

April 15, 2004

The Honorable Betty Montgomery
Auditor of State
88 East Broad Street
P.O. Box 1140
Columbus, Ohio 43216-1140

SYLLABUS:

2004-014

1. As currently used in R.C. 9.24, the term “state funds” means moneys, other than federal funds, that are held in the state treasury and appropriated by the General Assembly in accordance with Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision. A state agency or political subdivision must comply with R.C. 9.24 only when it awards a contract that is paid for in whole or in part with state funds. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. On June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), the term “state funds,” as used in R.C. 9.24, will exclude all funds that the state receives from another source and passes through to a political subdivision.
2. For purposes of R.C. 9.24, a contract is awarded when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. A purchase arrangement that does not involve competitive contracting procedures does not constitute the awarding of a contract and is not subject to R.C. 9.24. The creation of an employment relationship, whether by statute or contract, does not constitute the awarding of a contract for purposes of R.C. 9.24; however, the creation of an independent contractor relationship for the purchase of services is subject to the provisions of R.C. 9.24 if a contract is awarded.
3. As currently used in R.C. 9.24, the term “political subdivision” means a limited geographical area of the state within which a public agency is authorized to exercise some governmental function. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A.

(2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. On June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), “[p]olitical subdivision” will have the definition set forth in R.C. 9.24(H)(2), namely, a county, city, village, township, park district, or school district that has received more than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year.

4. As used in R.C. 9.24, the term “state agency” has the definition set forth in R.C. 9.66 and R.C. 1.60, namely, “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.”
5. The Public Employees Retirement System (governed by R.C. Chapter 145), the Police and Fire Pension Fund (governed by R.C. Chapter 742), the State Teachers Retirement System (governed by R.C. Chapter 3307), the School Employees Retirement System (governed by R.C. Chapter 3309), and the Highway Patrol Retirement System (governed by R.C. Chapter 5505) are neither state agencies nor political subdivisions for purposes of R.C. 9.24, and their moneys are not state funds for purposes of R.C. 9.24. Therefore, they are not subject to the provisions of R.C. 9.24.
6. The Public Employees Deferred Compensation Board (governed by R.C. Chapter 148) is neither a state agency nor a political subdivision for purposes of R.C. 9.24, and its moneys are not state funds for purposes of R.C. 9.24. Therefore, the Board is not subject to the provisions of R.C. 9.24.
7. An agreement that a health care provider makes with the Bureau of Workers’ Compensation pursuant to R.C. 4121.44 to R.C. 4121.442 in order to be certified or recertified for participation in the Health Partnership Program or the Qualified Health Plan system is not a contract awarded under R.C. 9.24 and is not a contract paid for in whole or in part with state funds. Therefore, such an agreement is not subject to the provisions of R.C. 9.24.
8. R.C. 9.24 does not apply to grants of state or federal moneys awarded by the Department of Aging (governed by R.C. Chapter 173) or by other state agencies or political subdivisions.



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April 15, 2004

OPINION NO. 2004-014

The Honorable Betty Montgomery
Auditor of State
88 East Broad Street
P.O. Box 1140
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Dear Auditor Montgomery:

We have received your request for advice concerning the interpretation and application of the recently enacted provisions of R.C. 9.24. Various questions regarding the implementation of R.C. 9.24 have been raised also by other public officials who are confronted with the obligation of complying with that statute.¹ To provide a comprehensive analysis of the provisions in question, we are, with your consent, using this opinion to address the following questions:

1. What is the meaning of the term "state funds," as used in R.C. 9.24? In particular, is a political subdivision permitted to segregate the funds it receives from the state and comply with R.C. 9.24 only as to expenditures for public contracts paid with those segregated funds?
2. What is the meaning of the term "contract," as used in R.C. 9.24? In particular, does it encompass an employment contract? What types of

¹ In addition to the questions addressed in this opinion, various issues concerning R.C. 9.24 are currently in litigation. There are a number of pending cases alleging the unconstitutionality of R.C. 9.24 and R.C. 117.28 in the context of findings for recovery against sureties for political subdivisions that were the focus of individual audit reports, or the invalidity of particular findings for recovery. It is our understanding, however, that the matters addressed in this opinion are not currently pending before the courts and, therefore, that it is appropriate for us to consider these matters at this time. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-048, at 2-242, n.3; 1972 Op. Att'y Gen. No. 72-097 (syllabus, paragraph 2) ("[w]hen a request for an Opinion of the Attorney General presents a question, which is at that time pending in a court proceeding, it would, in almost all cases, be improper for the Attorney General to express his opinion on such a question").

transactions should be included in the definition of “contract” pursuant to R.C. 9.24, and does the term “award” as used in that section in any way limit the applicability of the term “contract”? For example, does R.C. 9.24 apply to the purchase of a copy of a transcript from a court reporter whose services in the case have been retained by a private party? If so, would it be possible to apply the exception in R.C. 9.24(B)(5)?

3. What is the meaning of the term “political subdivision,” as used in R.C. 9.24?
4. What is the meaning of the term “state agency,” as used in R.C. 9.24?
5. Are PERS, PFPF, STRS, SERS, and HPRS subject to R.C. 9.24? In particular, are the moneys of PERS, PFPF, STRS, SERS, or HPRS “state funds” for purposes of R.C. 9.24, and are PERS, PFPF, STRS, SERS, and HPRS “state agenc[ies]” or “political subdivision[s]” for purposes of R.C. 9.24?
6. Is the Public Employees Deferred Compensation Board subject to R.C. 9.24? In particular, are the moneys of the Public Employees Deferred Compensation Board “state funds” for purposes of R.C. 9.24, and is the Public Employees Deferred Compensation Board a “state agency” or “political subdivision” for purposes of R.C. 9.24?
7. Is an agreement that a health care provider makes with the Bureau of Workers’ Compensation pursuant to R.C. 4121.44 to R.C. 4121.442 in order to be certified or recertified for participation in the Health Partnership Program or the Qualified Health Plan system a contract subject to R.C. 9.24?
8. Does R.C. 9.24 apply to grants of state or federal moneys awarded by the Department of Aging or by other state agencies or political subdivisions?

R.C. 9.24

R.C. 9.24 was enacted in Am. Sub. H.B. 95, 125th Gen. A. (2003) (act eff. June 26, 2003; R.C. 9.24(A) and (E) eff. Jan. 1, 2004 (sec. 201, uncodified); other provisions of R.C. 9.24 eff. Sept. 26, 2003 (sec. 179, uncodified)), and became fully effective on January 1, 2004.² R.C.

² The full text of R.C. 9.24 is as follows:

(A) No state agency and no political subdivision shall award a contract for goods, services, or construction, paid for in whole or in part with state funds,

to a person against whom a finding for recovery has been issued by the auditor of state, if the finding for recovery is unresolved.

(B) For purposes of this section, a finding for recovery is unresolved unless one of the following criteria applies:

(1) The money identified in the finding for recovery is paid in full to the state agency or political subdivision to whom the money was owed;

(2) The debtor has entered into a repayment plan that is approved by the attorney general and the state agency or political subdivision to whom the money identified in the finding for recovery is owed. A repayment plan may include a provision permitting a state agency or political subdivision to withhold payment to a debtor for goods, services, or construction provided to or for the state agency or political subdivision pursuant to a contract that is entered into with the debtor after the date the finding for recovery was issued.

(3) The attorney general waives a repayment plan described in division (B)(2) of this section for good cause;

(4) The debtor and state agency or political subdivision to whom the money identified in the finding for recovery is owed have agreed to a payment plan established through an enforceable settlement agreement.

(5) The state agency or political subdivision desiring to enter into a contract with a debtor certifies, and the attorney general concurs, that all of the following are true:

(a) Essential services the state agency or political subdivision is seeking to obtain from the debtor cannot be provided by any other person besides the debtor;

(b) Awarding a contract to the debtor for the essential services described in division (B)(5)(a) is in the best interest of the state;

(c) Good faith efforts have been made to collect the money identified in the finding of recovery.

(6) The debtor has commenced an action to contest the finding for recovery and a final determination on the action has not yet been reached.

(C) The attorney general shall submit an initial report to the auditor of state, not later than December 1, 2003, indicating the status of collection for all findings for recovery issued by the auditor of state for calendar years 2001, 2002, and 2003. Beginning on January 1, 2004, the attorney general shall submit to the auditor of state, on the first day of every January, April, July, and October, a list of all findings for recovery that have been resolved in accordance with division (B) of this section during the calendar quarter preceding the submission of the list and a description of the means of resolution.

(D) The auditor of state shall maintain a database, accessible to the public, listing persons against whom an unresolved finding for recovery has been issued, and the amount of the money identified in the unresolved finding for

9.24(A) prohibits a state agency or political subdivision from awarding a contract for goods, services, or construction, paid for in whole or in part with state funds, to a person against whom the Auditor of State has issued a finding for recovery, if the finding for recovery is unresolved. The statute describes several manners in which a finding for recovery may be resolved. R.C. 9.24(B).³

recovery. The auditor of state shall have this database operational on or before January 1, 2004. The initial database shall contain the information required under this division for calendar years 2001, 2002, and 2003.

Beginning January 15, 2004, the auditor of state shall update the database by the fifteenth day of every January, April, July, and October to reflect resolved findings for recovery that are reported to the auditor of state by the attorney general on the first day of the same month pursuant to division (C) of this section.

(E) Before awarding a contract for goods, services, or construction, paid for in whole or in part with state funds, a state agency or political subdivision shall verify that the person to whom the state agency or political subdivision plans to award the contract does not appear in the database described in division (D) of this section.

(F) As used in this section:

(1) "State agency" has the same meaning as in section 9.66 of the Revised Code.

(2) "Finding for recovery" means a determination issued by the auditor of state, contained in a report the auditor of state gives to the attorney general pursuant to section 117.28 of the Revised Code, that public money has been illegally expended, public money has been collected but not been accounted for, public money is due but has not been collected, or public property has been converted or misappropriated.

(3) "Debtor" means a person against whom a finding for recovery has been issued.

³ We are aware of legislation that amends R.C. 9.24 in various respects. The legislation is the Capital Reappropriations Act, Am. Sub. S.B. 189, which was signed by the Governor on March 30, 2004. The appropriation provisions became effective on March 30, 2004, and the nonappropriation provisions, including the amendment of R.C. 9.24, will take effect on June 29, 2004, unless a referendum petition is filed. *See* Ohio Const. art. II, § 1c; R.C. 1.471; Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified). The amendments to R.C. 9.24 enacted by Am. Sub. S.B. 189 will make some substantive changes in matters addressed in this opinion. Certain changes are addressed in notes 5, 8, and 9, *infra*. Other changes provide exceptions to the operation of R.C. 9.24 for bonding and insurance companies, medicaid or disability providers, and certain contracts under federal law, *see* R.C. 9.24(A) and (F); limit the contracts to which R.C. 9.24 applies to amounts in

R.C. 9.24 requires the Auditor of State to maintain a database, accessible to the public, that lists persons against whom an unresolved finding for recovery has been issued, together with the amount of money identified in that unresolved finding for recovery. R.C. 9.24(D). It requires the Attorney General to provide the Auditor of State with periodic reports listing findings for recovery that are resolved, and it requires the Auditor of State to update the database accordingly. R.C. 9.24(C) and (D). R.C. 9.24 also requires that, before awarding a contract for goods, services, or construction, paid for in whole or in part with state funds, a state agency or political subdivision verify that the person to whom the state agency or political subdivision plans to award the contract does not appear in the Auditor of State's database of persons against whom unresolved findings for recovery are pending. R.C. 9.24(E).

As used in R.C. 9.24, the term “[f]inding for recovery” means a determination issued by the Auditor of State “that public money has been illegally expended, public money has been collected but not been accounted for, public money is due but has not been collected, or public property has been converted or misappropriated.” R.C. 9.24(F)(2). Findings for recovery are issued in accordance with R.C. 117.28.⁴ A finding for recovery is made by the Auditor of State in an audit report that is filed with the public office audited, and a certified copy is filed with the legal counsel of the public office or prosecuting attorney of the county. R.C. 117.26; R.C. 117.27; R.C. 117.28. The finding for recovery is also contained in a report given by the Auditor of State to the Attorney General pursuant to R.C. 117.28. *See* R.C. 9.24(F)(2). The legal counsel or prosecuting attorney, within one hundred twenty days after receiving the report, may institute civil action to recover the money or property, and must notify the Attorney General as to whether any legal action has been taken. The Attorney General may take legal action in conjunction with the legal counsel or prosecuting attorney and, after one hundred twenty days, may take independent action. R.C. 117.28. The evident intent of R.C. 9.24 is to prohibit a state agency or political subdivision from awarding contracts to persons against whom findings for recovery are currently pending.

excess of twenty-five thousand dollars per contract or an aggregate of fifty thousand dollars, *see* R.C. 9.24(A) and (G); clarify the extent of the application of R.C. 9.24, *see* R.C. 9.24(A) and (H)(6); and modify the procedures to be followed in implementing R.C. 9.24, *see* R.C. 9.24(C) and (E).

⁴ For purposes of findings for recovery and other provisions of R.C. Chapter 117, the term “[p]ublic money” is defined to mean “any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.” R.C. 117.01(C); *see* R.C. 117.28. Thus, a person's appearance in the Auditor of State's database may result from financial transactions involving moneys from state or local governmental entities or from other sources, provided that they are received, collected by, or due a public official under color of office.

Meaning of “state funds,” as used in R.C. 9.24

Your first question relates to the meaning of the term “state funds,” as used in R.C. 9.24. You have asked, in particular, whether the use of this term indicates that a political subdivision may segregate the funds that it receives from the state and comply with R.C. 9.24 only as to expenditures for public contracts paid with those segregated funds. You are concerned about establishing the meaning of “state funds” for purposes of R.C. 9.24 to assure that R.C. 9.24 is implemented uniformly by state agencies and political subdivisions throughout the state.

The goal of statutory interpretation is to determine the intent of the legislature, as evidenced in the statutory language adopted. *See State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994) (“[t]he polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used and the purpose it sought to accomplish”). The term “state funds” is not defined by statute for purposes of R.C. 9.24.⁵ Therefore, it is appropriate to consider the common meaning of the term and the context in which it appears. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”); *Police & Firemen’s Disability & Pension Fund v. City of Akron*, 149 Ohio App. 3d 497, 501, 2002-Ohio-4863 at ¶14; 778 N.E.2d 68 (Summit County 2002), *appeal denied*, 98 Ohio St. 3d 1424, 2003-Ohio-259, 782 N.E.2d 78 (2003).

⁵ Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), R.C. 9.24(H)(6) will state: “‘State money’ does not include funds the state receives from another source and passes through to a political subdivision.” This meaning of “[s]tate money” will appear in connection with R.C. 9.24(H)(2), which will state: “‘Political subdivision’ means a political subdivision as defined in section 9.82 of the Revised Code that has received more than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year.” It is not clear whether the term “[s]tate money” has the same meaning as the term “state funds” used in R.C. 9.24(A), but it appears that the “[s]tate money” referred to in R.C. 9.24(H) may be the money used to pay for a contract awarded under R.C. 9.24(A). Therefore, it appears that, upon the effective date of the amendment of R.C. 9.24, the term “state funds,” as used in R.C. 9.24, will exclude all funds that the state receives from another source and passes through to a political subdivision. Moneys from the federal government are moneys from another source that would be excluded under this definition; as discussed in this opinion, they are also excluded under the current ordinary meaning of the term “state funds.” The statute does not specify which other sources are included as “another source,” but it seems likely that such sources would also be excluded under the current ordinary meaning of the term “state funds.” To make these determinations, it would be necessary to consider each such source as it is identified.

Although the term “state funds” is nowhere defined by statute, it is used throughout the Revised Code. *See, e.g.*, R.C. 126.31(B) (reimbursement of travel expenses for certain persons whose compensation is paid in whole or in part from “state funds”); R.C. 340.08 and R.C. 340.10 (distribution of “state funds” to boards of alcohol, drug addiction, and mental health services); R.C. 1521.24 (expenditure of “state funds” to alleviate shore erosion); R.C. 3317.01 (calculation of “state and local funds” of schools); R.C. 3323.08(C) (“state funds” for special education); R.C. 3345.022 (college or university supported in part or in whole by “state funds”); R.C. 3333.38 (eligibility for post-secondary student financial assistance “supported by state funds”); R.C. 4907.476 (use of “state funds” for design or administrative costs of grade crossing project).

The term “state funds” generally refers to funds that are held in the state treasury and appropriated by the General Assembly pursuant to Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision. *See* Ohio Const., art. II, § 22 (“[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law”); *see also, e.g.*, R.C. 311.01(D) (costs of training course for sheriffs are paid from “state funds appropriated” to the Ohio Peace Officer Training Commission for this purpose); R.C. 3379.07 (Ohio Arts Council “shall administer any state funds appropriated” for development of the arts); R.C. 4116.01 (“[p]ublic authority” includes a chartered municipality only if the contract for a public improvement “includes state funds appropriated for the purposes of that public improvement”); *In re Ford*, 3 Ohio App. 3d 416, 420, 446 N.E.2d 214 (Franklin County 1982) (using the term “state funds” to refer to funds “belonging to the state, whether from the general fund or some special fund” and finding that the funds of the State Teachers Retirement Board are trust funds and not “state funds, special or general”); 1985 Op. Att’y Gen. No. 85-025, at 2-96 to 2-97 (finding that tax moneys paid by the Treasurer of State into a special account within the state special revenue fund are state funds under R.C. Chapter 124); 1983 Op. Att’y Gen. No. 83-022 (because the Transportation Research Board uses no funds appropriated by the General Assembly, it does not pay its employees with “state funds”). *See generally* 1980 Op. Att’y Gen. No. 80-051 (syllabus) (“[t]he provisions of R.C. 153.12 are applicable to the award and payment of any contract for a public improvement project entered into by any county, township, municipal corporation or other subdivision of the state, excepting boards of education, whether or not state funds are provided for such project”).

Used in this sense, moneys that are “state funds” contrast with moneys that are held by the Treasurer of State in the contingent fund or in custodial funds. Contingent and custodial moneys are not part of the state treasury and, for various purposes, are not considered to be state funds. *See, e.g.*, R.C. 113.05(B) (“custodial funds of the treasurer of state ... are required by law to be kept in the custody of the treasurer of state but are not part of the state treasury”); R.C. 113.10 (Treasurer of State’s contingent fund is not part of the state treasury); R.C. 113.11 (payments from state treasury or custodial fund); *see also, e.g.*, R.C. 3334.11 (Ohio tuition trust fund is a custodial fund and is not part of the state treasury); R.C. 3770.06 (state lottery gross revenue fund is a custodial fund and is not part of the state treasury); *In re Ford* (funds of the State Teachers Retirement System are held in trust and are not state funds, so employees of the System are not compensated by state funds and are not in the service of the state for purposes of R.C. 124.01); 1982 Op. Att’y Gen. No. 82-082.

Opinions of the Ohio Attorney General have found that moneys held in trust or moneys held in a custodial capacity by the Treasurer of State are not moneys belonging to the state for purposes of Ohio Const. art. VIII, § 4, which prohibits the state from lending its credit to, or becoming the owner of, a private business. *See, e.g.*, 1999 Op. Att’y Gen. No. 99-002 (state insurance fund, under the Administrator of Workers’ Compensation); 1974 Op. Att’y Gen. No. 74-102 (moneys of the Public Employees Deferred Compensation Board). Similarly, federal moneys that are held in trust for particular purposes are not considered to be moneys of the state for purposes of Ohio Const. art. VIII, § 4. *See* 1973 Op. Att’y Gen. No. 73-006. This understanding of moneys of the state reasonably applies also to the term “state funds,” as used in R.C. 9.24.

Further, “state funds” may be distinguished from “federal funds,” even when federal funds are held in the state treasury and appropriated by the General Assembly. *See* R.C. 131.35; R.C. 131.36; note 5, *supra*. The plain distinction is that federal funds are received from the federal government, and they may retain that identity. *See* R.C. 131.35; *see also, e.g.*, R.C. 173.01; R.C. 3333.06; 1988 Op. Att’y Gen. No. 88-007; 1984 Op. Att’y Gen. No. 84-080; 1984 Op. Att’y Gen. No. 84-033, at 2-97 (“both state and federal funds, received from the Department of Public Welfare, are placed in the county treasury to the credit of the public assistance fund”). *See generally Sandusky Nursing Home, Inc. v. Ohio Dep’t of Human Servs.*, 51 Ohio App. 3d 212, 555 N.E.2d 984 (Franklin County 1988) (provision of federal and state funds for Medicaid).

“State funds” also has a different meaning than “public money” or “public moneys.” The terms “public money” and “public moneys” are defined in various ways in different statutes, but they are consistently used as broad terms that include moneys of political subdivisions as well as moneys of the state. *See* R.C. 117.01(C) and note 4, *supra*; R.C. 135.01(K) (for purposes of portions of the Uniform Depository Act, defining “[p]ublic moneys” to include moneys in the treasury of the state or a subdivision of the state and moneys coming lawfully into the possession or custody of the treasurer of state or a subdivision); *see also* R.C. 9.38 (payment or deposit of public moneys); R.C. 9.39 (liability for public moneys received); 1989 Op. Att’y Gen. No. 89-002; 1974 Op. Att’y Gen. No. 74-102. *See generally State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) (“[a]ll public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund”). Similarly, “public funds” is a broader term than “state funds.” *See* R.C. 4115.03(A) (prevailing wage law applies to construction of a public improvement paid with expenditures from “public funds” of a state officer, board, or commission or a political subdivision).⁶

⁶ R.C. 9.24 is directed to a state agency or political subdivision that seeks to award a contract for goods, services, or construction paid for in whole or in part with state funds. The intent of the statute is to exclude from persons to whom the contract may be awarded any persons who appear in the Auditor of State’s database of persons against whom unresolved findings for recovery have been issued. Although we find the interpretation adopted in this opinion to be the best reading of the language of R.C. 9.24 and to be most consistent with other

By its terms, R.C. 9.24 applies to a situation in which a state agency or political subdivision intends to award a contract that is “paid for in whole or in part with state funds.” Under the common definition of “state funds” outlined above, a contract of a state agency or

provisions of the Revised Code, we are aware that alternative interpretations are possible. For example, it might be argued, because a finding for recovery may be based on actions taken with regard to any public money, *see* note 4, *supra*, that “state funds” should be construed in R.C. 9.24 to apply to all types of public money that might support a “[f]inding for recovery” under R.C. 117.28. This argument would find support in the fact that R.C. 9.24(F)(2) defines the term “[f]indings for recovery” by reference to R.C. 117.28 and refers repeatedly to “public money.” This argument would rely upon reading “state” in a broad sense to include the government and the people whom the government represents, in contrast with the more specific definition of “state” as “the State of Ohio.” *See Webster’s Third New International Dictionary* 2228 (unabridged ed. 1993) (defining “state,” *inter alia*, as **5 a** “a body of people permanently occupying a definite territory and politically organized under a sovereign government” or **5 b** “the political organization that has supreme civil authority and political power and serves as the basis of government” and **7** “one of the bodies or component units in a federal system that ... forms with the other units a sovereign nation < the United States of America >”); *see also Black’s Law Dictionary* 1415-16 (7th ed. 1999). Thus, the term “state funds” could be read to mean the funds of the people, held in trust by the government, and to be equivalent to the term “public money” appearing in R.C. 9.24(F)(2), as used in R.C. Chapter 117 to support findings for recovery. *See* note 4, *supra*; *see also, e.g.*, R.C. 9.38 (requirement for payment or deposit of public moneys); R.C. 9.39 (“[a]ll public officials are liable for all public money received or collected by them or by their subordinates under color of office”). Under this interpretation, the terms “state funds” and “public money,” as used in R.C. 9.24, would be read *in pari materia* to apply to the same moneys. Thus, a person’s record of dealing with public money of any sort would reflect upon the person’s opportunity to be awarded a contract for goods, services, or construction paid for in whole or in part with public money of any sort. Reading the term “state funds” to be synonymous with “public money” would thus coordinate the various provisions of R.C. 9.24 and cause them to be read and construed in a consistent manner. *See, e.g., Gough Lumber Co. v. Crawford*, 124 Ohio St. 46, 48-49, 176 N.E. 677 (1931) (“[i]t is our duty to so construe statutes and parts thereof that the same may be reconciled and held harmonious, if this can be done and their intent and purpose be maintained”); 1984 Op. Att’y Gen. No. 84-063, at 2-203 (construing divisions (A) and (B) of a statute *in pari materia* to ascertain and effectuate the legislative intent). Under this reading, the type of transaction that may result in a finding for recovery is also the type of transaction that is subject to the provisions of R.C. 9.24, so that a state agency or political subdivision must comply with R.C. 9.24 whenever it seeks to award a contract paid for in whole or in part with public money from any source. This reading would preclude a political subdivision from segregating its state funds and avoiding compliance with R.C. 9.24 when it does not use state funds. This reading would, however, be inconsistent with the ordinary meaning of the term “state funds,” as used in the Revised Code and discussed in the body of this opinion.

political subdivision thus is subject to the requirements of R.C. 9.24 only if it is paid for in whole or in part by moneys (other than federal funds) that are appropriated from the state treasury by the General Assembly. As your letter indicates, this portion of the statute may lead to questions of fact concerning the source of moneys that pay for particular contracts. If state funds are commingled with local funds, a contract paid with those moneys would be presumed to include both state and local funds and, thus, to be subject to R.C. 9.24. *See generally* 1992 Op. Att'y Gen. No. 92-030, at 2-118; 1981 Op. Att'y Gen. No. 81-035, at 2-137. If the relevant statutes and accounting principles allow, however, a political subdivision may segregate its funds, so that it is relieved from complying with R.C. 9.24 with respect to a particular contract because that contract is not paid for in whole or in part with state funds. This result is permitted by the plain language of the statute, and any change of policy in this regard may be made only by the General Assembly. *See Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975); 1999 Op. Att'y Gen. No. 99-044, at 2-278 (“[s]hould the General Assembly wish to modify the existing statutory provisions, it could do so through appropriate legislation”).

We conclude, therefore, that, as currently used in R.C. 9.24, the term “state funds” means moneys, other than federal funds, that are held in the state treasury and appropriated by the General Assembly in accordance with Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision. A state agency or political subdivision must comply with R.C. 9.24 only when it awards a contract that is paid for in whole or in part with state funds. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), the term “state funds,” as used in R.C. 9.24, will exclude all funds that the state receives from another source and passes through to a political subdivision. *See* note 5, *supra*.

Meaning of “award a contract,” as used in R.C. 9.24

Your second question asks about the meaning of the terms “contract” and “award,” as used in R.C. 9.24. You are concerned particularly as to whether R.C. 9.24 applies to relationships between a state agency or political subdivision and its employees or independent contractors. You have also noted that, in addition to a formal written agreement (described as a “traditional contract”), which may or may not be preceded by a request for proposal or participation in the competitive bidding process, public offices frequently utilize purchase orders, credit cards, debit cards, procurement cards, and various other methods to obtain goods or services or execute construction projects. The question is which transactions trigger the verification requirements of R.C. 9.24.

R.C. 9.24 does not define the term “contract.” Therefore, it is appropriate to consider the ordinary meaning of the word and the context in which it appears. *See* R.C. 1.42. In general, a contract is “an agreement between two or more persons or parties to do or not to do something.” *Webster’s Third New International Dictionary* 494 (unabridged ed. 1993); *see also* Restatement (Second) of Contracts § 1 (1981) (“[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a

duty”); *Black’s Law Dictionary* 318 (7th ed. 1999) (defining contract, *inter alia*, to mean “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”). The term “contract” thus may encompass a wide variety of arrangements, ranging from a simple consumer purchase to a competitively bid and formally adopted agreement. *See, e.g.*, R.C. 9.06 (contracts for private operation and management of correctional facilities); R.C. 9.25 (purchase from federal government without necessity of advertising for bids); R.C. 9.35 (contract for payroll or accounting services); R.C. 9.48 (participation by county or township in contract of another county or township for equipment, materials, supplies, or services); 1981 Op. Att’y Gen. No. 81-033, at 2-128 n.1 (considering “informal agreements” and “formal contract negotiations” and stating that “the distinction between the two is somewhat unclear”). In the context of R.C. 9.24, the relevant contract is a contract “for goods, services, or construction” that is “award[ed]” to a person against whom an unresolved finding for recovery is pending.

As your question suggests, an understanding of the word “award” is pivotal to the construction of R.C. 9.24. Although many arrangements under which a state agency or political subdivision obtains goods or services may, in a general sense, be considered contractual arrangements, the application of R.C. 9.24 is limited to situations in which a state agency or political subdivision seeks to “award” a contract for goods, services, or construction.

It is a firmly established principle of statutory construction that, in enacting legislation, the General Assembly is presumed to use words that intelligently and advisedly express its intent. *See Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948); *Watson v. Doolittle*, 10 Ohio App. 2d 143, 147, 226 N.E. 771 (Williams County 1967). The use of the word “award” in R.C. 9.24 thus provides insight regarding the intent of the General Assembly.

Throughout the Revised Code, the word “award” is used in connection with what you have termed a traditional contract (that is, a formal written agreement) that is entered into through an arrangement under which various applicants compete for the opportunity to provide a governmental body with goods, services, or construction, and that opportunity is granted (that is, the contract is awarded) to the applicant that is selected as best meeting the applicable requirements. *See Black’s Law Dictionary* 132 (7th ed. 1999) (defining “award” to mean “[t]o grant by formal process or by judicial decree”); *Webster’s New World Dictionary* 97 (2d college ed. 1978) (defining “award” to mean “to give as the result of judging the relative merits of those in competition”); 1991 Op. Att’y Gen. No. 91-002, at 2-10 (“it is inherent in the process of competitive bidding that the work for which a contract is awarded be submitted for competing bids”). For example, the word “award” is used prominently in R.C. 153.12, which governs contracts for public improvements, beginning with these words:

(A) *With respect to award* of any contract for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement made by the state, or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in

the state or a political subdivision or that is authorized by state law, the *award*, and execution of the contract, shall be made within sixty days after the date on which the bids are opened. The failure to *award* and execute the contract within sixty days invalidates the entire bid proceedings and all bids submitted, unless the time for *awarding* and executing the contract is extended by mutual consent of the owner or its representatives and the bidder whose bid the owner accepts and with respect to whom the owner subsequently *awards* and executes a contract.

R.C. 153.12(A) (emphasis added). This provision requires competitive bidding and provides for the contract to be awarded pursuant to the competitive bidding procedure.

Similarly, R.C. 9.312 applies to situations in which a state agency or political subdivision is required by law, ordinance, or resolution “to award a contract to the lowest responsive and responsible bidder.” R.C. 9.312(A). It includes provisions governing the situation in which a state agency or political subdivision “determines to award a contract to a bidder other than the apparent low bidder,” R.C. 9.312(B), and it authorizes political subdivisions to make themselves subject to the provisions of R.C. 9.312 by the enactment of an ordinance or resolution, R.C. 9.312(C).

The term “award” is also used in various other statutes that relate to competitive contracting procedures. *See, e.g.*, R.C. 9.314 (in purchasing services or supplies by means of reverse auction on the internet, a political subdivision “may award a contract to the offeror whose proposal the political subdivision determines to be the most advantageous to the political subdivision”); R.C. 125.07 (when Director of Administrative Services makes purchases by competitive sealed proposal, “[a]ward may be made to the offeror whose proposal is determined to be the most advantageous to this state”); R.C. 125.11 (contracts awarded pursuant to reverse auction or competitive sealed bidding “shall be awarded to the lowest responsive and responsible bidder on each item”); R.C. 153.52 (awarding contracts for separate bidders); R.C. 307.90(A) (“[t]he award of all contracts subject to sections 307.86 to 307.92 of the Revised Code shall be made to the lowest and best bidder”); R.C. 3313.46 (awarding of contracts by boards of education); R.C. 3345.65 (procedure by which board of trustees of a state institution of higher education requests proposals and awards a contract to implement energy saving measures); R.C. 3505.13 (bidding on, and awarding of, contract for ballots); R.C. 3704.14(D) (request for proposal process used to award contracts for motor vehicle inspections); R.C. 4582.12 and R.C. 4582.31 (awarding of contracts by port authority); R.C. 5525.08 (contract may not be awarded to unqualified bidder); *cf.* R.C. 121.23 (prohibiting a state agency from awarding a public improvement, service, or supply contract or subcontract to a person listed for having more than one contempt finding for failure to correct an unfair labor practice, and prohibiting a person holding a contract with a state agency from entering into a subcontract with someone on the list); R.C. 4115.133 (prohibiting a public authority from awarding a contract for a public improvement to a person listed for violations of prevailing wage provisions). The general understanding of awarding a contract, thus, is that it requires a formal competitive process for considering bids or proposals, selecting the offer that best serves the needs of the public body, and entering into a

written contract with the person making that offer. *See generally* 1991 Op. Att’y Gen. No. 91-002.

Construed in accordance with common usage, a contract is “awarded” when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. Under this construction, the word “award” may not reasonably be applied to situations in which a contract for goods, services, or construction is exempted from competitive contracting procedures. *See, e.g.*, R.C. 9.36; R.C. 125.05; R.C. 127.16; R.C. 306.43; R.C. 307.86. Rather, the same factors that exempt a particular contract or type of contract from competitive contracting procedures operate also to exempt the contract from the provisions of R.C. 9.24.

It should not be possible, however, for a state agency or political subdivision to avoid the requirements of R.C. 9.24 by failing to follow competitive contracting procedures when they are mandated by statute. Therefore, if a contract is executed pursuant to a statute that requires a formal competitive contracting procedure, the contract must be considered to be awarded for purposes of R.C. 9.24, and therefore to be subject to the provisions of R.C. 9.24, even if the formal competitive contracting procedure was not actually followed.⁷

By its terms, R.C. 9.24 applies to contracts for goods, services, or construction. Arrangements to procure services through an independent contractor come within the provisions of R.C. 9.24 if a contract is awarded. *See, e.g.*, 1991 Op. Att’y Gen. No. 91-002 (various means of bidding on contracts for the purchase of personal services). It does not appear, however, that R.C. 9.24 applies to employment relationships. Instead, under Ohio law, the relationship between a governmental body and its officers and employees is generally considered to be a matter of law and not of contract. *See Fuldauer v. City of Cleveland*, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972) (syllabus, paragraph 3) (“[a] public officer or employee holds his office as a matter of law and not of contract, nor has such officer or employee a vested interest or private right of property in his office or employment”); *accord Malone v. Court of Common Pleas*, 45 Ohio St. 2d 245, 344 N.E.2d 126 (1976); *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 83 N.E.2d 393 (1948).

In some instances, a public servant may be employed by contract. *See, e.g.*, R.C. 3319.08 (teachers). Even in those instances, however, the selection of an individual to serve as a

⁷ Apart from the question whether R.C. 9.24 applies, a contract that is entered into without compliance with mandatory competitive contracting requirements may be void. *See, e.g.*, *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St. 2d 41, 231 N.E.2d 356 (1966) (syllabus) (where statutory requirements for competitive bidding are mandatory, “a contract made without compliance with such sections is void”); 2000 Op. Att’y Gen. No. 2000-048, at 2-294 (“[i]t has long been established that any contract made by a public entity that is in violation of statute or beyond the power of the entity to make is void and binding on neither party”).

contractual employee is referred to as employing or appointing the individual, rather than as “awarding” a contract to the individual. *See, e.g.*, R.C. 124.01(F) (defining “employee” as “any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer”); R.C. 124.11 (classified and unclassified service); R.C. 3319.08; R.C. 3319.09(A) (teachers are persons who “are employed in the public schools”).

Thus, employment arrangements with particular individuals, whether created by statute or contract, are not generally considered to be “awarded” to those individuals. Instead, they are matters of employment or appointment. *See, e.g.*, R.C. 121.14 (“[e]ach department may employ, subject to the civil service laws in force at the time the employment is made, the necessary employees”), R.C. 124.01(D) (defining “[a]ppointing authority” to mean “the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution”); R.C. 325.17 (“[t]he officers mentioned in [R.C. 325.27] may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices”); R.C. 4117.01(C) (for purposes of collective bargaining, a public employee is “any person holding a position by appointment or employment,” with certain exceptions).

As discussed above, the term “award a contract” is used in connection with competitive contracting procedures. Contracts for goods, services, or construction may be “awarded” pursuant to these procedures, but competitive contracting procedures are not used to secure the services of regular employees. Therefore, employment arrangements cannot reasonably be classified as contracts awarded under R.C. 9.24. *See, e.g.*, R.C. 125.01(G) (“[s]ervices’ means the furnishing of labor, time, or effort by a person, not involving the delivery of a specific end product other than a report which, if provided, is merely incidental to the required performance. ‘Services’ does not include services furnished pursuant to employment agreements or collective bargaining agreements”); R.C. 5705.41 (“‘contract’ as used in this section excludes current payrolls of regular employees and officers”). Accordingly, it is appropriate to exclude employment arrangements from the provisions of R.C. 9.24.⁸

⁸ If employment arrangements were found to come within R.C. 9.24, there would arise various questions concerning the ability of a public body to continue to employ a person against whom an unresolved finding for recovery is pending. For example, there would be the question whether the continued employment might be considered the award of a contract, and there would be the question whether a contract could be renewed. Further, there would be the question whether termination of an unclassified employee would comply with R.C. 124.34(A), which permits termination only for “incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.” Collective bargaining provisions could raise additional questions. *See, e.g.*, R.C. 4117.10(A) (specifying that the termination provisions of R.C. 124.34(A) prevail over

We have been asked whether R.C. 9.24 applies to the purchase of a transcript from a court reporter whose services in the case have been retained by a private party. We conclude that it does not. In purchasing a transcript from a court reporter, the purchaser is securing a product provided through the services of the reporter; however, the purchaser is not awarding a contract pursuant to a competitive contracting procedure. Therefore, R.C. 9.24 does not apply. If a state agency or political subdivision were to use competitive contracting procedures to select a court reporter to provide services as an independent contractor and were to pay the contract for services in whole or in part with state funds, then the arrangement would be subject to R.C. 9.24.

We have been asked also about various other types of purchase arrangements. Under the analysis set forth above, purchase arrangements that do not involve competitive contracting procedures (for example, the use of credit or debit cards) do not constitute the awarding of a contract and, therefore, are not subject to R.C. 9.24.

We conclude, therefore, that for purposes of R.C. 9.24, a contract is awarded when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. A purchase arrangement that does not involve competitive contracting procedures does not constitute the awarding of a contract and is not subject to R.C. 9.24. The creation of an employment relationship, whether by statute or contract, does not constitute the awarding of a contract for purposes of R.C. 9.24; however, the creation of an independent contractor relationship for the purchase of services is subject to the provisions of R.C. 9.24 if a contract is awarded.

Meaning of “political subdivision,” as used in R.C. 9.24

The term “political subdivision” is not defined by R.C. 9.24,⁹ nor is there a single definition of the term applicable throughout the Revised Code. *See, e.g.*, 1992 Op. Att’y Gen.

any provision in a collective bargaining agreement). The fact that R.C. 9.24 does not address the issues that would arise regarding employment relationships provides additional support for the conclusion that these arrangements were not intended to be included among contracts awarded for goods, services, or construction that are subject to R.C. 9.24.

Upon the effective date of Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), R.C. 9.24(G)(2) will state expressly that “[t]his section does not apply to employment contracts,” thereby confirming the conclusion reached in this opinion.

⁹ Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), R.C.

No. 92-061, at 2-254 (“[t]he term ‘political subdivision’ is used in various contexts throughout the Revised Code and is given various definitions. It is possible for an entity to be a political subdivision for one purpose and not for another”); 1991 Op. Att’y Gen. No. 91-072; 1983 Op. Att’y Gen. No. 83-059, at 2-247. Where no statutory definition is provided, it is appropriate to use the common meaning of the term “political subdivision.” See R.C. 1.42.

In accordance with ordinary meaning and common usage, the term “political subdivision” has been defined to mean “a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function.” 1972 Op. Att’y Gen. No. 72-035, at 2-135; *accord* 2002 Op. Att’y Gen. No. 2002-038, at 2-244; 1997 Op. Att’y Gen. No. 97-036, at 2-211; 1984 Op. Att’y Gen. No. 84-055; *see also In re Ford*, 3 Ohio App. 3d at 418; *Fair v. Sch. Employees Ret. Sys.*, 44 Ohio App. 2d 115, 118-19, 335 N.E.2d 868 (Franklin County 1975); *Wolf v. City of Columbus*, 98 Ohio App. 333, 129 N.E.2d 309 (Franklin County 1954); *Black’s Law Dictionary* 1179 (7th ed. 1999) (defining “political subdivision” to mean “[a] division of a state that exists primarily to discharge some function of local government”). This definition has been found to include a variety of public entities. *See, e.g.*, 2002 Op. Att’y Gen. No. 2002-038, at 2-244 (townships); 1997 Op. Att’y Gen. No. 97-036 (syllabus, paragraph 1) (“[e]xcept where the context of a statutory scheme indicates otherwise, a joint-county alcohol, drug addiction, and mental health service district is a political subdivision”); 1984 Op. Att’y Gen. No. 84-055, at 2-183 (counties, townships, municipalities, and school districts).

In the instant case, the political subdivisions that are subject to R.C. 9.24 will be limited by the language of R.C. 9.24 making its provisions applicable only to contracts that are paid for in whole or in part with state funds. Thus, a political subdivision is required to comply with R.C. 9.24 only if it is in the process of awarding a contract for goods, services, or construction that will be paid for in whole or in part with state funds. As discussed above, state funds, in general, are funds held in the state treasury and appropriated by the General Assembly. *See* note 5, *supra*. An entity that does not have such funds, or that does not use them to pay for a particular contract, need not comply with the provisions of R.C. 9.24.

9.24(H)(2) and (6) will contain the following definitions: “‘Political subdivision’ means a political subdivision as defined in section 9.82 of the Revised Code that has received more than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year,” and “‘State money’ does not include funds the state receives from another source and passes through to a political subdivision.” R.C. 9.82(A) defines “[p]olitical subdivision” to mean “a county, city, village, township, park district, or school district.” Therefore, upon the effective date of the amendment of R.C. 9.24, “[p]olitical subdivision” will have the definition set forth in R.C. 9.24(H)(2), namely, a county, city, village, township, park district, or school district that has received more than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year.

We conclude, therefore, that as currently used in R.C. 9.24, the term “political subdivision” means a limited geographical area of the state within which a public agency is authorized to exercise some governmental function. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), “[p]olitical subdivision” will have the definition set forth in R.C. 9.24(H)(2), namely, a county, city, village, township, park district, or school district that has received more than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year. *See note 9, supra.*

Meaning of “state agency,” as used in R.C. 9.24

By statutory definition, the term “state agency,” as used in R.C. 9.24, has the same meaning as in R.C. 9.66. R.C. 9.24(F)(1). R.C. 9.66 requires that persons who apply to the state, a state agency, or a political subdivision for economic development assistance indicate whether they have any outstanding liabilities owed to the state, a state agency, or a political subdivision, and authorize inspection of their financial records. R.C. 9.66(B). R.C. 9.66 also prohibits future economic development assistance to a person who fails to comply or makes a false statement and requires the return of moneys received by that person. R.C. 9.66(C). R.C. 9.66 defines “[s]tate agency” to mean “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.” R.C. 9.66(A)(4).

The definition of “state agency” set forth in R.C. 9.66 is identical to the definition appearing in R.C. 1.60, which is applicable to Title I of the Revised Code, except as otherwise provided. R.C. 1.60. The definition of “state agency” appearing in R.C. 1.60 has been construed in several instances and has been found, for example, not to include the state retirement funds. *See* 1996 Op. Att’y Gen. No. 96-032; *see also, e.g.,* 1996 Op. Att’y Gen. No. 96-064 (the Ohio Turnpike Commission is a state agency as defined in R.C. 1.60); 1994 Op. Att’y Gen. No. 94-016, at 2-74 to 2-76 (the Ohio Retirement Study Commission is not a state agency as defined in R.C. 1.60); 1988 Op. Att’y Gen. No. 88-007, at 2-20 to 2-21 (the Bureau of Disability Determination is a state agency as defined in R.C. 1.60 even though it receives its funding from the federal government). Because the language is identical, it is appropriate to attribute to R.C. 9.24 the construction of the definition of “state agency” applied to R.C. 1.60.

We conclude, accordingly, that as used in R.C. 9.24, the term “state agency” has the definition set forth in R.C. 9.66 and R.C. 1.60, namely, “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.”

Application of R.C. 9.24 to the state retirement systems

We have been asked, in particular, if the state retirement systems are subject to the provisions of R.C. 9.24. The five state retirement systems are the Public Employees Retirement System (PERS), governed by R.C. Chapter 145; the Police and Fire Pension Fund (PFPF), governed by R.C. Chapter 742; the State Teachers Retirement System (STRS), governed by R.C.

Chapter 3307; the School Employees Retirement System (SERS), governed by R.C. Chapter 3309; and the Highway Patrol Retirement System (HPRS), governed by R.C. Chapter 5505. The analysis set forth above indicates that these systems are not subject to the provisions of R.C. 9.24.

It has been concluded that the state retirement systems are not state agencies as that term is defined for purposes of R.C. 1.60 because they do not exercise their statutory functions on behalf of the state and, therefore, do not have an agency relationship with the state. Rather:

The members of the boards of the systems are expressly designated as trustees of the funds in each system and expressly charged with the duty to administer the funds “solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system.”

1996 Op. Att’y Gen. No. 96-032, at 2-126 (citations omitted). Because the definition of “state agency” in R.C. 9.24 is identical to that in R.C. 1.60, we conclude, similarly, that the state retirement systems are not state agencies for purposes of R.C. 9.24 because they do not exercise their statutory functions on behalf of the state. *Cf. In re Ford* (finding that STRS is an instrumentality of the state and a state agency, but that its employees are not in the service of the state because they are compensated with moneys of STRS that are not state moneys); *Fair v. Sch. Employees Ret. Sys.* (predating the definition in R.C. 1.60, *see* 1996 Op. Att’y Gen. No. 96-032, at 2-126 n.6, and finding that SERS is an instrumentality of the state that exercises its powers and duties throughout the state, but is not an agency listed in R.C. 119.01(A) or a political subdivision under R.C. 2506.10 for purposes of appeal rights); 1993 Op. Att’y Gen. No. 93-071, at 2-327 to 2-328 (finding that HPRS is an agency or instrumentality of the State of Ohio for purposes of 29 U.S.C. § 630(b) and thus is an employer as defined in that section).

We conclude also that the state retirement systems are not political subdivisions because they have responsibilities to individuals throughout the state, rather than serving a limited geographical area. *See In re Ford*, 3 Ohio App. 3d at 418 (SERS and STRS are not subdivisions of the state because they exercise powers and duties throughout the state, rather than solely within a geographical subdivision); *Fair v. Sch. Employees Ret. Sys.*, 44 Ohio App. 2d at 118-19; 1972 Op. Att’y Gen. No. 72-035 (syllabus) (“[a] political subdivision of the State is a limited geographical area wherein a public agency is authorized to exercise some governmental function, as contrasted to an instrumentality of the State, which is a public agency with state-wide authority”).

Further, under the analysis of state funds set forth above, it is clear that the moneys of the state retirement systems are not state funds. Retirement system moneys are not held in the state treasury or appropriated by the General Assembly. Rather, they are held by the Treasurer of State as custodial funds and are paid out upon the authorization of the appropriate board. *See* R.C. 145.26; R.C. 742.61; R.C. 3307.12; R.C. 3309.12; R.C. 5505.11; *see also In re Ford*. The fact that the statutes state that retirement system funds may be deposited “in the same manner as

state funds are deposited,” further indicates that these moneys are not state funds. R.C. 145.26; R.C. 742.61; R.C. 3307.12; R.C. 3309.12; R.C. 5505.11.

We conclude, accordingly, that the state retirement systems are neither state agencies nor political subdivisions for purposes of R.C. 9.24, and their moneys are not state funds for purposes of R.C. 9.24. Therefore, PERS, PFPF, STRS, SERS, and HPRS are not subject to the provisions of R.C. 9.24.

Application of R.C. 9.24 to the Public Employees Deferred Compensation Board

We have also been asked if the Public Employees Deferred Compensation Board is subject to the provisions of R.C. 9.24. The Public Employees Deferred Compensation Board is established by R.C. Chapter 148. *See* R.C. 148.02. It is empowered to promulgate and offer to eligible employees a program for the deferral of compensation, and then to administer the program. R.C. 148.04(A). The members of the Public Employees Deferred Compensation Board are the trustees of the deferred funds and are required to “discharge their duties with respect to the funds solely in the interest of and for the exclusive benefit of participating employees, continuing members, and their beneficiaries.” *Id.*

Because the moneys of the Public Employees Deferred Compensation Board are held in trust for the benefit of participating employees, continuing members, and their beneficiaries, the moneys are not state funds as that term is used in R.C. 9.24. *See* 1974 Op. Att’y Gen. No. 74-102 (deferred compensation moneys are not state funds for purposes of the lending credit and investment prohibitions of Ohio Const. art. VIII, § 4). Because the Public Employees Deferred Compensation Board, like the state retirement systems, exercises its statutory functions on behalf of participants and their beneficiaries, rather than on behalf of the state, the Public Employees Deferred Compensation Board is not a state agency, as that term is used in R.C. 9.24. Because the Public Employees Deferred Compensation Board serves the entire state, rather than a limited geographical area, the Board is not a political subdivision for purposes of R.C. 9.24.

We conclude, accordingly, that the Public Employees Deferred Compensation Board is neither a state agency nor a political subdivision for purposes of R.C. 9.24, and its moneys are not state funds for purposes of R.C. 9.24. Therefore, the Board is not subject to the provisions of R.C. 9.24.

Application of R.C. 9.24 to the Bureau of Workers’ Compensation

We have been asked if the agreement that a health care provider makes with the Bureau of Workers’ Compensation in order to be certified or recertified for participation in the Health Partnership Program (HPP) or the Qualified Health Plan (QHP) system is a contract subject to R.C. 9.24. The relevant provisions appear in R.C. 4121.44-.442 and 10 Ohio Admin. Code Chapter 4123-6.

The Bureau of Workers’ Compensation’s HPP and QHP have been instituted to facilitate the provision of appropriate health care to workers injured in the course of their employment.

See R.C. 4121.44. In order to participate in this comprehensive program, a medical provider must receive a certification from the Bureau through the process of “credentialing,” and must periodically be recertified through the process of “recredentialing.” “Credentialing” and “recredentialing” are defined as “[a] process by which the bureau validates or reviews the application of a provider for eligibility for participation in the HPP.” 10 Ohio Admin. Code 4123-6-01(H). “Certification” and “recertification” are defined as “[a] process by which the bureau approves a provider or [managed care organization] for participation in the HPP.” 10 Ohio Admin. Code 4123-6-01(I).

To be credentialed and certified, or to be recredentialed and recertified, a provider must make application to the Bureau and enter into an agreement that indicates acceptance of the responsibilities imposed upon a provider. 10 Ohio Admin. Code 4123-6-02, 4123-6-023, and 4123-6-024; *see also* 10 Ohio Admin. Code 4123-6-01(L) (“[b]ureau certified provider” is “[a] credentialed provider who has completed and signed a provider application and agreement or recertification application and agreement with the bureau and is approved by the bureau for participation in the HPP”). Rules of the Bureau establish “minimum credentialing criteria for providers to qualify for participation in the HPP.” 10 Ohio Admin. Code 4123-6-022(A).

Credentialing and recredentialing thus are means of being certified or recertified to participate in the Bureau’s programs. Certification or recertification indicates that a provider has met minimum standards. *See* 10 Ohio Admin. Code 4123-6-022. Certification and recertification are available to an unspecified number of applicants who meet these standards. There are no competitive contracting procedures required for participation, and participation is not limited to the single best qualified applicant. Therefore, certification or recertification to participate in HPP or QHP does not constitute the awarding of a contract, as that term is used in R.C. 9.24.

Further, we have been informed that all services furnished by a certified provider are ultimately paid by money from the state insurance fund, which consists of contributions from public and private employers. *See* R.C. 4123.30. Moneys in the state insurance fund are trust moneys held for the benefit of employers and employees for the payment of the costs of workers’ compensation. *See* Ohio Const. art. II, § 35; R.C. 4123.30. State insurance fund moneys are held by the Treasurer of State as custodial funds, rather than in the state treasury, and, therefore, are not considered to be state funds. *See* R.C. 4123.42. For this reason as well, the process of credentialing and certifying a provider for participation in the HPP or QHP is not subject to the provisions of R.C. 9.24.

We conclude, therefore, that an agreement that a health care provider makes with the Bureau of Workers’ Compensation pursuant to R.C. 4121.44 to R.C. 4121.442 in order to be certified or recertified for participation in HPP or QHP is not a contract awarded under R.C. 9.24 and is not a contract paid for in whole or in part with state funds. Therefore, such an agreement is not subject to the provisions of R.C. 9.24.

Application of R.C. 9.24 to grant moneys

The next question concerns payments that are designated as grants, rather than contracts for purchases. Specifically, the question is whether R.C. 9.24 applies to grants of state or federal moneys awarded by the Department of Aging or by other state agencies or political subdivisions.

The act of awarding a grant is generally considered to be different from the act of awarding a contract. *See Black's Law Dictionary* 318, 707 (7th ed. 1999) (defining "contract" to mean "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law" and defining "grant" to mean "[t]o give or confer (something), with or without compensation"). Although the recipient of a grant may need to meet certain requirements to become or remain eligible for the grant, the awarding of a grant generally connotes an element of gift, rather than an equal exchange resulting in a standard business contract. As was stated in 2000 Op. Att'y Gen. No. 2000-13, at 2-76: "[A] grant is generally a transfer of money with no expectation that the money will be repaid. A grant is usually made pursuant to an agreement that sets forth the manner in which the money may be expended." *See also, e.g.*, 1998 Op. Att'y Gen. No. 98-034; 1977 Op. Att'y Gen. No. 77-049, at 1-274 to 2-175 (under grant and loan program, "funds are being given or loaned to individuals who are giving nothing tangible in return therefor. The grant program [sic] involves an outright transfer of funds. The loans are advanced to borrowers in exchange for nothing more than the promise of repayment"). A grant recipient may be required to agree to abide by the conditions of the grant, but a grant is not ordinarily considered a contract for goods, services, or construction. *Cf.* note 10, *infra*.

Thus, the common meaning of "award a contract," as discussed above, does not include the award of a grant by a public entity. *See* 1986 Op. Att'y Gen. No. 86-075 (syllabus, paragraph 2) (the disbursement of federal grant funds to nonprofit rehabilitation facilities for the purpose of aiding the facilities in establishing vocational rehabilitation programs does not constitute a purchase or acquisition for purposes of R.C. 126.30, which requires a state agency to pay interest on late payments for the purchase, lease, or other acquisition of equipment, materials, goods, supplies, or services). Accordingly, a state agency or political subdivision that receives state funds by appropriation from the General Assembly must comply with R.C. 9.24 if it awards a contract for goods, services, or construction paid for in whole or in part with those state funds. R.C. 9.24 does not apply, however, if the state agency or political subdivision makes a grant of the funds, rather than using them to pay for a contract that it awards.

This conclusion is supported by R.C. 9.66, which expressly addresses the fiscal responsibility of certain grant recipients. R.C. 9.66 requires a person who applies to the state, a state agency, or a political subdivision for economic development assistance to indicate on the application for assistance if the person has outstanding liabilities owed to the state, a state agency, or a political subdivision, and to provide authorization for the governmental entity to inspect its financial records. R.C. 9.66(B). The statute also renders a person who makes a false statement in this regard ineligible for economic development assistance and requires the return of moneys received. R.C. 9.66(C). The fact that grants and loans that constitute economic

development assistance are covered by R.C. 9.66 suggests that grants and loans are not included within the similar provisions of R.C. 9.24.

We have been asked particularly about grants awarded by the Department of Aging. Pursuant to R.C. 173.01, the Department of Aging is empowered to administer programs of the federal government relating to the aged and to administer certain funds granted by the federal government. R.C. 173.01(A). The Department of Aging is also empowered to administer state funds that are appropriated for its use. R.C. 173.01(B). It may use state and federal funds to make grants and sub-grants. R.C. 173.01(A) and (B); *see also* R.C. 131.35. In order to carry out various functions, the Department of Aging is also authorized to enter into contracts for the purchase of services. R.C. 173.11-12. We have been informed that the Department of Aging has considered a grant of funds to be different from a contract for the purchase of services, and has used different procedures for awarding grants than for awarding contracts. *See* 45 C.F.R. §§ 92.36, 92.37 (2003). The question for consideration in this opinion is whether the awarding of grants, as well as the awarding of contracts, is subject to the provisions of R.C. 9.24.

We agree with the Department of Aging that the awarding of a grant is different from the awarding of a contract in significant respects.¹⁰ As discussed above, the awarding of a grant generally includes the element of gift and does not constitute a purchase by equal exchange. Therefore, although there may be competition for grants, they are not contracts for purposes of R.C. 9.24 and are not subject to the provisions of R.C. 9.24.

Further, federal funds are commonly distinguished from state or local funds, and this distinction applies also for purposes of R.C. 9.24. R.C. 131.35. *See generally* 1986 Op. Att’y Gen. No. 86-075, at 2-418 (in disbursing federal grant funds, the Rehabilitation Services Commission “is channeling funds from the federal government to the facility”); 1977 Op. Att’y Gen. No. 77-049 (under program using only federal funds for grants and loans to homeowners, the moneys never become moneys of the municipal corporation for purposes of constitutional prohibitions against lending credit); note 5, *supra*. Accordingly, if the Department of Aging

¹⁰ This opinion does not address the manner in which grants and contracts are treated under statutes other than R.C. 9.24. We have been asked about the significance of *State v. Lordi*, 140 Ohio App. 3d 561, 2000-Ohio-2582, 748 N.E.2d 566 (Mahoning County 2000), in which the court found that an arrangement under which a private entity was awarded a Community Development Block Grant and additional moneys for the purpose of creating job opportunities was a public contract for purposes of R.C. 2921.42, which prohibits a public official from having an interest in a public contract for the purchase of property or services. We note that R.C. 2921.42 contains a definition of “public contract” that is not applicable to R.C. 9.24 and is not consistent with the interpretation of R.C. 9.24 set forth in this opinion. *See* R.C. 2921.42(G)(1) (including, *inter alia*, employment contracts as public contracts). Because terms may be construed differently for purposes of different statutes, we do not find that *State v. Lordi* affects the analysis and conclusions contained in this opinion.

makes a grant consisting entirely of federal funds, the grant does not involve state funds and, for that reason as well, is not subject to R.C. 9.24.

Accordingly, we conclude that R.C. 9.24 does not apply to grants of state or federal moneys awarded by the Department of Aging or by other state agencies or political subdivisions. Rather, R.C. 9.24 applies only to the awarding of contracts for goods, services, or construction.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. As currently used in R.C. 9.24, the term “state funds” means moneys, other than federal funds, that are held in the state treasury and appropriated by the General Assembly in accordance with Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision. A state agency or political subdivision must comply with R.C. 9.24 only when it awards a contract that is paid for in whole or in part with state funds. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), the term “state funds,” as used in R.C. 9.24, will exclude all funds that the state receives from another source and passes through to a political subdivision.
2. For purposes of R.C. 9.24, a contract is awarded when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. A purchase arrangement that does not involve competitive contracting procedures does not constitute the awarding of a contract and is not subject to R.C. 9.24. The creation of an employment relationship, whether by statute or contract, does not constitute the awarding of a contract for purposes of R.C. 9.24; however, the creation of an independent contractor relationship for the purchase of services is subject to the provisions of R.C. 9.24 if a contract is awarded.
3. As currently used in R.C. 9.24, the term “political subdivision” means a limited geographical area of the state within which a public agency is authorized to exercise some governmental function. Upon the effective date of the amendment of R.C. 9.24 by Am. Sub. S.B. 189, 125th Gen. A. (2004) (eff. Mar. 30, 2004, with certain provisions, including the amendment of R.C. 9.24, eff. on June 29, 2004, unless a referendum petition is filed) (section 78, uncodified), “[p]olitical subdivision” will have the definition set forth in R.C. 9.24(H)(2), namely, a county, city, village, township, park district, or school district that has received more

than fifty thousand dollars of state money in the current fiscal year or the preceding fiscal year.

4. As used in R.C. 9.24, the term “state agency” has the definition set forth in R.C. 9.66 and R.C. 1.60, namely, “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.”
5. The Public Employees Retirement System (governed by R.C. Chapter 145), the Police and Fire Pension Fund (governed by R.C. Chapter 742), the State Teachers Retirement System (governed by R.C. Chapter 3307), the School Employees Retirement System (governed by R.C. Chapter 3309), and the Highway Patrol Retirement System (governed by R.C. Chapter 5505) are neither state agencies nor political subdivisions for purposes of R.C. 9.24, and their moneys are not state funds for purposes of R.C. 9.24. Therefore, they are not subject to the provisions of R.C. 9.24.
6. The Public Employees Deferred Compensation Board (governed by R.C. Chapter 148) is neither a state agency nor a political subdivision for purposes of R.C. 9.24, and its moneys are not state funds for purposes of R.C. 9.24. Therefore, the Board is not subject to the provisions of R.C. 9.24.
7. An agreement that a health care provider makes with the Bureau of Workers’ Compensation pursuant to R.C. 4121.44 to R.C. 4121.442 in order to be certified or recertified for participation in the Health Partnership Program or the Qualified Health Plan system is not a contract awarded under R.C. 9.24 and is not a contract paid for in whole or in part with state funds. Therefore, such an agreement is not subject to the provisions of R.C. 9.24.
8. R.C. 9.24 does not apply to grants of state or federal moneys awarded by the Department of Aging (governed by R.C. Chapter 173) or by other state agencies or political subdivisions.

Respectfully,



JIM PETRO
Attorney General