

Fiscal Accountability Bill -- Senator Jacobson
Introduced 5/4/05
(Tentatively SB 143)

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5/12/05

We have provided several prior reviews of this proposed legislation. Although some accommodations have been made, our primary concerns remain. The following is a broad overview of concerns, followed by concerns with specific provisions.

Overview:

- In spite of some accommodations, still believe that this is bad legislation. They are missing the boat by excluding fee for service arrangements where the fee is established through a rate setting process and/or through a competitive bidding or a RFP process. You can easily argue that such a system would provide a higher degree of accountability than what is being proposed through this legislation. They are focusing on expenditures and not on the provision of services. There is no focus upon quality or effectiveness of service.
- Rules are to be written defining direct costs. It appears that the Attorney General's office will be writing these rules.
- This bill would be applicable to a number of our contracts.
- Question as to whether contracts between two government entities would be exempted.
- Believe that there are audit/final review coordination issues where a recipient has contracts with several government entities.
- In general, believe that this legislation is overly prescriptive and convoluted. It is very vague confusing and subject to interpretation that it raises more questions than answers. Do not believe that it truly gets at the issue of accountability, and that it is a very overbroad bureaucratic response to "all" contracts involving public monies. Which contracts will they really be looking at? Overall, this legislation gives rise to more questions than comments. We would need an illustration -- someone to actually walk us through how this legislation would apply to fully comprehend the impact upon our agency. There are many cross-references and

when you read the area cross-referenced, that was typically confusing in the first place. The overall authorization process is very unclear.

- As previously stated, very broad powers giving to the Attorney General and to the Government Contracting Advisory Council. Broad powers are given to the state in a very over reactive and proscriptive manner which will not truly address the underlying issues of accountability. Currently, the state only provides 6 to 8% of our overall funding.
- Seems to be making the shift from home rule to state rule. There are many costs to agencies to implement this legislation. They will be human resources commitment to the contract reconciliation process. Raises many questions regarding how audits when recipients of contracts with multiple governmental entities will be coordinated. How this entire process will be managed is every questionable. This legislation is a perfect example of bureaucracy run amuck. We need a tutorial. The more we read, the less we understand. What contracts will the state really be focusing upon -- are they going to be reviewing *all* contracts -- and how is this possible.
- We have instituted our own regulations and safeguards. This legislation includes everything under the sun, much of which should not be applicable to us. We need to be exempt.

Review of Specific Provisions:

1. ***Sec. 9.23 (D) (2)*** defines "contracting authority" of a governmental entity to mean the director or chief executive officer, in the case of a state agency, or the legislative authority, in the case of a political subdivision. Does this change the contracting authority to those who currently do not require contract approval by their Board of County Commissioners? Currently the board has independent authority pursuant to statute which is delegated to the Executive Director. Does this provision change existing practice?
2. ***Sec. 9.23 (E)*** references "minimum percentage of money that is to be used to pay for the recipient's direct costs." This is an example of a concern pointed out in our overview. This legislation is all about a mathematical formula to establish contracts amount, it does not address delivery of services or the quality or effectiveness of services.
3. ***9.231 (A) (1)***. This provision exempts what we consider to be administrative contracts (not a direct benefit to the client), only applies to service contracts. As previously stated, there is a low dollar threshold (\$25,000), our county only receives 6 to 8 % of total resources from the state. The provision regarding the cumulative total is overly prescriptive and convoluted. If you have spent a total of \$25,000 pursuant to a contract, it is automatically assumed that you must enter

into a contract with this entity the following year regarding of the anticipated amount that may or may not be spent.

4. **9.231 (A) (2) (a) and (b).** Under this provision the responsibility can transfer to a state agency to determine whether to enter into a contract. Who will write the contract; does this involve a lump sum of money or pass through dollars? More opportunity for the state to become involved and to take over the process. Does this apply to TANF money? Involvement with multiple state agencies could complicate and delay the process.
5. **9.231 (A) (3) (a).** This provision lists the exceptions. This is the provision which would allow us to exclude our contracts with our day care providers. In subparagraph (i) there is reference to "fixed rate," "competitive bidding," "capitated rate," and "market rate survey" -- these are clearly listed as "or's" not "and's." However, we have a question as to whether the subsequent paragraph (ii) nullifies the first paragraph -- even though the above are listed as "or's" -- we wish to be clear that there are no requirements for more than one or all of the above provisions.
6. **9.231 (B) (2) (a).** Need clarification pertaining to this health- related exemption. For example, we have a contract with a physician to perform medicals on prospective foster parents. Would this be exempted? This is another example of how questionable this bill's applicability is in terms of interpretation.
7. **9.231 (B) (2) (b).** Exempts if bill Medicaid.
8. **9.231 (B) (2) (c).** We are totally confused by this paragraph. The use of the word "unless" in the phrase in the middle of the run-on sentence paragraph "unless the services are performed for the benefit of children" seems to negate the overall intent of this paragraph and the final phrase "and the services are intended to help promote the health, safety, or welfare of those children or persons." We cannot discern the intent.
9. **9.231 (B) (2) (e).** Specifically exempts services provided for a foster home as defined in section 5103.02 of the Revised Code. This should encompass agency foster homes, network homes, group homes, and institutions.
10. **9.231 (B) (2) (f).** This provision references "routine business services other than administrative or management services" and cross references Chapter 119 of the Revised Code. Even after cross-references as a practical matter, we could not provide you an example of this definition. Another example of how convoluted and confusing this legislation is -- what are "routine business services?"
11. **9.232.** This provision would appear to totally change the way in which we currently do our contracts. This dictates a mathematical formula (would appear to be more appropriate to construction or business contracts that are very different

that those entered into by child welfare agencies.) For example, the contract would have to set forth "the minimum percentage of money that is to be used to pay for the recipient's direct costs." *This may not be that easy to calculate -- who will be doing this?* In sub-paragraph (C) we are required to provide "the name and telephone number of the individual designated by the governmental entity as the contact for obtaining approval of contract amounts .." Another need for clarification, is this the County Auditor, Agency Fiscal Director, or the fiscal employee who actually authorizes payment within the agency?

- 12. 9.233.** This provision provides that in no event shall a recipient be entitled to more than the contract payment earned. If the job is done more efficiently than proposed, in order to restrict profit, would the recipient be required to pay us back? What about unanticipated costs / overruns. This certainly is a disincentive to doing business with a public entity. Is a recipient required to provide documentation for a cost incurred for every service provided? At some point you are doing more documentation than service provision and it drives up the costs. *This is designed not to allow profit.* You will lose if there are overruns on indirect costs. Or does this provision not apply to us if we do fee for service? Again, arguably, the method proposed here provides less accountability as to performance outcomes (what we are seeking) than fee for service. We currently do not pay unless the service has been rendered. The focus is based upon a mathematical formula vs. the provision of service.
- 13. 9.234.** Must provide an "annual report" if the contract exceeds \$100,000. This adds to the recipients cost of doing business. Our agency already has a process for tracking outcomes. If the contract amount is between \$100,000 and \$300,00, a "Financial Review" is required. This legislation does not spell out what is entailed in a "financial review;" what is this vs. an audit? It must be performed by an independent accounting firm, and cannot be performed by our agency or by the recipient. Again, this drives up the cost of doing business with child welfare / public entities. Further, in sub-paragraph (B) (1), we will be required to designate the state as a "3rd party beneficiary." What rights does this give to the state and why? We realize that this provides total access to the state. We have already been moving in the direction of accountability -- isn't this overkill.
- 14. 9.235 (B) (1).** We have no clue what this provisions means (pertains in general to a recipient contracting with another person for the performance of some or all of the recipient's obligations and how direct costs are subsequently computed)... what and why?
- 15. 9.236.** Governmental entities already have the authority to file civil suit for breach of contract. Why so prescriptive -- seems to be usurping existing remedies and crosses over separation of legislative and judiciary functions. Defines specifically what can be recovered. Very proscriptive and restrictive. States that you may void a contract. Currently if the service is not rendered, we do not pay. We already have provisions separate from legislation which allowed

us to void a contract. As a legal entity we already have existing legal remedies for breach of contract and nonperformance. This is overkill. Much of this may not be applicable to us (e.g. return of property -- as property is not involved in the majority of our contracts.) Extensive boiler plate language. We have already worked on our own pertinent standard language in cooperation with the state.

- 16. 9.237 (A).** References rules by which the Attorney General has the ability to determine direct costs for *all* contracts. Again, extremely convoluted, for example in sub-paragraph (A), the rules shall set forth "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 pursuant to agreement of the parties." What does this last phrase mean -- how much leeway will the parties have? Very unclear and over reactive. Basically the state is in charge in spite of very limited financial contributions. By providing extensive authority to the AG, this also takes away the authority of other state departments.
- 17. 9.239.** Sets forth the Government Contracting Advisory Council and identifies members. The Attorney General chairs. The body is required to meet at least once every two years to review rules and makes recommendations to the Attorney General and Auditor of State regarding the adoption, amendment or repeal of those rules.