3), as applicable, are in compliance with Ohio Revised Code sections 3517.13(I) or 3517.13(J), as applicable."

Finally, below is language a county may send out with bid packets for competitively bid public contracts (contracts that exceed \$25,000). This language will alert the vendor submitting a bid that failure to complete the affidavit, described above and enclosed, along with the rest of the bid materials, will disqualify the vendor's bid.

“Ohio Revised Code sections 3517.13 (I)(3) and 3517.13(J)(3) require that no agency or department of this state or any political subdivision shall enter into any contract for the purchase of goods or services with a cost aggregating more than \$10,000 in a calendar year with a corporation, individual, partnership, or other unincorporated business, association, including, without limitation, a professional association organized under Chapter 1785. of the Revised Code, estate, or trust unless the agency, department, or political subdivision obtains for a calendar year, or the contract includes, a certification that the individuals named in Revised Code sections 3517.13(I)(1) and 3517.13(J)(1) are in compliance with the aforementioned provisions. The offeror is required to complete the affidavit contained in **Appendix A - Exhibit 5** of the proposal/bid. **Failure to submit the required form with the proposal/bid packet will deem the offeror’s response to be non-responsive and disqualified from receiving further consideration.**”

The language and form described above are samples of language and a form that will allow a county to comply with the new law. However, because of the broad reach of the language in the law, a county may be able to comply with the law’s provisions using alternative language or forms. Additionally, the suggested language and affidavit may not be suitable for all types of contracts and may need to be altered to fit each situation. A county may alter the language and form described above if the altered language and form also comply with H.B. 694.

8. How do H.B. 694 and H.B. 119 treat existing goods and services contracts *with a cost aggregating more than \$10,000 in a calendar year*?

H.B. 694 (as unchanged by H.B. 119) stipulates that for any public contracts not yet concluded at the time of the effective date of the act, which was April 4, 2007, the prohibitions on vendors making contributions in excess of the limitations during the life of the public contract and for one year following the conclusion of the public contract apply beginning on April 4. Thus, existing public contracts are treated as newly awarded public contracts under the act. (Section 4 of H.B. 694.)

However, H.B. 694 and H.B. 119 do not require a public officer to obtain certification for existing public contracts. Thus, the certification requirement described above applies only to new public contracts. (Section 4 of H.B. 694.)

9. What are the penalties for violating the law?

If a public officer awards a public contract in violation of the above described prohibitions, the officer is subject to a fine of not more than \$1,000 and the public contract must be rescinded if its terms have not yet been performed. (R.C. 3517.992(R)(1).)

If a vendor, including a PAC affiliated with the vendor, makes contributions to a public officer in violation of the above described prohibitions, the vendor is subject to a fine equal to three times the amount contributed in excess of the amount permitted to be

contributed. For example, if an individual vendor contributes \$3,000 to a public officer in violation of the act, the vendor would be subject to a \$6,000 fine (\$2,000 times three). Additionally, if a vendor makes such a contribution, any public contract that makes the vendor subject to the provisions of H.B. 694 may be rescinded at the discretion of the Ohio Elections Commission. (R.C. 3517.992(R)(2).)

If a vendor, including a PAC, knowingly makes a false statement on a certification a public officer is required to obtain from the vendor, as described above, the vendor is guilty of a fifth degree felony and the public contract that includes the false certification must be rescinded. (R.C. 3517.992(R)(3).)

The act does not specify a penalty for a public officer failing to obtain a certification as required under the new law. However, the public officer may be subject to general civil liability for violating a statutory provision.

However, H.B. 119 added a safe harbor provision to these penalties. The budget bill prohibits imposing a fine or rescinding a contract if a political contribution is made in violation of the law if both of the following conditions are met: (1) the contribution is made after the contract is awarded, and (2) the contribution is fully refunded within either of the following: (a) five business days after the contribution is accepted, or (b) ten business days after the public official knows of the unlawful contribution or the local board of elections notifies the public official of the unlawful contribution, whichever is earlier. (R.C. 3517.992(R)(4).)

ACKNOWLEDGEMENTS AND CONTACT INFORMATION

CCAO thanks all of the following individuals who assisted in preparing this County Advisory Bulletin: Karl Kuespert, Franklin County Purchasing Director; Maria J. Armstrong, Bricker & Eckler LLP; Philip C. Richter, Executive Director, Ohio Elections Commission.

The information and recommendations contained in this bulletin are based on H.B. 694 and H.B. 119 as enacted. However, several court and Ohio Elections Commission opinions are pending, any of which could change the prohibitions and requirements explained above. Please contact the individuals at CCAO listed below or your county prosecutors for up-to-date information concerning these acts.

CCAO recognizes that this law is very complex, difficult to understand, and often times ambiguous. Because of this complexity and ambiguity, many questions arise concerning the law's practical implementation. The questions addressed above are some of the most frequently asked questions; however, we recognize that many other questions exist. We encourage you to discuss any questions you have with your county prosecutor's office. Any errors or omissions made in this bulletin are the sole responsibility of CCAO.

For more information on H.B. 694 or how H.B. 694 was amended by H.B. 119, contact Brad Cole at (614) 220-7981 or bcole@ccao.org, or Beth Tsvetkoff at (614) 220-7996 or btsvetkoff@ccao.org.

**AFFIDAVIT IN COMPLIANCE WITH SECTION 3517.13
OF THE OHIO REVISED CODE**

STATE OF OHIO

COUNTY OF _____ SS:

Personally appeared before me the undersigned, as an individual or as a representative of

_____ for a contract for _____
(Name of Entity) (Type of Product or Service)

to be let by the County of _____, who, being duly cautioned and sworn, makes the following statement with respect to prohibited activities constituting a conflict of interest or other violations under Ohio Revised Code Section 3517.13, and further states that the undersigned has the authority to make the following representation on behalf of himself or herself or of the business entity:

1. That none of the following has **individually** made after April 4, 2007, and that, if awarded a contract for the purchase of goods or services with a cost aggregating more than \$10,000 in a calendar year, none of the following **individually** will make, beginning on the date the contract is awarded and extending until one year following the conclusion of the contract, as an individual, one or more campaign contributions totaling in excess of \$1,000, to any member of the _____ County Board of Commissioners or their individual campaign committees:
 - a. myself (if applicable);
 - b. any partner or owner or shareholder of the partnership (if applicable);
 - c. any owner of more than 20% of the corporation or business trust (if applicable);
 - d. each spouse of any person identified in (a) through (c) of this section;
 - e. each child seven years of age to seventeen years of age of any person identified in divisions (a) through (c) of this section (only applicable to contributions made on or after January 1, 2007).

2. That none of the following have **collectively** made after April 4, 2007, and that, if awarded a contract for the purchase of goods or services with a cost aggregating more than \$10,000 in a calendar year, none of the following **collectively** will make, beginning on the date the contract is awarded and extending until one year following the conclusion of the contract, one or more campaign contributions totaling in excess of \$2,000, to any member of the _____ County Board of Commissioners or their individual campaign committees:
 - a. myself (if applicable);
 - b. any partner or owner or shareholder of the partnership (if applicable);
 - c. any owner of more than 20% of the corporation or business trust (if applicable);
 - d. each spouse of any person identified in (a) through (c) of this section;
 - e. each child seven years of age to seventeen years of age of any person identified in divisions (a) through (c) of this section;
 - f. any political action committee affiliated with any person identified in divisions (a) through (c) of this section.

Signature _____

Title: _____

Sworn to before me and subscribed in my presence this _____ day of _____, 20_____.

Notary Public _____

My Commission Expires: _____