

May 30, 2007

The Honorable Name
Government Entity
Street
City, OH

RE: New Pay to Play Statute

Honorable Name:

On April 4, 2007, House Bill 694 of the 126th Ohio General Assembly became effective. Among several provisions of the Bill, Section 3517.13, the "Pay to Play" statute, was amended in a manner that directly affects your office. In sum, the statute prohibits any political subdivision, or agency or department thereof, from contracting with a vendor who has contributed a certain amount of money to the public official, or the campaign of the public official who is responsible for awarding the contract, in the two years prior to the award of the contract.

More specifically, Section 3517.13 prohibits any political subdivision, or department or agency thereof, from awarding a contract for the purchase of goods or services in excess of Five Hundred Dollars (\$500.00) to any business if certain individual persons affiliated with that business have made contributions in excess of One Thousand Dollars (\$1,000.00) in the previous two calendar years, or if certain persons affiliated with that business collectively have made contributions in excess of Two Thousand Dollars (\$2,000.00) in the previous two calendar years, to the holder of a public office having the ultimate responsibility for the award of the contract, or to the public office holder's campaign committee. Further, these limitations also apply during the term of any contract awarded, and continue for a period of one year after the conclusion of the awarded contract. In other words, contributions in the proscribed amounts cannot be made during the two calendar years prior to the entry into the contract, during the continuation of the contract, or for one year after its conclusion. In addition, regardless of whether any contributions have been made, the statute also requires that every contract for the purchase of more than Five Hundred Dollars (\$500.00) in goods or services must include a certification by the entity awarded the contract that the entity is in compliance with the requirements Section 3517.13. The

failure to abide by these requirements could result in the rescission of the contract, civil fines, and/or criminal penalties depending on the nature of the violation. R.C. § 3517.992.

Limitations on Contributions

No contract for the purchase of goods or services, in excess of Five Hundred Dollars (\$500.00), may be awarded to an individual; a partnership; an association; an estate; a trust; a corporation; or a business trust, if the individual; a partner or owner of the partnership or the association; a shareholder of the association; an executor or administrator of the estate; a trustee of the trust; an owner of more than twenty percent (20%) of the corporation or the business trust; a spouse of any of these persons; or a child, between seven (7) and seventeen (17) years of age, of any of these persons, has given an amount in excess of One Thousand Dollars (\$1,000.00), to the public official, or the campaign committee of the official public, who is ultimately responsible for the award of the contract, during the previous two calendar years. R.C. § 3517.13 (I)&(J). Further, no contract for the purchase of goods or services, in excess of Five Hundred Dollars (\$500.00), may be awarded to an individual; a partnership; an association; an estate; a trust; a corporation; or a business trust, if any combination of the following has given in excess of Two Thousand Dollars (\$2,000.00), to the public official, or the campaign committee of the official public who is ultimately responsible for the award of the contract, during the previous two calendar years: the individual; a partner or owner of the partnership or the association; a shareholder of the association; an executor or administrator of the estate; a trustee of the trust; an owner of more than twenty percent (20%) of the corporation or the business trust; a spouse of any of these persons; a child, between seven (7) and seventeen (17) years of age, of any of these persons; or a political action committee affiliated with the partnership, unincorporated business, association, estate, trust, corporation, or business trust. R.C. § 3517.13 (I)&(J). These limitations on contributions also apply during the term of the contract from the date that it is awarded, and continue to be applicable for a period of one year after the completion of the contract. R.C. § 3517.13.

In addition to the above contribution limitations, no political subdivision, agency or department, is permitted to award a contract unless the contract includes a certification by the vendor that the vendor is in compliance with the above requirements regarding contributions made in the two calendar years prior to the award of the contract. R.C. § 3517.13 (I)&(J). I have enclosed herewith a copy of such a certification for your use, and, for your convenience, my office will send an electronic version of this certification to you via electronic mail. Please direct requests for electronic copies to <email address> with the “Pay to Play” in the subject line. Although a certification is required for all purchases of goods and/or services in excess of Five Hundred Dollars (\$500.00), even where there is no written contract, this means that a purchase from a local hardware store, or discount center requires the execution of a certification. In many cases this may be impracticable, or impossible so some commentators have suggested alternatives. It appears that it would be sufficient for a purchase order, voucher, check or a warrant issued to contain language that indicates that the vendor, by accepting payment, certifies the vendor’s compliance with Section 3517.13 of the Ohio Revised Code. In such cases, I suggest the including the following language on a purchase order, or voucher:

“If this is a contract for goods or services in excess of \$500.00, the vendor hereby

certifies that all persons identified in Divisions (I)(3) and (J)(3) of Ohio Revised Code Section 3517.13, as applicable, are in compliance with Divisions (I), or (J) of Ohio Revised Code Section 3517.13, as applicable.”

And, the following language on a warrant or check written for the payment of funds in excess of Five Hundred Dollars (\$500.00):

“The negotiation of this instrument constitutes the Payee’s certification that the Payee, and entities affiliated with the Payee, are in compliance with O.R.C. § 3517.13.”

Penalties and Consequences

In an effort to enforce the requirements of Section 3517.13, House Bill 694 also amended Section 3517.992 of the Revised Code to penalize violations of Section 3517.13. This statute provides a fine of up to One Thousand Dollars (\$1,000.00) for whoever violates the provisions of 3517.13 by awarding a contract to an entity that has contributed more than the limit provided by Section 3517.13 in the previous two calendars years, and the rescission of the awarded contract if it has not yet been performed. R.C. § 3517.992 (R)(1). This statute also provides for fines equal to three times the amount contributed in excess of the limitations provided by Section 3517.13, and rescission of the contract at the discretion of the Ohio Elections Commission, whenever an entity violates the limitation on contributions during the existence of a contract, or within one year of the contract’s termination. R.C. § 3517.992(R)(2). Any entity that makes a false statement on a certification of compliance with Section 3517.13 is guilty of a felony of the fifth degree, and the contract that contains the falsified certification will be rescinded. R.C. § 3517.992(R)(3). Although the “Pay to Play” statute does not explicitly provide any consequences if a certificate of compliance is not secured, a taxpayer or a competing vendor could file an action to rescind such a contract, or the State Auditor could issue a finding, because the statute is clear — a public office is prohibited from contracting for purchases in excess of Five Hundred Dollars (\$500.00) unless a certification is secured.

Uncertainties

Any newly adopted legislation often raises questions regarding its application, and these statutes are no exception. One question that may arise is what constitutes a contract for the purchase of goods or services. The statutes by their form are limited to transactions which involve the acquisition of goods or services in excess of Five Hundred Dollars (\$500.00). It should be noted, however, that nearly every purchase is a contract for goods or services. There is no requirement that a contract be written. A simple transaction such as the purchase of office supplies at an office superstore, or materials at a hardware store, is a contract for the purchase of goods. Similarly, an agreement that an auto mechanic will repair a vehicle, or that a painter will repaint the walls of a room is a contract for a service. What is not clear is whether the purchase of land, an enterprise zone agreement, or an agreement regarding the use or distribution of Federal grant money, is an agreement for the purchase of goods or services. The statute does make clear, however, that while an employment agreement with a single employee is not a contract for the purchase of goods or services, a collective bargaining agreement with a labor organization is a contract for the purchase of services. R.C. § 3517.13(L). The enforcement of

the provisions of Section 3517.13 with respect to collective bargaining agreements, however, has been temporarily stayed by court order. UAW v. Brunner, Franklin Co. Case No. 07-CV-3412, May 1, 2007 Order by Judge Bender.

In addition, it is also unclear as to whether some these limitations are cumulative. It is clear from the statute that a person who makes five separate donations of Five Hundred Dollars (\$500.00) to your campaign in the two proceeding years, cannot contract with your office for the sale of more than Five Hundred Dollars (\$500.00) of goods and services, as that person has exceeded the limits set forth in the statute. It is not clear, however, whether contributions are cumulative across a multi-member board, or whether purchases below Five Hundred Dollars (\$500.00) are cumulative. For example, a board of county commissioners is a three member board, and no single county commissioner may individually award a contract without the concurrence of at least one other commissioner. The statute does not make clear whether a Two Thousand Dollar (\$2,000.00) contribution to the campaign of one county commissioner would preclude the board of county commissioners from contracting with the contributor. Also it is unclear whether a board of county commissioners may contract with a vendor who has made a Five Hundred Dollar (\$500.00) contribution to the campaign of each county commissioner. Finally, the statute does not indicate whether two separate purchases of Three Hundred Dollars (\$300.00) each from the same vendor will trigger the campaign contribution limitations.

Conclusions

The future of the new “Pay to Play” rules is unknown. The interpretation and application of the same will undoubtedly be affected by future litigation, the adoption of administrative rules, and, perhaps, some statutory amendments. In the meantime, it is important that we not run afoul of the provisions of these statutes. Therefore, I am advising you that you, or your office:

1. Should not enter into any agreements for, award any contracts for or make any purchases of goods and/or services in excess of Five Hundred Dollars (\$500.00), or make purchases of goods and/or services from a single vendor which exceed Five Hundred Dollars (\$500.00) during a single fiscal year, unless that vendor has executed a formal Certification of Compliance with Section 3517.13 of the Ohio Revised Code, or certifies compliance with that statute by accepting a warrant or purchase order which contains certification language as described herein;
2. Before making any purchase of goods and/or services in excess of Five Hundred Dollars (\$500.00), review your campaign finance reports to determine whether the vendor, from whom your office is contemplating making that purchase, has contributed funds to you, or to your campaign committee within the previous two calendar years; and
3. Maintain a list of all vendors with whom your office has contracted for the purchase of goods or services in excess of Five Hundred Dollars (\$500.00) so that during the term of such agreements, and for one year thereafter,

you or your campaign committee treasurer may refuse to accept contributions that exceed the limits imposed by the “Pay to Play” rules.

4. Should consider placing the language described herein on your office’s purchase orders, warrants, and checks.
5. Should review all contracts entered into by your office since the amendment of this section which became effective, April 4, 2007, and obtain the certifications necessary to ensure compliance with the statute.

It is my hope that foregoing discussion proves to be of benefit in your continued service to the public. If you have any questions or concerns regarding the Pay to play rules, or their application, please feel free to contact this office. I thank you for your attention to this matter.

Sincerely,

County Prosecutor

enclosure