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## Too Much Power, Too Little Oversight: Ohio's State Controlling Board

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ZACH SCHILLER  
APRIL, 2003

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April, 2003

Policy Matters Ohio

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## **Executive Summary**

Ohio's State Controlling Board, a state panel that is the final arbiter of hundreds of millions of dollars in state contracts and adjusts spending after the budget is approved, is an oversight board that isn't doing enough oversight. At the same time, it has taken on powers of the legislature that should be left to the legislature itself.

The Controlling Board, which is composed of three legislators from each house and an executive branch appointee, meets biweekly to ensure that money appropriated by the legislature is spent properly. It is the last word on many capital projects and economic development expenditures. It passes judgment on spending transfers within agencies, and supervises the expenditure of new funds made available to the state by the U.S. government and other sources. It also approves contracts that fall outside standard bidding procedures. Altogether, billions of dollars of state spending come before it annually for approval.

Though the board's Republican majority indicated more recently that it was tightening up on its reviews, the board approved seven out of every ten requests it received last year without any discussion. These include items that deserve question. When the board has questions, there is often a disconnect between what they ask and the responses given, leaving an observer to wonder if he or she has wandered into a missing chapter of Alice in Wonderland. During calendar 2002, the board voted down one request out of the 1,665 it considered. Another 52 were initially deferred, often because they were withdrawn before the board considered them. Most of these requests were approved later.

Many transfers the board approves reflect routine needs to move money from one program to another within agencies. However, others may violate the intent of the legislature. Some requests expose the existence of unspent monies at state agencies whose expenditure might be better decided by the General Assembly. The board last year also approved tens of millions of dollars for contracts in which it was unclear that a competitive selection process was used. Though there are sometimes good reasons for the lack of competition, such as the existence of only one vendor, often there is a lack of information about the process, making it impossible to judge whether a selection was appropriate.

The lack of aggressive scrutiny by the board is evident in its approval of medical-service contracts at the Department of Rehabilitation and Correction. A review of the board's record in approving such deals reveals a lack of competitive bidding, costs that at least in some instances seem out of line, and approvals in the face of cloudy documentation on the selection process. The board's pattern of inattention also is apparent in its treatment of a number of requests from the Department of Development. It approved funds to help Stanley Works move a facility from one Cleveland-area location to another even while the company was embroiled in a national controversy over moving its headquarters – on paper – to the Caribbean to avoid U.S. taxes. The board has approved economic development subsidies that may not be necessary and raise concerns that the state is helping one community at the expense of another.

Record-keeping and access to Controlling Board information are remarkably weak. Though improvements have been made since the board was criticized over its scanty minutes in 2001, it

remains difficult to track its activities in detail. The board tape records its meetings, but only to produce written minutes; tapes are used again at the subsequent meeting, so no full transcript of meetings exists.

The board lodges the authority of the legislature in the hands of a few. Concentrating power in this way is not good government. The board's authority over normal activities of the General Assembly should be sharply curtailed. To the degree that the board provides a check on executive power, its duties are worth preserving, but steps should be taken to ensure that it provides the needed oversight. To accomplish that, the General Assembly should:

- Assess the board's far-flung powers and responsibilities, and eliminate those that do not fit with the above charter.
- Curb the board's transfer powers to include only the most routine items, and require a supermajority to approve such transfers and increases in appropriation authority.
- Scrutinize the grant, loan and bond requests of the Development Department more closely.
- Consider an overhaul of the state purchasing process that covers waivers of competitive selection, and inform the board earlier in the process.
- Subject competitive waivers to a necessity test. Require an explanation for every contract of what competitive process was used to award it, mandate reports on efforts to seek new vendors before renewals of noncompetitive contracts, and establish strict criteria governing unbid consulting contracts.
- Require cost comparisons before allowing public services to be provided by private vendors.

Beyond these changes, the board must operate in full sunlight and expand access to its decision-making and records. To bring that about, it should make requests available on its web site a week in advance of its meetings and provide public notice when a request is originally filed. It should allow staff to question agency representatives at board meetings, provide an opportunity for members of the public to testify, and keep a taped copy and make a transcript of each meeting.

## **Importance of the Controlling Board**

The State Controlling Board is a little-known arm of Ohio state government, popping up in news reports now and then but hardly known to most citizens. The board's own manual candidly notes that puzzlement may be the likely response of most to its name. Yet invoking the Controlling Board "often brings fear and uncertainty into the hearts of those who must appear before it."<sup>1</sup>

Obscure as it may be to most Ohioans, this board of six legislators and one budget department official affects nearly everyone in the state with the sweep of its actions. State assistance for primary and secondary as well as higher education; development department spending on many of its loans and grants; certain capital projects of public universities; spending decisions on many new U.S. funds the state receives – all these things come before the biweekly meetings of the board.

Some of these are mundane; in November, it raised license fees for opticians. Others involve subjects of intense local interest. The company hired to study the redesign of the interstate highway through downtown Cleveland was cleared by the board. Contracts to hire the bank that processed child-support payments, special counsel to assist the attorney general and many others have been approved by the board. The Controlling Board also may determine how agencies may use unspent money.

At one time or another, the board has been given substantial authority, such as deciding which mental health facility to close. One year, the entire appropriation for what was then the Department of Human Services was given to the Controlling Board to dole out. "Although the General Assembly sets the appropriations for the biennium, it is often the Controlling Board that has the final word on how the monies are spent," wrote expert Richard G. Sheridan in his book on Ohio state budgeting, *Follow the Money*.<sup>2</sup>

Last December, the General Assembly gave the Controlling Board another power: To override a fact-finder's recommendation in contract negotiations with unions representing state employees. This lodged with a group of seven a decision that previously required approval with a three-fifths majority by both houses of the legislature.<sup>3</sup> This illustrates that in some ways, the board is anti-democratic, giving the legislative leadership power that they would not otherwise have. Rep. Waldo Bennett Rose, a Republican who was in the minority on the Controlling Board in the late '70s, said then that it had become "a way for the legislature to dump off hot potatoes" and had probably gone too far in making policy.<sup>4</sup>

The board's significance only grows in a time of budget crisis, as Ohio faces now. Some actions are small, such as when its president told the Adjutant General last May to make ends meet and live within his existing budget when he sought reimbursement for funds spent on the National Guard after September 11, 2001. The importance of the board's role was reinforced at its Feb.

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<sup>1</sup> State Controlling Board. *Controlling Board Manual*. December 1997, Section I, p. 7.

<sup>2</sup> Sheridan, Richard G. *Follow the Money: Ohio State Budgeting*. Federation for Community Planning, 2000, p. 176.

<sup>3</sup> Hershey, Bill. "Capital Budget Passes House Amid Union Cry." *The Dayton Daily News*, Dec. 5, 2002; H.B. 675, 124<sup>th</sup> General Assembly.

<sup>4</sup> Miller, Robert E (Associated Press). "7 Who Run Ohio." *The Plain Dealer*, Dec. 3, 1978.

10, 2003, meeting, when 11 of the 57 items on its agenda were deferred at the request of the House and Senate majority (Republican) caucuses. Sen. Bill Harris, chairman of the Senate finance committee, said that requests using General Revenue Fund money would be held and reviewed carefully because of the budget situation. Rep. Charles Calvert, chair of the House finance committee, added that the legislature would look at all funding sources, and he asked agencies to review their spending plans.<sup>5</sup> Requests deferred at the meeting included a \$3.2 million increase in authority for vocational education spending and more than \$2.2 million for a Department of Youth Services juvenile detention center project in Fremont. Items that were held ranged from a scenic bicycle trail to a health survey. Through the end of March, only 4 of the 11 had received approval.

The board majority's injunction may be having some effect. For instance, the Department of Youth Services scratched one of the six requests it sent over for consideration recently, and at the Feb. 24 meeting asked to defer another for a phone system at a facility that isn't going to start operating until after the next fiscal biennium.<sup>6</sup>

A single number cannot easily be placed on the total dollar amount of Controlling Board actions, but over the course of a year, billions of dollars worth of spending must come before it for approval.

All this makes the board well worth studying. In preparing this report, Policy Matters Ohio gathered data on the board's consideration of requests during calendar 2002.<sup>7</sup> We focused special attention on the second half of the year (the first half of fiscal 2003), and have continued attending board meetings since then.<sup>8</sup>

An earlier Policy Matters Ohio report outlined the proliferation of outside service contracts by the state, and raised questions about the lack of oversight of such contracts and excessive cost of some of them.<sup>9</sup> Because the Controlling Board approves a significant number of such outside contracts, we thought it was also worthy of study. This report describes the Controlling Board and its powers, and reviews the kinds of requests it considers. It examines the process the board uses and recounts the results, in both qualitative and quantitative terms. It focuses attention on two of the leading agencies that come before the board, the Department of Rehabilitation and Correction and the Department of Development. The report examines public access to the board and concludes with recommendations on how the board's role and practices should be changed to improve accountability.

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<sup>5</sup> *Gongwer News Service* reported that he said most of the items probably would eventually return to Controlling Board agendas. "I would say most of them will come back, many of them next fiscal year rather than this fiscal year, provided it's an area we're going to budget for in 2004-2005," Rep. Calvert said. (*Gongwer News Service*, Ohio Report No. 27, Volume 72, Feb. 10, 2003.)

<sup>6</sup> DYS338-03, Item 49, Feb. 24, 2003; Interview with Ann Liotta, Chief of Policy and Communications, Department of Youth Services, March 7, 2003.

<sup>7</sup> Unless otherwise noted, Controlling Board items cited in this report are from calendar 2002.

<sup>8</sup> This analysis covers items that were listed on the board's agenda or added to it and acted upon at a meeting. However, this understates the number of items the board handles. The board president approves the development department's regional 166 loans, subject to members' questions. Only those that are questioned are included in the agenda, so it understates the full number of items the board considers.

<sup>9</sup> Schiller, Zach. *Unmanaged Costs: Government Contracting by the State of Ohio*. Policy Matters Ohio, April 2002.

## **What the Board Does**

The board, first created in 1915 and established permanently in 1975, includes the budget department official and six legislators – the chairs of each finance committee, along with one member from each major party appointed by the leader of each chamber.<sup>10</sup> Thus, legislative leaders control most of the Controlling Board’s membership. A recent newspaper profile of Rep. Calvert, for instance, said that he “has been Speaker Larry Householder’s inside “go-to guy” -- a man who shuns the limelight and does the backroom problem-solving work on financial and education issues.”<sup>11</sup> Originally, the board was composed of the governor, the auditor and attorney general and the heads of the two finance committees. “When the composition of the Board was changed in 1969, it emerged as a venue for greater legislative oversight of executive action in addition to an arena for building consensus,” its manual states.<sup>12</sup> Housed in the Office of Budget & Management, it has just two employees, the president and the secretary. As a member of the administration, the president works to ensure the approval of agency requests, and tries to avoid “no” votes.<sup>13</sup>

The board was established soon after the General Assembly began appropriating funds by line item. With more detailed appropriations, “a means of making adjustments in them when the General Assembly was not in session seemed to be needed.”<sup>14</sup> At that time, the legislature only met for six months every two years, so it apparently was an alternative to convening the whole legislature to make such changes.

The board has a variety of powers that involve different roles. Though these vary widely, most broadly they involve oversight of the budget after the legislature enacts it. The board may add new appropriation authority, approve new contracts without competitive bids, and transfer funds from one use to another within an agency. It exercises oversight over the executive branch on such matters as development department grants and releases of capital appropriations for some university building and many other projects. “Over its history, the Board has been viewed as a convenient way to exercise legislative oversight over executive actions,” the board’s manual says.<sup>15</sup> “It gives us one last bite of the apple to make sure money is spent the way it should (be),” said Brian M. Perera, director of finance for the Ohio Senate. Sheridan, formerly Ohio’s legislative budget officer, points out the board has both legislative and executive powers: “When it makes transfers between appropriation items or authorizes spending in excess of

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<sup>10</sup> *Controlling Board Manual*, Section I, p. 9

<sup>11</sup> Leonard, Lee. “Finance Chairmen New to State Budget Battles.” *The Columbus Dispatch*, Feb. 11, 2003.

<sup>12</sup> *Controlling Board Manual*, Section I, p. 8.

<sup>13</sup> *Ibid*, Section I, p. 13.

<sup>14</sup> Bloedel, Richard. “The Controlling Board,” *Members Only: An Information brief prepared to members of the Ohio General Assembly by the Legislative Service Commission*. Vol. 123, Issue 2.Oct. 22, 1999, p.1.

<sup>15</sup> Section I, p. 9. The manual goes on to say: “Thus the powers of the Board have been expanded into areas beyond those contained in the Board’s original authorization. Recent history demonstrates that the Board’s authority often is expanded as a reaction to the legislature’s perceptions of inappropriate behavior on the part of the executive branch. The last significant expansion of Controlling Board authority was made to include all leases above a certain threshold dollar value made by state government. This change was made in reaction to the scandal at the time surrounding perceived political favoritism in the awarding of telecommunication equipment lease/purchases.”

appropriations, it is clearly acting legislatively. When it limits administrative discretion in spending appropriated funds, it is acting administratively.”<sup>16</sup>

### Powers of the Board

The single largest Controlling Board action by dollar volume in 2002 was the approval of a \$6.26 billion estimated spending plan of the Ohio Department of Education for its payments to school districts for the 2003 fiscal year.<sup>17</sup> The board is charged with approving such payments by statute, just as it must authorize the release of instructional funds by the Board of Regents to state-supported colleges and universities. The approval of that \$1.57 billion request, which described the formula used to send money to college campuses around the state, was the second-largest item during the year.<sup>18</sup> Each was approved without questions from the board, and Perera calls them largely a formality.<sup>19</sup>

Releasing money that the General Assembly has appropriated is the most frequent board action. It approved 733 releases during 2002, adding up to \$2.7 billion (The approval of the school-district payments amounts to much the same thing as a release, but is not technically classified as such and thus is not included in that total). The support to colleges and universities and just two others accounted for at least \$2.245 billion of that: A request by the School Facilities Commission to release \$429 million to 30 school districts involved in its programs,<sup>20</sup> and a \$248 million release of money for the controversial multi agency radio communication system (MARCS), which also involved a waiver of competitive selection.<sup>21</sup>

Many releases involve capital spending by colleges and universities, which the legislature has appropriated without earmarking for a specific project. Such “general” capital expenditures must be approved by the board before they are released. Other releases cover the use of funds for the brown field redevelopment program approved by the state’s voters, or various development department grants and loans.

Among the board’s most frequently used powers is to waive the state’s competitive selection process and approve contracts with vendors. During calendar 2002, the board approved more than \$793 million of such contracts. As described below, this overstates the actual amount of contracts bid without competitive bids.

The board also may transfer money within an agency from one line item to another, or from one year in Ohio’s two-year budget cycle to another. Transfers are discussed in more detail below.

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<sup>16</sup> Sheridan, *Follow the Money*, p. 176.

<sup>17</sup> EDU254-03, Item 61, July 29.

<sup>18</sup> BOR095-03, Item 18, Dec. 16.

<sup>19</sup> Interview with Brian Perera. Senate Finance Director. Dec. 16, 2002.

<sup>20</sup> SFC075-03, Item 44, Aug. 12.

<sup>21</sup> DAS213-0304, Item 20, July 1. This request, which included a transfer, release and waiver, was a technical correction that did not involve the release of additional funds, according to Anni Efthimiou, budget manager at the Department of Administrative Services. Previous DAS requests approved by the board had not checked the box indicating they were waivers of competitive selection, she said, so this request was needed to ensure they have been properly approved.

The Controlling Board also can authorize increased spending beyond what the General Assembly has approved when the state receives certain new revenues. Usually, these actions to create or increase appropriation authority stem from the receipt of additional funds from U.S. or other sources (The new federal education law, for instance, brought numerous such requests). It can also create new funds to receive unanticipated revenue and authorize spending from them.<sup>22</sup> It is prohibited from increasing appropriations for the General Revenue Fund, however.<sup>23</sup>

In the first six months of fiscal 2003, the board authorized \$275 million in new appropriation authority, most of it for new education department programs. It also increased appropriation authority 85 times, for a total of nearly \$161 million. Among the most significant of these was one for \$32.79 million to the health department for bioterrorism and hospital preparedness, and two to the Department of Job & Family Services related to unemployment insurance, for \$34.4 million and \$12.4 million, respectively. These included an authorization to spend additional federal funds received to help run the program and to spend money in fiscal 2003 that had originally been appropriated the year before for an automation project whose timetable had slipped.<sup>24</sup>

Much of this spending of federal funds is routine, and Ohio is able to use the money sooner than some other states that have more laborious processes for handling such funds

Many of the loans, grants and bonds authorized by the development department, as well as real estate purchases by universities, also require Controlling Board approval. The board approved 44 real estate purchases in 2002 adding up to \$23.5 million, most of them by universities and the rest by the Department of Natural Resources or the Arts and Sports Facilities Commission. Acquisitions of real estate by state-assisted institutions of higher education, and all of those made with capital appropriations, require the board's approval.

Overall, the board's actions span state government. Figure 1 outlines the major types of requests approved by the board during calendar 2002.

Most agencies come before the board at one time or another with requests. Figure 2 shows the agencies with the largest number of requests approved by the board in calendar 2002.

Universities, despite accounting for the largest number of requests, do not account for a proportionately high share of the spending the board authorizes. Altogether, the board approved \$22.7 million in transfers, \$32.8 million in waivers and \$73.8 million in releases for universities last year.<sup>25</sup> Many are small capital projects or equipment purchases. The state department with the most requests approved by the board, the Department of Development, is discussed in more detail below.

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<sup>22</sup> Bloedel. *Members Only*, p.14. See also *Ohio Revised Code*, Section 131.35.

<sup>23</sup> *Controlling Board Manual*, Section II, p. 4.

<sup>24</sup> Interview with Christopher T. Carlson, Deputy Director, Ohio Department of Job & Family Services, Feb. 14, 2003.

<sup>25</sup> Many Controlling Board requests involve more than one action, such as a transfer and a release. Thus, the amounts from these different actions cannot be added together.

Figure 1

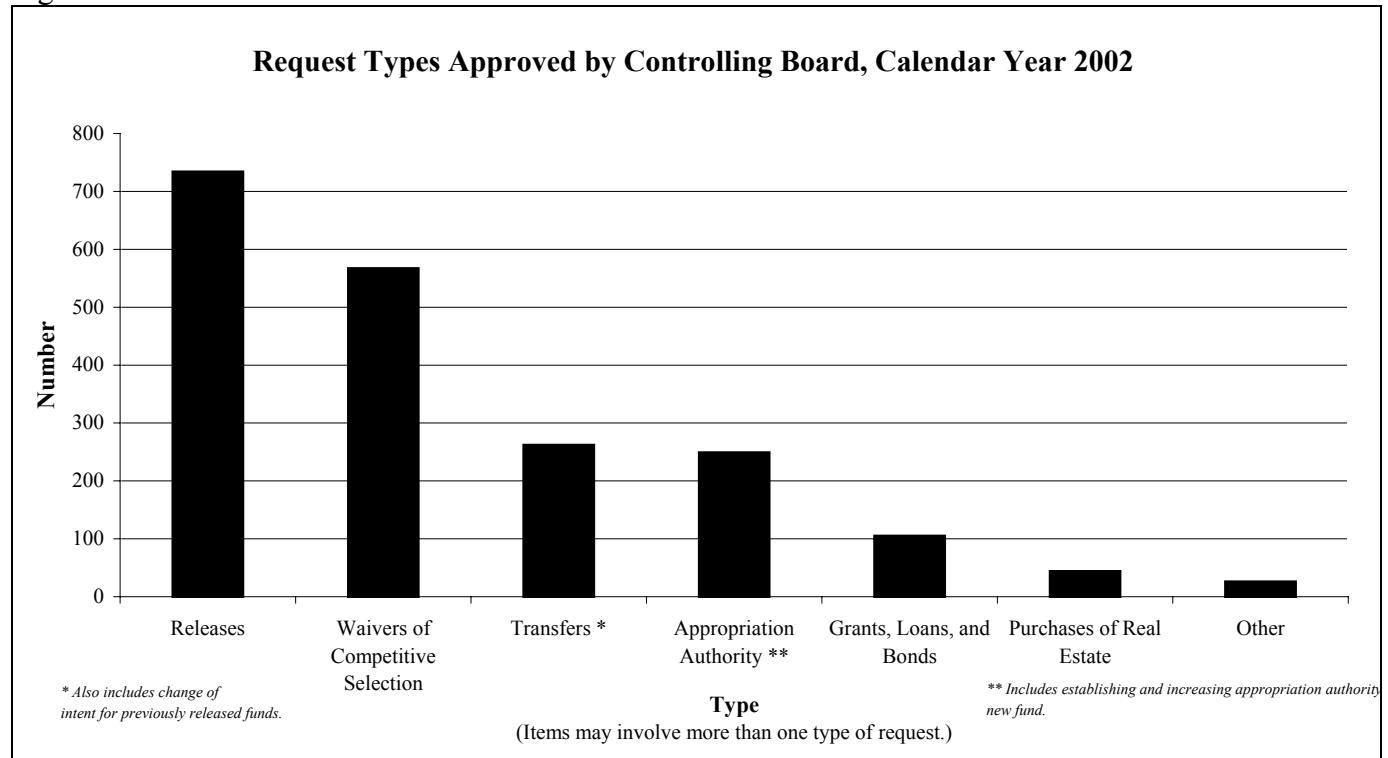
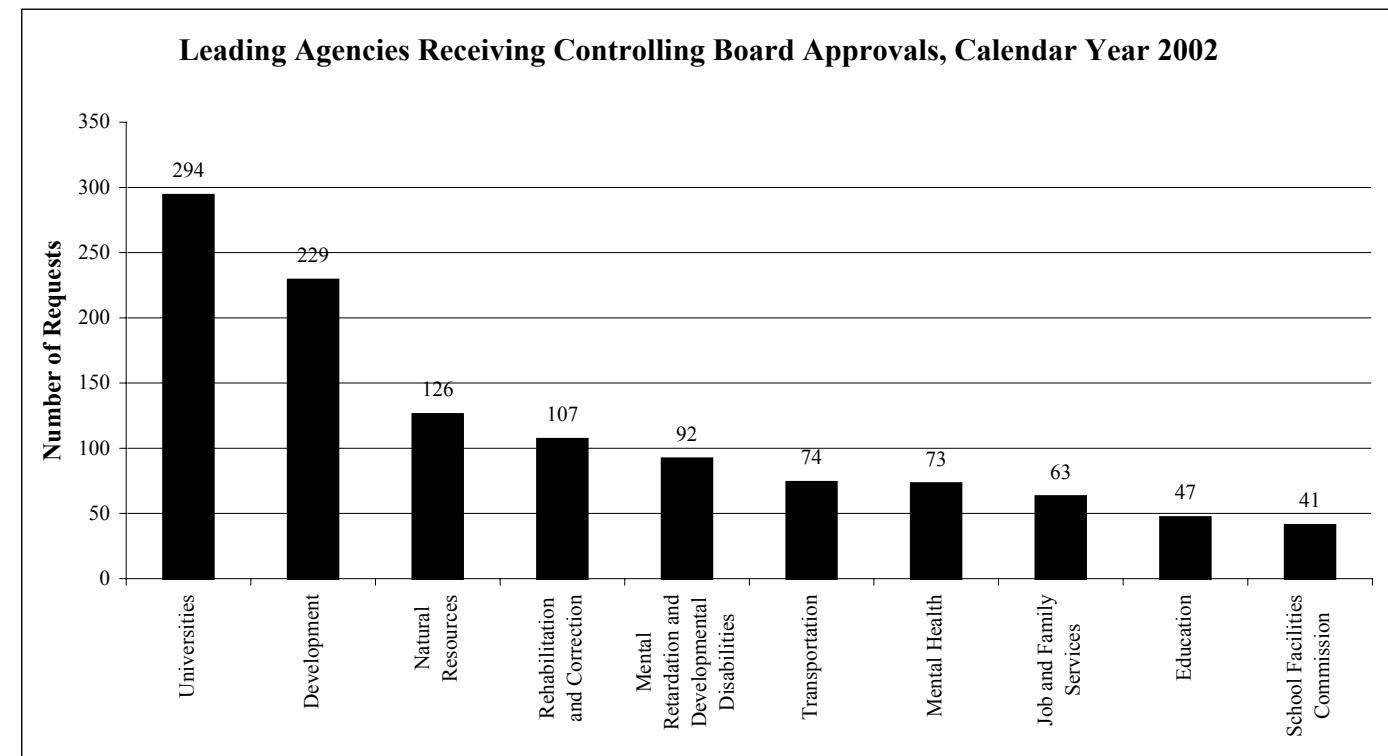


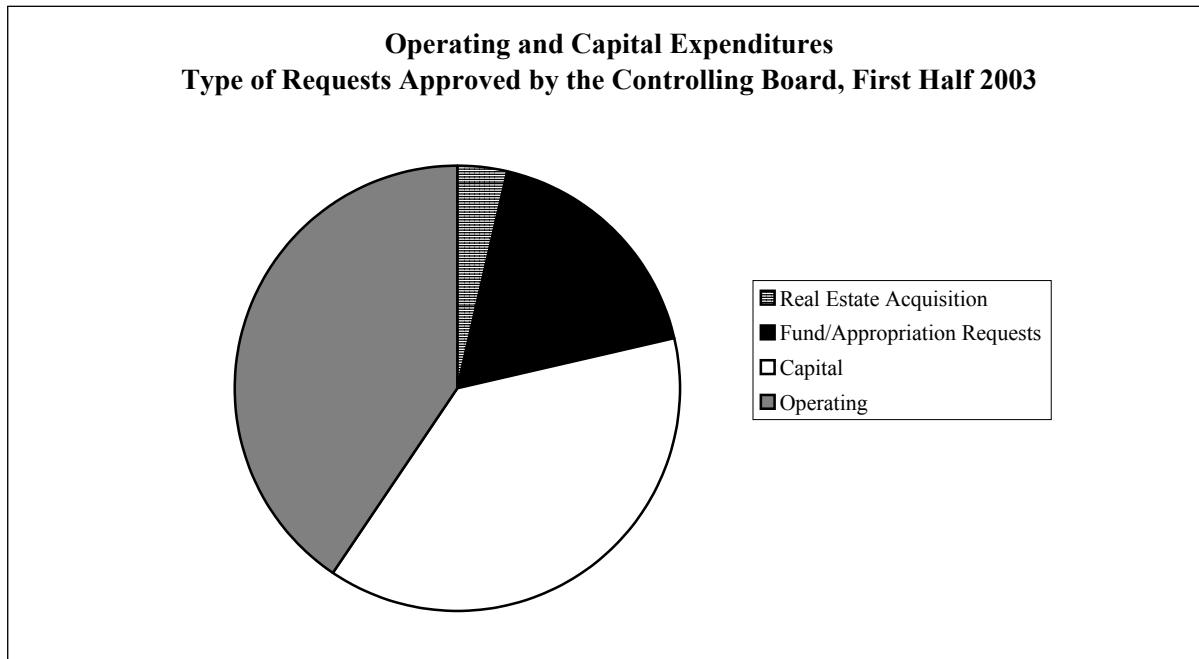
Figure 2



Source: Policy Matters analysis of State Controlling Board data

About an equal number of the board's actions cover operating and capital expenditures, respectively. A smaller number involve fund or appropriation requests, which call for creation of new or additional spending authority, or real estate purchases. Figure 3 depicts the breakdown between these purposes during the first half of fiscal 2003 (the last half of calendar 2002).

Figure 3



Source: Policy Matters analysis of State Controlling Board data

### The Board's Process

Each agency submits its proposed requests to the Office of Budget & Management 18 days before each meeting, where they are reviewed and may be sent back if they are incomplete or need revision. OBM staff help the president determine if each item is appropriate.<sup>26</sup> President Lisa H. Dodge said that only a few requests each meeting never make it onto the agenda.<sup>27</sup> However, Paolo DeMaria, Gov. Bob Taft's chief policy adviser, noted that agencies may decide not to initiate requests because of informal comments from OBM analysts.<sup>28</sup> After the president determines the agenda, it is posted on the board's web site, generally a week before the meeting.<sup>29</sup> The requests – an average of 72 a week during calendar 2002 – then may be reviewed or obtained from the board's office.

Staff of the Legislative Service Commission review the agency requests in the week prior to each meeting, and provide a briefing document known as the “green sheet” for its green cover. It analyzes some of the requests in the upcoming meeting, provides background material and raises

<sup>26</sup> The OBM debt coordinator analyst reviews and approves requests involving capital appropriations. (*Controlling Board Manual*, Section I, p. 14).

<sup>27</sup> Interview with Lisa Dodge, Controlling Board President, Nov. 25, 2002.

<sup>28</sup> Interview with Paolo DeMaria, March 17, 2003.

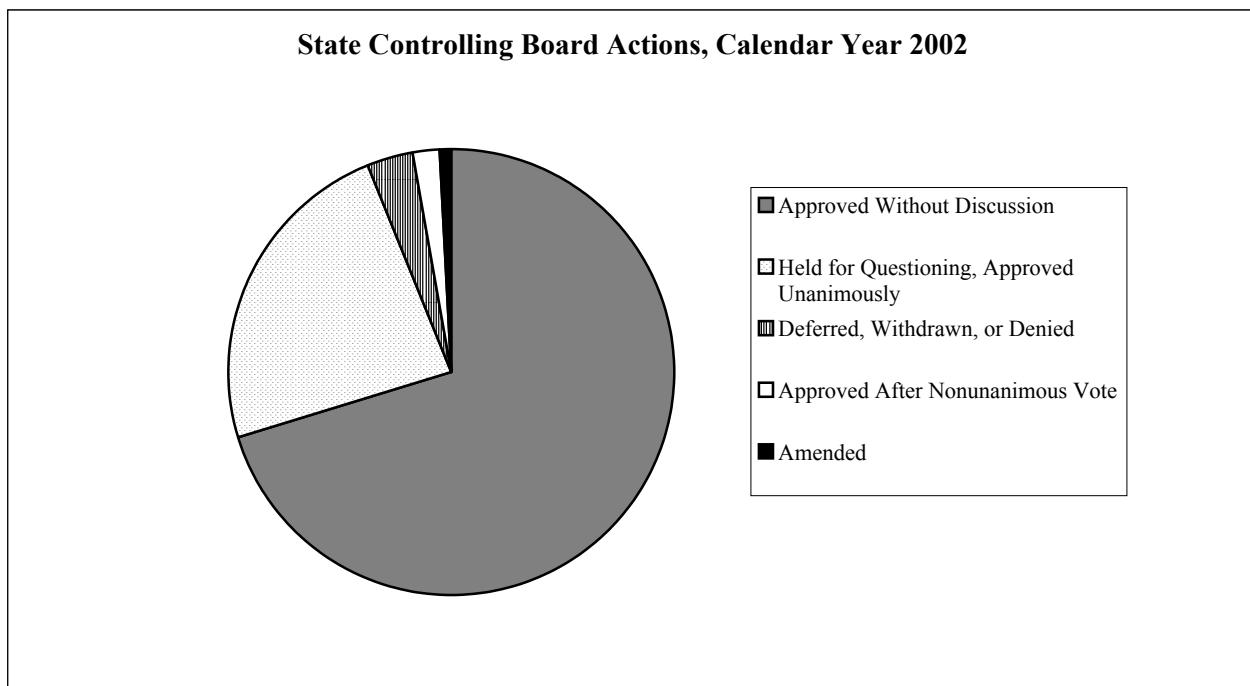
<sup>29</sup> <http://www.state.oh.us/obm/information/ControllingBoard/ControllingBoard.asp>

questions about certain items. Staff of individual legislative members and staff from the party caucuses also review them, and members from each party meet with LSC staff prior to the meeting, though the majority Republicans do not always meet with the LSC. On particularly sensitive items, administration officials may meet with Republican legislative board members and staff from the party's caucus leadership to brief them in detail, so they know in advance about them.

### Blanket Approvals

The board meets every other Monday in a hearing room in the state capitol. It approves a large majority of the items it handles without questioning them. After each member says which items he or she would like to hold for questioning, the rest are approved together as a group. The room, which is crowded at the start with agency representatives who must attend to answer questions about their requests, rapidly empties out when many learn that their requests have been accepted. Figure 4 depicts how the board acts on the items brought to it.

Figure 4



Source: Policy Matters analysis of State Controlling Board data

Last year was not an aberration. Gov. Taft's Management Improvement Commission, which examined the Controlling Board as part of its review of state government to recommend budget savings, found in November, 2000, that approximately 80 percent to 85 percent of all agenda items were approved as a block without questioning from the board.<sup>30</sup>

Blanket approvals in calendar 2002 included 159 transfers and 352 competitive waivers. Forty of these transfers and 70 waivers were for sums of \$1 million or greater. Transfers and waivers, like

<sup>30</sup> Management Improvement Commission. *MIC2000, A Report to the Governor of Ohio*. November, 2000, p. 26.

other items, are usually approved without discussion. Among those requests that received blanket approval were some that, on the face of it, should have provoked questions.

For instance, in November, the board approved a \$210,000 contract with Mid-Ohio Radiology Inc. for comprehensive radiology services at Corrections Medical Center.<sup>31</sup> Mid-Ohio's was "the most qualified and responsive bid" as the result of a request-for-proposal process, according to the request submitted by the Department of Rehabilitation and Correction. However, the request also said that the company was the only one to respond with a bid. Moreover, the contract approved by the board includes an option for a two-year renewal.

The DRC's request indicates that it advertised in 12 metro newspapers for two weeks, and distributed proposals to a dozen companies. Asked more recently why the bid was accepted and an extension arranged, the department cited these efforts and responded, "The proposal submitted by Mid Ohio Radiology met all the requirements of the RFP; therefore, the contract was awarded to Mid Ohio Radiology."<sup>32</sup> Perhaps this was the best vendor for the job. But the lack of a competitive bidder did not merit any discussion by the Controlling Board.

At the same meeting, the board authorized extending the state's contract with Bank One to June 30, 2003, to provide closeout-banking services for the centralized collection and disbursement of child support payments.<sup>33</sup> Before the meeting, an item in *The Columbus Dispatch* pointed out that as part of the transition to another vendor, Bank One was turning over to the state various items acquired under the \$50 million, no-bid contract such as four microwaves and a toaster in the break room. "Along with the assortment of tables, desks and chairs bought with public money are a paper shredder, 20 pieces of artwork, three trash cans, an ice machine, three oscillating fans, 10 clocks, a combination TV/VCR and three paper-towel dispensers," the paper reported.<sup>34</sup> Whether or not the contract allowed for such purchases, one would think it might have rated a question – if only to know if this would be standard procedure for the vendor hired in Bank One's place.<sup>35</sup>

Another blanket approval that might have raised a red flag was one of three Dec. 16 requests by the Department of Youth Services. Together, they proposed to use about \$230,000 that had been

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<sup>31</sup> DRC360-03, Item 70, Nov. 18.

<sup>32</sup> Letter from Kelly M. Sanders, Chief, Bureau of Monitoring and Compliance, Office of Administration, Department of Rehabilitation and Correction, Jan. 27, 2003.

<sup>33</sup> BDP007, Dec. 16 Item 7. The extension allows Bank One to wrap up its accounting; it does not add to the amount the bank is paid.

<sup>34</sup> Rowland, Darrel. "Bank Forced to Turn Over Child-Support Goodies." *The Columbus Dispatch*, Dec. 10, 2002.

<sup>35</sup> The Bank One contract itself exposed a certain lack of oversight by the board. It originally was approved by the Controlling Board in 1999 after the only bid for the job came in far higher than the state had projected and it scurried to find another vendor. It was extended for a year in 2001 and then for another six months by the board in May 2002, after Bank One had drawn sharp criticism for its performance. *The Plain Dealer* editorialized: "Ohio appears to grossly overpay private vendors who operate its child support distribution system. Last May, the state granted Bank One an unbid \$46.4 million contract to do the job for a year. On Monday, it extended the contract for another six months at a cost of \$25.2 million. Other states, notably Pennsylvania and New York, pay far less." ("It's Our Business; Ohioans should be Able to Judge the State's Deals Before Contracts are Signed and Payments Made." *The Plain Dealer*, May 12, 2002. p. H2.) The two Democratic members of the board attempted to amend the contract so it would last only three months, but that proposal failed on a 5-2 vote. The contract then was unanimously approved (Controlling Board, Minutes of the May 6, 2002 meeting).

earmarked for a gym expansion at its Cuyahoga Hills Boys School instead for other projects there and at two other facilities.<sup>36</sup>

The agency said in the proposals that the gym was no longer needed because the population was down, and that it would reevaluate that project. Most of the money is going instead for equipment at a new education building at the Indian River Juvenile Correctional Facility in Massillon.<sup>37</sup> That request covers both “administrative and classroom needs,” including desks and other furniture, to be made by state prison inmates, as well as computers and software. “Because these items will bring the facility up to its intended use and will allow for the full functioning of the new educational building, the department has elected to use capital funds for this purpose,” the request said.

Ironically, this request was approved just before a barebones biennial capital budget cleared the legislature. Given the capital spending crunch, if the gym is unneeded, should DYS be buying these items, or should the funds go back into the till? At the very least, the spending change should get more scrutiny. For instance, if, as the agency says, the equipment is needed for the education building at Indian River, why wasn’t that provided for when it was built? The Controlling Board approved the item without discussion.

In another instance, the lack of board questioning raised a broader issue of how much money should be spent that may be available to agencies through sources of their own. In this case, the Adjutant General received approval in October for a request to use \$165,800 from sale of surplus property and cellular tower and other rentals for such purposes as the completion of the Camp Perry barracks and operating expenses for the Ohio National Guard.<sup>38</sup>

The agency said in its request that without the additional funding, it would have to pay utility and other bills from “very limited” General Revenue Fund monies, maintenance projects would be temporarily delayed or curtailed, and completion of the barracks would be delayed until July 2003. This request for increased appropriation authority received blanket approval. It could well be an important purpose. But is this the best use of this additional revenue, given the cuts elsewhere? Should individual departments get extra revenue that may be available to them, instead of using it for other purposes in other departments? Sometimes, points out DeMaria, Gov. Taft’s policy adviser, these funds are obligated for specific purposes. However, the Taft administration has swept up some such surplus funds to help balance the overall budget this fiscal year, and the General Assembly is conducting a thorough review of these funds.<sup>39</sup> That seems more productive, if done regularly and appropriately, than leaving it in the hands of the Controlling Board.

### Alice in Wonderland

On the other hand, members of the board not infrequently ask questions, get nonresponsive answers or information that suggests more follow-up, and then approve a request anyway, often unanimously. There often is a disconnect between the questions asked and the responses given,

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<sup>36</sup> DYS328-330, Items 76-78, Dec. 16.

<sup>37</sup> DYS329-03, Item 77.

<sup>38</sup> ADJ038-03, Item 14, Oct. 28.

<sup>39</sup> DeMaria Interview, March 17, 2003.

leaving an observer to wonder if he or she has wandered into a missing chapter of *Alice in Wonderland*. Examples include the following:

When the board approved a \$2.5 million contract in June involving catastrophic property insurance for state buildings, Rep. Sylvester Patton asked Scott Roberts of the Department of Administrative Services if agencies had budgeted to pay for such insurance. Roberts replied that they hadn't, and that most agencies think there is a fund set aside to pay for insurance, but there isn't. Following this answer, the item was approved with no objections.<sup>40</sup>

At a July meeting, Sen. Tom Roberts asked when construction would begin on a Columbus parking lot for which the board was being asked to approve a \$107,331 contract modification. The chief engineer on the project replied that they didn't foresee being able to do it in the next two years. When Rep. Patton asked if the project would need to be changed again by then, the engineer admitted that was a concern. He also raised the possibility that the department might have to start the project again then from scratch, yet he was not asked if the state shouldn't wait before spending to modify the plans. The request was then approved with no objections.<sup>41</sup>

Roberts made a point of questioning a number of competitive waivers requested by the Department of Mental Health last June, repeatedly wondering if these jobs could be done in-house by state workers for less. In one case, the department asked to hire psychiatrists on an as-needed basis at Appalachian Behavioral Healthcare. Roberts pointed out that the night and weekend rates for these doctors were much higher, and asked how often they would be needed in those off hours. Woody Weimer, chief of human resources, at first answered that these part-time contractors are used primarily for nighttime services. However, Brad Nielsen of the facility's human resources department corrected him, saying that they would be used mostly during the day, and potentially on nights and weekends in case of emergency. When Roberts asked if their budget was prepared to meet the costs of weekend work, he received only a vague answer. The department officials never clarified how often these physicians might work on weekends or evenings, but the item passed unanimously without further question.

Sen. James Carnes inquired about a contract involving the construction of a maintenance building at Lake Katharine State Nature Preserve. Why, he asked, had the Department of Natural Resources accepted a bid of \$35,000 for plumbing when the estimate was \$20,000? Assistant Director J. William Moody noted that separate bids had been issued for each portion of the contract and that initially no one had bid on plumbing. Moody explained that they spent roughly \$4,000 advertising the project and so rather than re-advertise, they chose to offer the plumbing job to one of the companies bidding on other portions of the work. Sen. Mark Mallory asked what guidelines the department uses when deciding whether it's worth it to re-bid a contract. Moody said he wasn't sure they had written guidelines, but that "our folks thought we should go ahead" with this project. Then-Rep. John Carey (now a state senator) asked whether this project would disturb the wildlife habitat. Moody's response: "I hope not," followed by "probably, nothing will be impacted." Strangely, there were no further questions, and the request was approved with no objections.<sup>42</sup>

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<sup>40</sup> DAS206-03, Item 18, June 17, 2002.

<sup>41</sup> DNR079-03, Item 49, July 1, 2002.

<sup>42</sup> DNR094-03, Item 28, Oct. 7, 2002.

Of course, individual members of the board may have reasons for approving a request even when all the relevant questions have not been answered. They may not want to look like a roadblock, or they may believe their vote could be inaccurately portrayed. Still, it leaves citizens to wonder whether the board is providing the control its name implies.

## Deferrals

Generally, the board operates by consensus. It rarely rejects a request. The Management Improvement Commission noted in 2000 that virtually all items held by the board for questioning are approved.<sup>43</sup> During calendar 2002, only one item was actually voted down and rejected. That was a request from the Department of Natural Resources to spend \$56,035 on a new telephone system at its Athens district office. Board members objected that it was done without soliciting bids and involved the use of an electrical contractor to do phone work.<sup>44</sup> It was denied by a 5-2 vote. Peter King, the department's fiscal officer, said recently that a company that had done the electrical work for the whole building was there and capable of doing the phone system, so the department asked it to do it. After the board denied the request, the department quickly found another contractor to do the job for \$49,065 under a state term contract previously bid out by the Department of Administrative Services.<sup>45</sup>

During calendar 2002, 52 out of 1,665 requests the board considered were deferred or withdrawn, often before the board considered them. Most of these items were eventually approved at a later meeting. Zeroing in on the second half of the calendar year (the first half of fiscal 2003), 16 out of the 715 requests the board considered passed without a unanimous vote. The panel deferred, or agencies withdrew, 29 requests. Most of the time, these were items that made it onto the agenda but were withdrawn prior to consideration by the board. Altogether, only seven items were deferred after board objections were publicly expressed. Table 1 provides information about those seven items, four of which subsequently were approved:

The modest number of deferrals may be partly the result of efficiency at the Office of Budget & Management. Perera of the Senate Republican staff said that OBM analysts do a more thorough job these days, instead of just ensuring that a request is technically correct

Richard Bloedel noted in his description of the board in *Members Only*, a publication prepared for members of the General Assembly by the Legislative Service Commission: "That fact that only a small number of items are rejected or modified is not a good measure of the impact of the Board." Because of the concern its name evokes, "The result is a measure of self-screening of requests by the agencies and further screening by the President of the Board," he said.<sup>46</sup>

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<sup>43</sup> Management Improvement Commission report, p. 26

<sup>44</sup> DNR053-02, Item, 46, Jan. 28; Controlling Board, Minutes of the January 28, 2002 Meeting; Dodge interview, March 17, 2003.

<sup>45</sup> King interview, March 18, 2003; DNR284-02, Item 64, Feb. 11.

<sup>46</sup> Bloedel. *Members Only*, p. 4.

**Table 1**

DEFERRALS AFTER BOARD DISCUSSION, JULY - DECEMBER 2002						
Agency	Request Type *	Amount	Description	Company/Seller	Agenda Date	Result
Ohio University	P	\$ 592,500	To purchase real estate as an addition to the OU main campus.	Ohio University Foundation	7/29/02	Did not return by 3/03.
Miami University	W, R	\$ 81,878	For Door Hardware Upgrade Project, including card access equipment.**	Blackboard Campuswide, Inc.	8/12/02	Approved 9/23/02.
Ohio State University	P	\$ 65,000	To purchase real estate to control development at the border of the regional campus.	Lawrence Babisch and Carl Fry	8/26/02	Approved 10/7/02.
Tuition Trust Authority	W	\$ 45,000	Investment consulting services.	Milliman USA	8/26/02	Approved 10/28/02.
Transportation	W	\$ 263,407	To provide computer software and custom installation for use in the Maintenance Section.	Cascade International Technologies	8/26/02	Approved 10/7/02.
Transportation	W	\$ 33,591	To provide assistance in the development of life cycle analysis for pavement marking materials.	Infrastructure Management and Engineering, Inc.	11/18/02	Did not return by 3/03.
Transportation	W	\$ 49,975	To administer three separate external customer surveys.	Business Research Services, Inc.	11/18/02	Did not return by 3/03.

\* Request Type Key: R= Release; W= Waiver; P= Purchase of Real Estate

\*\* Includes waiver of competitive selection of \$55,435 to purchase equipment from Blackboard Campuswide, Inc.

Source: State Controlling Board

Terry Thomas, a president of the board under Gov. Richard Celeste in the 1980s, agreed. “The fear of putting something up that might be treated unkindly, even if it does get approved, does result in better behavior on the part of any administration,” he said, and certain items are weeded out.<sup>47</sup> Sheridan puts it in a different light. “It’s not so much whether they approve it or don’t approve it, it’s making the agency justify it, or attach conditions or follow up,” he said.<sup>48</sup>

Though the board rarely turns down a request – at least until its recent move to take a harder look – its members sometimes grill agency representatives with the smallest of requests. That may be why the prospect of appearing before the board is intimidating to many agency officials. “The general rule of thumb is most of our people would rather take their chances of catching anthrax than going to the Controlling Board,” said one agency representative who appears there regularly.

In some cases, deferred items were later approved when more information was provided. That’s what happened, according to President Dodge, with a request the board initially deferred by the

<sup>47</sup> Interview with Terry Thomas, Nov. 26, 2002.

<sup>48</sup> Interview with Richard Sheridan, December 17, 2002.

Department of Transportation for a competitive waiver for software for each county to develop snow-removal routes. When it was first considered on Aug. 26, Sen. Carnes wondered what this would do that the counties couldn't and why the department was spending more on studies instead of building roads.<sup>49</sup> The request was approved unanimously when it was brought up again on Oct. 7.

Among the three items that were never approved was a request from Ohio University to purchase 0.27 acres of real estate for \$592,500 as an addition to its main campus. The land has a restaurant on it, which would continue to operate until eventually it is turned into a food service facility for university students. All four Republican legislators on the board asked questions about the purchase, which actually involved the university buying the land from the university foundation, which had acquired it. They ranged from queries about whether the university had thwarted a sale to a private individual to how much the facility would pay in taxes. Dodge asked, based on the reluctance of several Controlling Board members, if the agency representative would like to defer his request until the next board meeting. Sen. Harris said he simply wouldn't vote for it, no matter what additional information was provided. The request has not returned to the board.<sup>50</sup> Dodge said recently that board members were concerned that the university was reimbursing the foundation, and it did not provide them with enough assurances that tuition money would not be used for the purchase.<sup>51</sup>

The other two items came from the Department of Transportation. One was a \$33,591 contract for development of life cycle analysis for pavement marking materials.<sup>52</sup> Board members questioned if the agency couldn't get the data in other ways or do it itself. Agency representative Michelle Holdgreve said the department wanted to do further research and asked to defer the request pending further information. The other was a \$49,975 contract to conduct customer surveys.<sup>53</sup> The board members asked if there weren't more economical ways these could be conducted, and Holdgreve said it would take the request back see if there was a better way.

## Transfers

During 2002, the board approved 236 transfers totaling more than \$662 million. Much of this total was from a single \$424 million transfer by the Department of Job & Family Services. According to Carlson, the ODJFS official, the transfer reflected a move to a new way of structuring the agency's budget more along the lines of its programs. Instead of having a line item for all of its payroll costs, for instance, that will be spread out among the various programs the department runs. Altogether, there were 40 transfers in 2002 for \$1 million or more. Most of the transfers were for capital projects or other non-operating purposes. Table 2 gives details on the 20 largest transfers.<sup>54</sup>

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<sup>49</sup> DOT158, Item 59, Aug. 26.

<sup>50</sup> OHU176, Item 17, July 29, 2002.

<sup>51</sup> Dodge interview, March 17, 2003.

<sup>52</sup> DOT066-03, Item 77, Nov. 18.

<sup>53</sup> DOT174-03, Item 86, Nov. 18.

<sup>54</sup> The board also approved 26 items which involved changing the intent of previously released funds. These generally are capital projects, in which some of the funds already released are reallocated for another purpose in the same project. For instance, funds left over in a contingency account might be used to buy equipment. See *Controlling Board Manual*, Section II, p. 8.

Many of the board's transfers reflect routine needs to move money from one program to another within agencies. Sometimes, they are to move funds from a general line item in which funds are temporarily held to a more specific line item, enabling the money to be spent. However, the board's use of its authority to transfer money from one fiscal year to the next, and between line items, raises two rather fundamental questions. Each underlines the concentration of power in the seven-member board's hands, at the expense of the General Assembly as a whole.

One is that it sometimes exposes the availability of unspent funds at an agency. Though the purpose of the spending may be innocuous, these funds could be used for another thing entirely – and at a time of budget crisis, the routine approval of such spending with little outside scrutiny seems questionable, at best.

The other is that the board's authorization of spending for a purpose other than what the General Assembly approved may violate the intent of the legislature. The law governing the Controlling Board states: “The controlling board shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly.”<sup>55</sup> Critics of the board such as Sheridan argue that transfers the board is authorized to approve likely depart from legislative intent. “Such transfers can result in changes in program emphasis or an agency’s commitment to operate at higher levels of spending in future years,” he said in his latest book on state budgeting. “Thus, this language is far less limiting than would appear on the surface.”<sup>56</sup>

In November, the board approved a request by the Department of Natural Resources to transfer \$1.7 million from state park maintenance to general park operations, in order to keep paying some of its staff amidst budget cuts (the department sets aside 10 percent of the revenue it generates for maintenance of revenue-generating facilities. It wanted to use this account to pay staff). Citing criticism of the legislature and school boards for deterioration of facilities, Rep. Calvert asked why the department was taking money from maintenance to pay salaries. Moody, the ODNR assistant director, acknowledged it was deferred maintenance and that it was a slippery slope to let such work go in favor of paying staff, but that the department felt it was more important to keep the parks open. Calvert objected, and the request was approved by a 6-1 vote.<sup>57</sup> Asked about the request more recently, DNR Fiscal Officer King said, “We don’t want to do that on a regular basis, but when we get caught in a pinch, that is a very valid short-term strategy.”<sup>58</sup> While this transfer may well be the public’s preference, the decision demonstrates how the board can approve a direct change in the legislature’s intent.

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<sup>55</sup> Ohio Revised Code, Section 127.17.

<sup>56</sup> Sheridan, *Follow the Money*, p. 174.

<sup>57</sup> DNR334-03, Item 58, Nov. 18.

<sup>58</sup> Interview with Peter King, Feb. 10, 2003.

Table 2

<b>LARGEST TRANSFERS, CALENDAR YEAR 2002</b>				
	<b>Agency</b>	<b>Amount Transferred</b>	<b>Description</b>	<b>Approved</b>
1	Job & Family Services	\$ 424,441,963	Reorganization of budget structure to align spending by program (e.g. workforce development) instead of type of expenditure (e.g. personnel services).	6/3/02
2	Budget & Management	\$ 40,352,254	Budget Stabilization Fund to Health Care/Medicaid.	5/20/02
3	School Facilities Commission	\$ 33,047,514	School Building Program Assistance to Exceptional Needs Program.	10/28/02
4	School Facilities Commission	\$ 15,000,000	Exceptional Needs to Public School Buildings.	3/11/02
5	Board of Regents	\$ 11,809,610	Research Facility Investment Loans and Grants to various line items.	9/9/02
6	Board of Regents	\$ 10,000,000	Technology Initiative to various line items.	3/11/02
7	Job & Family Services	\$ 9,396,711	Maintenance FY02 to Support Services FY03.	6/3/02
8	School Facilities Commission	\$ 5,600,000	Exceptional Needs to Public School Buildings.	8/12/02
9	Job & Family Services	\$ 4,335,746	Medicaid Systems Enhancements FY02 to Computer Projects FY03.	6/3/02
10	Rehabilitation and Correction	\$ 4,317,100	Lima Correctional Institution's HVAC Renovation to Heating System Renovations.	3/11/02
11	Job & Family Services	\$ 4,297,888	Equipment FY02 to Support Services FY03.	6/3/02
12	Rehabilitation and Correction	\$ 4,276,750	Various line items to New Exterior Recreation Unit for project at Ohio State Penitentiary.	7/29/02
13	Budget & Management	\$ 3,951,947	Emergency purposes/contingencies FY02 to emergency purposes/contingencies FY03.	12/2/02
14	Historical Society	\$ 3,028,709	Ohio's Bicentennial Celebration to Ohio Bicentennial Commission.	7/29/02
15	Development	\$ 3,000,000	Facilities Establishment Fund to Capital Access Loan Program Fund.	2/11/02
16	Rehabilitation and Correction	\$ 2,500,000	Various capital line items to OPI Warehouse Addition at Pickaway Correctional Institution.	8/12/02
17	Ohio State University	\$ 2,007,310	Transfer of \$1,643,498 from basic renovations, \$230,530 from supplemental renovation and \$133,282 from ADA modifications to Campbell Hall, University Hall and Evans lab classroom project.	12/2/02
18	Youth Services	\$ 1,962,640	Health and Safety Unit Riverview to Fire Suppression/Safety Security for the Security System Improvements Project at Scioto Juvenile Correctional Facility.	4/22/02
19	University of Cincinnati	\$ 1,910,000	Critical Building Components to Medical Sciences Building for rehabilitation project.	5/20/02
20	Administrative Services	\$ 1,881,049	Various line items to surface road building renovations project.	5/20/02

Source: State Controlling Board

Decades ago, when legislators served only part-time and the General Assembly was not in session virtually year-round, providing this kind of authority may have been important. Now, the legislature is in session most of the time, so it would not be necessary for it to convene especially for such items. Leaving them to the Controlling Board also means that a small group well out of the public eye makes important decisions during a budget crisis. While it meets in an open forum, the board's decisions are not subject to the same scrutiny and debate as those of the General Assembly.

The Arts and Sports Facilities Commission received Controlling Board approval last June to transfer \$1.2 million in capital funds from five other projects to renovate the Adena State Memorial for Ohio's bicentennial (Adena was the estate of Thomas Worthington, one of Ohio's first two U.S. senators and sixth governor). Money was transferred from the Hayes Presidential Center Museum, the Cedar Bog Nature Preserve Educational Center, Ohio village buildings renovation and Ohio Historical Center renovations, which the agency hoped to recoup in the next capital budget.<sup>59</sup>

Sen. Harris asked at the meeting what would happen if there was not enough money in the capital budget to fund these other renovation projects, which would lose it to the Adena restoration. Jim Nargang, the commission's finance director, responded that the Adena project was a high-priority, time-sensitive project and said that if other projects weren't refunded, they would find a way to eventually complete them. Rep. Calvert asked if this project was more important than those being put at risk. Nargang said that it was. The request was approved by a 6-1 vote, with Calvert objecting.

The Adena restoration may indeed have been a more timely use of the funds – and as it turned out, the state capital budget passed late last year included funding for the four projects that lost it to Adena.<sup>60</sup> But is this decision one that the Controlling Board should make?

"The goal on transfers is to keep them within legislative intent," said Brian Perera, the Senate finance director. Board members may be more lenient with transfers of capital funds, when a renovation may not have been the original plan but would save money. "If (an agency is) trying to transfer operating money, there's a hell of a lot of scrutiny now," he said.<sup>61</sup>

## **Waivers**

A handful of the 567 waivers of competitive selection approved by the board in calendar 2002 accounted for most of the dollar value. As noted above, one was the radio communication system, which was a technical correction that did not involve the release of additional funds. The next two largest – one for \$61.9 million, one for \$42.8 million – were for the Department of Transportation to hire dozens of consultants to provide construction plans. Table 3 lists the top 20 waivers approved during the period.

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<sup>59</sup> Included in the \$1.2 million was the agency's proposal to use \$77,000 previously released for the Archives Library Shelving project, which was completed without that money being used (AFC026-03, Item 21, June 17.)

<sup>60</sup> Interview with Jim Nargang, Feb. 10, 2003.

<sup>61</sup> Interview with Brian Perera, December 16, 2002.

Table 3

<b>LARGEST WAIVERS OF COMPETITIVE SELECTION, CALENDAR YEAR 2002</b>					
	<b>Agency</b>	<b>Amount</b>	<b>Description</b>	<b>Corporation</b>	<b>Approved</b>
1	Administrative Services	\$ 247,828,695	Multi-agency radio communication system TRW (this item was a technical correction; see text).		7/1/02
2	Transportation	\$ 61,900,000	Construction plans, right of way acquisition and appraisal, environmental investigations, data collection and planning studies.	74 consulting firms	7/1/02
3	Transportation	\$ 42,800,000	Construction plans, bridge inspections, right of way acquisition, asbestos testing and environmental investigations.	44 consulting firms	11/18/02
4	Administrative Services	\$ 36,462,380	Medical care to state employees.	6 HMOs	5/20/02
5	Transportation	\$ 34,000,000	Craig Memorial Bridge replacement project.	Various vendors	6/3/02
6	School Facilities Commission	\$ 26,432,993	Administration of sixteen Classroom Facilities Assistance Program projects, two Exceptional Needs program projects, and three Accelerated Urban School District projects.	11 construction management firms	4/8/02
7	Board of Deposit	\$ 25,267,225	Banking services for collection and disbursement of child-support payments.	Bank One	5/6/02
8	Transportation	\$ 23,820,000	Construction plans, right of way acquisition and appraisal, environmental investigations, construction inspection, and planning studies.	28 consulting firms	3/25/02
9	Administrative Services	\$ 13,500,000	A universal fuel card on behalf of all the state agencies for the purchase of fuel, petroleum products and emergency repairs.	Voyager Fleet Systems, Inc.	6/17/02
10	Attorney General	\$ 13,015,000	Contract with Special Counsel.	26 vendors	8/12/02
11	Transportation	\$ 8,257,124*	Operations and maintenance of the Advanced Regional Traffic Interactive Management and Information System.	TRW	3/11/02
12	Mental Health	\$ 8,134,000	Pharmaceuticals/medical supplies/lab supplies.	Various vendors	6/3/02
13	Rehabilitation and Correction	\$ 7,696,757	Mental health services at various institutions.	Various mental health professionals	6/17/02
14	Administrative Services	\$ 6,500,000	Medical care for approximately 8000 state employees.	United HealthCare	6/17/02
15	School Facilities Commission	\$ 5,639,291	Construction management.	4 construction management firms	11/18/02
16	School Facilities Commission	\$ 5,600,000	Assessment services.	16 firms	8/12/02
17	Transportation	\$ 5,375,423	Planning studies and environmental evaluations for Lakefront Study in Cleveland	Burgess & Niple Limited	7/1/02

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18	Health	\$ 4,996,095*	Process payment requests from providers of community-based health and support services to individuals with HIV.	Nationwide Health Plans	3/25/02
19	Transportation	\$ 4,936,369	Major Investment Study of Interstate Route 70/Interstate Route 71 South Innerbelt.	MS Consultants, Inc.	3/11/02
20	Job & Family Services	\$ 4,000,000*	Auditing of Medicaid long-term care facility cost reports.	Tichenor & Associates, LLP; Clifton Gunderson, LLP	1/14/02

\* Waiver amount covers spending for both FY 2002 and FY 2003.

Source: State Controlling Board

Agencies generally must use a competitive selection process of the Department of Administrative Services to make each purchase of supplies for more than \$29,000 or services worth more than \$58,000.<sup>62</sup> If DAS determines that the different kinds of competitive selection it uses are not advantageous, the department may grant an agency what is called a “release and permit” allowing it to conduct its own vendor selection process. Then, if an agency is spending more than \$50,000 in a fiscal year with a particular vendor, it must go to the Controlling Board for approval of a waiver of competitive selection (agencies that run institutions, such as the correction and mental health departments, require Controlling Board approval once they spend \$75,000 with a given supplier).

In fact, there are various good reasons why a contract may not go through a DAS competitive selection process. For instance, an agency may need to make the purchase quickly, not allowing the time for it; it previously may have bought equipment from a vendor, and the purchase is an add-on to it; or it may be that only one vendor – a “sole source” – can supply the product or service, among other things. In other instances, the board is renewing existing contracts, which may have been competitively awarded when the contractor was first selected. Each of these reasons may be abused, of course. However, they cover many legitimate waivers.

The overall amount of waivers also overstates the amount of contracts that are not truly competitively bid for another reason: In many cases, agencies use a “request-for-proposal” process to select a vendor. Agencies may request proposals from bidders for a contract, and evaluate the proposals using other criteria in addition to price alone. This is a common method used for purchase of goods and services where quality cannot be easily defined, so price is not the overwhelming consideration. “For the vast majority of waivers, we have done an alternative competitive selection process,” said Perera. He sees the use of the term as a misnomer, as does Controlling Board President Lisa Dodge. “I think we should revisit the term, ‘waiver,’” she said.<sup>63</sup>

However, in many cases, there is no way of knowing whether a competitive process was used. In some instances, it’s clear that it was not – raising real issues about the use of outside contractors, the costs of doing so and the possibility that someone other than the best vendor was selected.

<sup>62</sup> Those numbers are set to increase to \$30,000 for supplies and \$60,000 for services as of July 1.

<sup>63</sup> Dodge Interview, Nov. 25, 2002.

More often, there is simply a lack of information about the process, making it impossible for citizens to judge whether a selection was appropriate and eliminating real accountability for contracting decisions.

In more than a third of the waivers that the board approved during the first half of fiscal 2003, there appeared to be no request-for-proposal process. In some instances, that was because they were the sole available source for the service. However, that was not true in many other cases, despite Dodge's statement that, "I'm not aware of an example besides a sole source where (they) didn't do an RFP."<sup>64</sup>

With dozens of waivers, it is impossible to tell from the documentation provided with the request if the contracts were competitively bid or not. Sometimes, these were renewals or modifications of existing contracts, and no history is provided on how the contractor was selected to begin with. For instance, DNR received approval on Dec. 16 for a supplemental contract to spend another \$745,832 on a consultant for design of a new dam at Buckeye Lake State Park.<sup>65</sup> The request did not reveal how consultant DLZ Ohio Inc. was originally selected. Asked about the item later, Peter King, DNR's fiscal officer, said DLZ was selected in an earlier part of the project according to an RFP-type process, which the department is required to use, and it was pleased with DLZ's work. He added that hiring contractors who know the terrain can be more efficient in older areas like Buckeye Lake, which have their own unique issues.

The board renewed a Department of Public Safety contract with eGovNet to handle vehicle registrations on-line or through an automated telephone service for the second time last June with no indication of whether the vendor was competitively selected. Renewal for another year is possible. This could be economical for the state, but the request does not provide sufficient detail to tell.<sup>66</sup>

Sheridan pointed out in a 1978 book, that while statute requires it has to show "an emergency or sufficient economic reason exists" to approve a purchase without competitive selection, "In practice, an agency needs to show very little in this regard to obtain Controlling Board approval for a waiver of competitive bidding."<sup>67</sup>

Some of the board's waiver approvals strain the imagination. On March 10, the board approved a \$450,000 increase in a contract with the blue-chip Washington, D.C., law firm of Covington & Burling to help the Department of Job & Family Services craft the details of proposed cuts in Medicaid.<sup>68</sup> The firm will be paid \$300 an hour, more than double the usual state rate for outside counsel. In explaining the request, the attorney general's office said that the outside counsel was needed to insure strict adherence to federal and state Medicaid regulations as it

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<sup>64</sup> Ibid.

<sup>65</sup> DNR107, Item 51, Dec.16.

<sup>66</sup> DHS287, Item 108, June 3.

<sup>67</sup> Sheridan, *Follow the Money*, p. 272. The statute reads: "Upon the request of either a state agency or the director of budget and management and after the controlling board determines that an emergency or a sufficient economic reason exists, the controlling board may approve the making of a purchase without competitive selection as provided in division (B) of this section." (*Ohio Revised Code*, Section 127.16 (A)).

<sup>68</sup> AGO221-03, Item 1, March 10, 2003.

implements changes that will reduce Medicaid spending by \$1 billion over the next two fiscal years, protecting the state against lawsuits. "This work needs to be completed now so that whatever containment measures are enacted can be immediately implemented to have maximum cost saving impact in SFY04," it said. The request cited the experience of Charles Miller, a Covington & Burling attorney, and noted that Ohio firms qualified to do the work are representing health-care providers to be affected by the rule changes.

Responding to questions from Sen. Ray Miller and Rep. Patton, officials backing the request said the firm represents many states, where it has had a general pattern of success. The waiver was approved without objections. The board apparently overlooked the irony of the state hiring a law firm at \$300 an hour to help eliminate vision care and other benefits for thousands and leave 50,000 Ohioans without health insurance. Members also did not question, as some have in other instances where outside counsel has been hired, whether the state could develop its own in-house legal expertise to handle such a huge, ongoing program.<sup>69</sup>

As mentioned, in some cases the state agency did not require real competition in awarding a contract. For example, on July 1, the board approved a \$359,266 contract with Lorz Communications Inc. of Columbus for administrative support for the AdoptOHIO Ohio Adoption Photo Listing. The contractor maintains and updates a photo listing web site of children waiting to be adopted, prepares publications to be printed and assists adoption agencies to insure that eligible children are included in the photo listing. According to its request to the board, the Department of Job & Family Services issued a request for proposal to find a vendor and distributed 128 letters announcing it. The agency received just two proposals, but only the one from Lorz met the minimum technical requirements. The price was within the agency's budgeted amount, and it was selected. The contract is for the 2003 fiscal year, but if the company performs satisfactorily, "ODJFS would be interested in renewing this contract for the period of July 1, 2003, through June 30, 2005. The amount of this renewal is not known at this time."<sup>70</sup> Chris Carlson, the ODJFS official, said that time constraints prevented the agency from redoing the request for proposal.<sup>71</sup> "Further delaying the process would have only hurt the kids this contract was intending to help," he said. "And forcing a qualified vendor to resubmit its proposal (at added cost and without compensation) simply for the failures of the other vendors made no sense in this case."<sup>72</sup>

Of course, in some instances, the state uses the bidder because it is the only available source of a service. For example, when the OhioLINK consortium of university libraries in 1990 sought a vendor to deliver an electronic central catalogue that would contain the holdings of its member libraries, no one was selling such a product. Innovative Interfaces Inc. of Emeryville, Calif., was approved by the Controlling Board in 1991, and has been supplying the software for that and

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<sup>69</sup> According to *Gongwer News Service*, Matthew Cox, Director of Special Counsel, told the board: "I don't want to say this rate is a bargain," but that the firm normally charges in excess of \$400 an hour. (*Gongwer News Service*, Ohio Report No. 47, Volume 72, March 10, 2003.)

<sup>70</sup> JFS102-03, Item 41, July 1.

<sup>71</sup> Carlson said there were several delays after the RFP was issued in November 2001, "to ensure that the competition was completed fairly and honestly." The agency had gone without these services during fiscal 2002, he said, the cost of the contract was within the agency's budget, and "our staff believed that the Lorz proposal was a good one."

<sup>72</sup> E-mail from Christopher T. Carlson, Feb. 18, 2003.

various enhancements since. No vendor has yet developed an equivalent system, according to OhioLINK Executive Director Tom Sanville, and Ohio remains ahead of other states. “There’s no reason for us to consider it timely to change horses at this point,” he said.<sup>73</sup> President Dodge noted that the board last year began requiring letters from the vendors being hired attesting that they were the only provider.<sup>74</sup>

Waivers of competitive selection long have been the most controversial element in what the board does. Both Republican- and Democratic-majority boards have come under fire for approving such waivers. In a 1999 article, the *Columbus Dispatch* said it had identified \$2.3 billion worth of contracts approved by the Controlling Board that were not competitively bid in the year ending September, 1998 – far more than the amount of contracts awarded with competition. It said that Gov. Taft, concerned about the disproportionate amount of money being approved for noncompetitively bid contracts, had ordered a review of how the state spends its money.<sup>75</sup>

As part of a broad review of state government, Gov. Taft’s Management Improvement Commission proposed a number of changes to Controlling Board procedures, aiming to reduce the number of items that pass through the board “without affecting the statutory intent and legislative oversight of this body.” It suggested that the board notify agencies of which items it was not holding for questions by Friday afternoon prior to the Monday meeting, along with boosting the threshold for consideration of unbid contracts from \$50,000 to \$100,000 and including an automatic \$5,000 annual increase. It also recommended giving the DAS chief the right to determine sole source vendors instead of the board, authorizing the budget director to approve lease renewals and contract continuations that the board has approved before unless there are later material changes and standardizing board request forms to facilitate electronic filing.

Dodge said board members need the weekend to review items, and thus had not been willing to provide advance notification to agencies. It is reviewing the threshold level, which the board has authority over, but Dodge said the board is reluctant to raise it now and reduce its oversight role because of the state’s fiscal situation. Though the board is interested in electronic filing of requests, it does not have the resources to do that now, she said. Other recommendations have not been implemented.<sup>76</sup>

The board sometimes raises questions about lack of competitive bidding or proper procedures. At its March 24 meeting, for instance, several board members sharply questioned nine items proposed by the University of Cincinnati, complaining that it had started work without board approval. The university withdrew two requests for capital projects totaling more than \$1.1 million in the face of board opposition. The board can also turn down a request because there was not competitive bidding, as with the DNR phone work. It did just that, at least initially, when the Tuition Trust Authority sought approval to add on to an existing contract and pay Milliman

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<sup>73</sup> Interview with Tom Sanville, Jan. 2003; WSU002-03, Item 15, Sept.23.

<sup>74</sup> Dodge Interview, Nov. 25, 2002.

<sup>75</sup> Johnson, Alan. “State OKs \$2.3 Billion in Unbid Contracts.” *The Columbus Dispatch*, Oct. 24, 1999, p.1A.

<sup>76</sup> Dodge interview, March 25, 2003.

USA \$45,000 for investment consulting.<sup>77</sup> Later, after learning that the agency had sought input from other similar buyers of such services and used an informal process to solicit estimates from eight firms, the board approved the request.<sup>78</sup>

The four Republican legislators on the board questioned Miami University's need to purchase electronic card readers for its campus security system,<sup>79</sup> leading to its deferral. The university sent more information, explaining why it would be costly to bid out and bring in another vendor. The request was later approved, on Sept. 23.

Occasionally, board questions result in action. Sen. Roberts suggested at the June 3 meeting that a competitive-waiver contract request from the attorney general conflicted with the state's campaign contribution law.<sup>80</sup> Within two years of a contract awarded without competitive bidding, the owner of a vendor to the state may not contribute more than a \$1,000 to the state official ultimately responsible for that contract. Sen. Roberts noted that John Games of the construction consulting firm Ben Games and Associates had contributed \$2,300 to Attorney General Betty Montgomery's campaign committee in November, 1998. Answering a question from Roberts, an official from the attorney general's office said that the company had been providing services to the agency since 1997 or 1998, and that the contract was not initially bid out. Joe Case, a spokesman for Montgomery, who is now the state auditor, said recently that, "Unbeknownst to either the campaign or folks in the (attorney general's) office, a contribution over the limit was made." As soon as that was discovered last summer, the money was returned,<sup>81</sup> Case said. He said there was no connection between the contribution and the contracting work.<sup>81</sup>

Action on the Ben Games contract was deferred after Roberts raised the question on June 3. It was scheduled for board action again July 1, but was deferred before the meeting.<sup>82</sup> That month, the attorney general decided to go ahead with the first part of the project, a drivers' training track at the Ohio Peace Officers Training Academy in London, Ohio, and signed a contract for \$39,000 with Ben Games for consulting work. The contract amount was below the threshold requiring Controlling Board approval, so it was not brought to the board for approval. However, on November 18, the board approved the second phase of the project, continuing the contract with Ben Games.<sup>83</sup>

Some could read the breaking of the contract into two phases as a circumvention of Controlling Board authority. Roberts and Rep. Barbara Sykes voted against the Nov. 18 request, which passed, 5-2. However, Case said that the project was broken into two because the agency knew work could not be completed before Montgomery's term ran out, and it did not want to tie the hands of the new incoming attorney general, who might want to choose his own consultant. Case noted that the General Assembly had approved the money for the project, and it was a priority for Montgomery to get the track portion completed. As it turned out, the track was done under budget and sooner than expected, Case said, and the agency came back with the request in

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<sup>77</sup> TTA024-03, Item 61, Aug. 26.

<sup>78</sup> TTA024-03, Item 65, Oct. 28; Dodge interview, March 17, 2003.

<sup>79</sup> MUN005, Item 8, Aug. 12.

<sup>80</sup> AGO035-02, Item 1, June 3.

<sup>81</sup> Interview with Joe Case, Director of Public Affairs, Auditor of State. Interview, March 27, 2003.

<sup>82</sup> AGO037-03, Item 1, July 1.

<sup>83</sup> AGO210-03, Item 5, Nov. 18.

November to finish the job, giving the new attorney general a period in which to choose another contractor if he preferred. “We think it was done totally appropriately, and gave the administration the flexibility to come in and make their own decisions on how the project would succeed,” he said.

Contracts approved by the board may also raise other kinds of issues. Between May and December of last year, the board approved three separate contracts with Clear Channel Communications, the big radio chain which now controls 1,200 stations. These included one from the health department, totaling \$67,500 over two fiscal years for a campaign advertising its Second Chance Trust Fund; \$49,750 to promote transportation department programs during Cleveland Browns games; and \$55,260 for a state-wide awareness campaign by the insurance department.<sup>84</sup>

Consolidation in the radio industry and the rise of Clear Channel in particular has provoked questions nationally. “Consolidation opponents complain that having one company like Clear Channel Communications control many of a city’s radio stations pushes up advertiser rates, robs stations of their local character and reduces the diversity of opinion or entertainment content carried on their airwaves,” *The Wall Street Journal* reported in January.<sup>85</sup> Even the chairman of the Federal Communications Commission has expressed concern.

All three waivers of competitive selection drew questions from the board, but only the one from the insurance department drew any negative votes. Sen. Roberts complained about the lack of evaluation of the previous campaign, and objected. “This is another unbid contract to a company where we haven’t evaluated (the job that was done),” he said. Rep. Patton questioned how well Clear Channel would get the message to less populated and minority areas. Sen. Harris noted Clear Channel’s massive control of Ohio’s radio market, and wanted to know if this was the greatest possible coverage. Todd Boyer, communications director for the department, responded that they had concluded that TV cost too much, print usage was declining and that this was the best tool to reach the largest amount of people at the lowest cost. He said that Clear Channel owns the largest station in every major market in the state, and that one ad on its WLW in Cincinnati reaches more people than all the stations of the only other statewide network. Boyer said the ads would run on every type of station, and promised to try and obtain demographic information. “It’s clear you’re not reaching a certain mass of people,” Patton said, though he did not object to the request.

### **Department of Rehabilitation and Correction**

An earlier report from Policy Matters Ohio questioned whether private operation of state prisons – contracts for which were approved by the Controlling Board – has resulted in the cost savings that is their primary rationale.<sup>86</sup>

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<sup>84</sup> DOH037-0203, Item 46, May 20; DOT159-03, Item 60, Aug. 26; and INS302-03, Item 42, Dec. 16, respectively.

<sup>85</sup> Dreazen Yochi J. & Anna Wilde Mathews. “Senators Focus on Reach, Clout of Radio Giant.” *The Wall Street Journal*, Jan. 30, 2001, p.B1.

<sup>86</sup> Hallett , Michael & Amy Hanauer. *Selective Celling: Inmate Population in Ohio’s Private Prisons*. Policy Matters Ohio, May 2001.

The Controlling Board's approval of medical-services contracts at the Department of Rehabilitation and Correction raises multiple questions about the vigilance of the board's oversight of outside contracting. A review of the board's record in approving such deals reveals a lack of competitive bidding, costs that at least in some instances seem out of line, and approvals in the face of cloudy documentation on the selection process.

DRC spending on outside medical services rose 6.5 percent, from \$34.5 million to \$36.7 million, between fiscal 2001 and fiscal 2002, according to the Office of Budget and Management. This contributed to an overall rise in the use of outside contractors at the department. In fiscal 2002, the agency spent \$107.9 million on purchased personal services, a wide array of primarily knowledge-related services. That was a 1.1 percent increase from the year before, when overall state purchases of such services fell 7.4 percent, to \$563.4 million.<sup>87</sup>

DRC spending on medical services has risen at a rate disproportionate to and far above that of overall state spending on outside medical services. Overall state spending on outside medical service contractors grew from \$26.3 million in FY 1991 to \$49.1 million in FY 2002. During that period, DRC spending on contracted medical services grew from \$6.6 million to \$36.7 million, an increase of over 400 percent. Even when adjusted both for inflation and inmate population growth this increase amounts to about a tripling of spending for outside medical services.

The biggest source of this spending – and fastest growth over the past decade – has been for contract psychiatrists and psychologists. Such spending skyrocketed in the mid-1990s, and has stayed at over \$10 million each year since FY 1999. In fiscal 2002, it amounted to \$12.8 million.

The Controlling Board plays a major role in approving such contracts. It approved most of these psychiatrists' contracts in a single request for more than \$7 million in fiscal 2002, and did the same thing again in fiscal 2003.<sup>88</sup> During calendar 2002, the board approved 63 DRC waivers of competitive selection worth \$31 million. That included \$19 million in fiscal 2003 medical service contracts—more than half of what the agency spends on outside medical services annually. During calendar 2002, the Controlling Board approved:

- 56 contracts totaling \$8,103,188 for outside psychiatrists at 28 institutions
- 15 contracts totaling \$4,745,455 for outside physicians at 23 institutions.
- 13 contracts totaling \$2,688,850 for dentists at 22 institutions
- 10 contracts totaling \$1,981,795 for pharmacists at 14 institutions

### **Contract Competition?**

The department in numerous cases has not used a competitive process to hire its outside psychiatrists. These include contractors who have been renewed for years. For instance, no request-for-proposal process was used when the DRC contracted with Gary E. Beven, Southern Ohio Correctional Facility, beginning in fiscal 1996; Joseph J. Trevino, Oakwood Correctional Facility, beginning in FY2001; Gary N. Sales, Lorain Correctional Institution, FY1998; Steven

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<sup>87</sup> State of Ohio, Central Accounting System. Expenditures by Object, For the Posting Fiscal Year 2002. All numbers in actual dollars.

<sup>88</sup> DRC152-02, Item 149, June 25, 2001; DRC315-03, Item 67, June 17, 2002.

M. Gemma, Ohio Reformatory for Women, FY1997; or John Morcos, London Correctional Institution, FY1996.

In explaining the selection process it used to hire these vendors, the department noted that it advertises in trade journals and all of Ohio's major newspapers, and lately has continuously posted opportunities on its web site. It said: "The Bureau of Mental Health Services maintains a centralized list of individuals who respond to the recruitment efforts. The Chief Psychiatrist or designee examines the application packet/vita of each individual for academic training, experience and licensing. Once approved by Central Office, the institutional staff interview the applicants and a background check is completed. The most qualified applicant with no license infractions is selected and offered a contract."<sup>89</sup>

In practice, what does this actually mean? In explaining why the department did not use a request-for-proposal process for hiring contract psychiatrists in FY2003, Kay Northrup, DRC deputy director in charge of health care, said at the June 17, 2002, Controlling Board meeting that psychiatrists are hard to find and that the department contracted with every applicant it got who had a valid state license.

Most of the time, the department says, its list of potential psychiatric vendors was "*very short.*" (emphasis in the original) It used its process of continuous, general advertising and selection from its ongoing list "because interested qualified vendors were in such short supply that DRC had difficulty consistently finding sufficient vendors to cover all of the psychiatric service needs."<sup>90</sup>

Still, contracting with everyone with a valid license seems misplaced in light of what is going on now: The department is bidding out all its medical and mental health contracts for the Fiscal 2004-2005 biennium. Asked to explain what has changed since the 2002-2003 biennium, the department explained: "The Office of Correctional Health Care directed a team to review and make recommendations for the process of soliciting the services of psychiatrists. As a result of their efforts and the more extensive advertising initiated in the past year, new potential vendors were identified. With this increased provider base, an RFP process will help to ensure DRC is able to provide these critical services in the most cost-effective manner possible."<sup>91</sup>

This promises a more competitive environment for the upcoming years. It suggests, however, that this could have been accomplished earlier – and underlines that oversight by the Controlling Board has been less than vigilant.

It has not been nonexistent. During 2002, Sen. Roberts questioned a number of the DRC's medical contracts and the need for the department to seek outside vendors instead of using civil service workers. His questioning, for instance, brought Northrup's explanation for why the department had not used an RFP process for its psychiatric contracts. He also asked, for example, about the operations of dentist Steven W. Huber, whose company provides dental services at 20

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<sup>89</sup> Letter from Kelly M. Sanders, Chief, Bureau of Monitoring and Compliance, Office of Administration, Department of Rehabilitation and Correction. Jan. 27, 2003, p. 1.

<sup>90</sup> Ibid, p. 4.

<sup>91</sup> Ibid, p. 5.

different institutions and accounted for nearly \$2.9 million out of the \$3.23 million the department spent on such outside services in fiscal 2002.<sup>92</sup>

In response to a question from Roberts last June, Northrup said that the department has looked at bringing work in-house, but chose to contract for two main reasons: That it can't attract good physicians with the current pay scale and that it's difficult for one physician to do the work because they need someone on duty 24 hours a day. Many medical-service contracts have been competitively bid. However, competition for a number of others besides those with psychiatrists and Mid-Ohio Radiology discussed above has been slim.

For instance, at Corrections Medical Center, the department issued a request for proposal for laboratory consultant services and accepted a \$171,384 bid from Dr. Michael Maymind. There were no competing bids.<sup>93</sup> Maymind had a contract with the department for the same work in the previous fiscal year, but it did not have a renewal clause. Asked recently about why it accepted a bid when there were no competing ones, DRC said it had advertised the opportunity and issued multiple RFPs. "The proposal submitted by Dr. Maymind met all of the requirements of the RFP; therefore, the department awarded the contract to him," it said.<sup>94</sup>

In their bids for the physician services fiscal 2002 contract covering the Lima, Allen and Oakwood facilities, three of the four bidders, including the one selected, Amin & Amin, said they would use Olugbenga Awe as a physician. Two of the firms, Prime Care Medical and Amin & Amin, each said they would use both Drs. Ashwin Amin and O. Awe. The fourth bidder, Correctional Medical Services, did not specify the individuals who would perform these services, but did not meet qualifications for the contract. Both physicians held existing contracts at institutions in this cluster, Amin as an independent contractor, Awe under a contract of Annashae Corp. The Controlling Board approved this \$288,000 contract at its June 13, 2001, meeting.<sup>95</sup>

Were these independent bids, given the use of the same personnel? Asked about the competition now, the department said that the proposals "were considered independent bids because they were submitted by separate entities even though three of the proposals named the same on-site providers. The Department cannot control the possibility of different vendors proposing the same practitioners; the choice of named practitioners is a business decision made by the Offeror." It goes on to note that it now requires signed letters of commitment to ensure that the practitioners are aware they are being proposed. "The Department received multiple proposals that met the qualifications and criteria; therefore, there was adequate competition. The Department awarded the contract to the lowest bidder."<sup>96</sup>

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<sup>92</sup> Northrup told him last June that Huber had 49 employees, including 20 dentists. She said he sub-contracts and runs 'an efficient operation.' Since that time, Huber has lost two dentists he has been unable to replace and by mutual agreement with the department, his contract at two institutions was cancelled and has been rebid. (DRC376-03, Item 110, Jan. 27, 2003.) The 20 institutions cited above do not include these two.

<sup>93</sup> DRC312-03, Item 131, June 3, 2002.

<sup>94</sup> Sanders letter, p. 2.

<sup>95</sup> DRC141-02, June 13, 2001.

<sup>96</sup> Sanders letter, p. 4.

Considering such bids to be truly competitive seems to be a misnomer, at a minimum. The lack of competition for some DRC contracts suggests that the department could be paying more than it should for some services

### **Medical-Service Costs**

Direct cost comparisons between pay for outside medical contractors and civil service workers are not easy to make. However, it is clear that the pay scale for outside psychiatrists is significantly higher than state rates. Fifteen psychiatrists at various DRC institutions approved as contractors by the Controlling Board at its June 3 meeting are being paid more than \$200,000 apiece in fiscal 2003. Under the state contract with SEIU/District 1199, annual pay for psychiatrists ranges from \$113,859 to \$138,362. Adding another 33 percent for benefits, compensation ranges from \$151,812 to \$184,483.

In part because of scrutiny by the Internal Revenue Service, DRC has changed its contract structure so that it pays psychiatrists according to how many “units” of service they deliver, instead of by the hour.<sup>97</sup> Contracts call for specific numbers of units of service per two-week period (A full mental health evaluation is three units, for example, while an evaluation of an inmate in seclusion or restraints is worth one unit). Though it’s impossible to compare costs directly, it seems clear that the state would save money if these jobs were brought back in-house.

### **A Lack of Transparency**

As with contracts at other departments cited above, DRC requests for competitive waivers at the Controlling Board are often opaque, providing minimal amounts of information about the bidding process. The \$7.7 million request in June 2002 renewed contracts for many of the department’s outside psychiatrists. It had no documentation on whether RFPs had been issued for the original contracts with these doctors. In this request for fiscal 2003 covering dozens of mental-health contracts, nearly all psychiatrists, the department simply said, “For FY03, we have retained many of the current service providers.” It provided no explanation to the board of how it decided to keep those it did.<sup>98</sup>

At its June 3 meeting, the Controlling Board approved a DRC request for pharmacy services at Ross and Chillicothe Correctional Institutions that stated that Pharmacy People was the “lowest, most responsive bidder that met minimum qualifications.”<sup>99</sup> It listed five bids. Pharmacy People had submitted two of the bids, both for \$249,096, a higher amount than any of the others.<sup>100</sup> What the request did not say was that two of the five bids were eliminated because they did not meet mandatory requirements of the RFP.<sup>101</sup> The proposal won the bidding based on a superior ratio of technical merit to cost, and it was below a fixed price that had been set.<sup>102</sup> The

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<sup>97</sup> Kay Northrup, DRC Deputy Director, at Controlling Board meeting on June 3, 2002.

<sup>98</sup> Responding to an inquiry for this report, the department explained that it chose to retain physicians based on interviews, credentials, the needs of the institution and a set of criteria, including quality, the need to ensure continuity of care whenever possible and other factors (Sanders letter, Jan. 27, 2003).

<sup>99</sup> DRC313-03, Item 132, June 3, 2002.

<sup>100</sup> Vendors may submit multiple proposals. Pharmacy People submitted two proposals with different staffing approaches

<sup>101</sup> Sanders letter, p. 3.

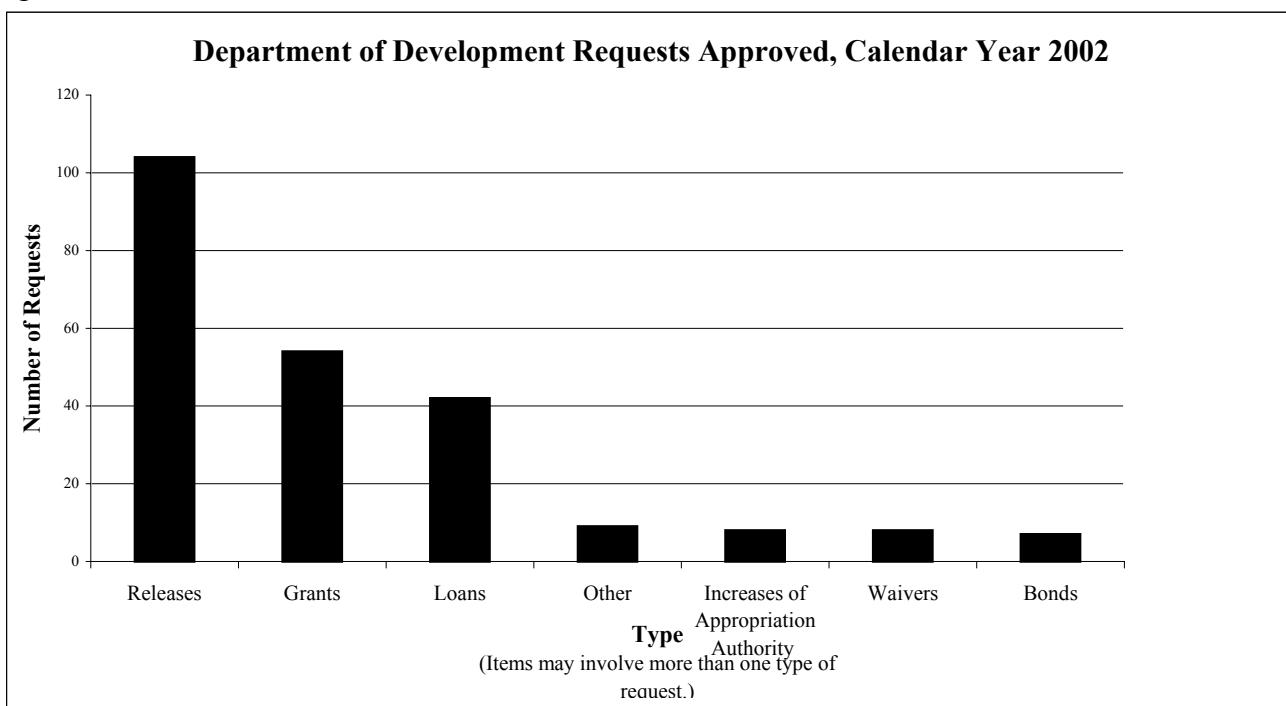
<sup>102</sup> In addition, Sanders’s letter said: “The department performs a variety of activities to encourage competition in the RFP process to include advertising in newspapers as well as on our website and maintaining a centralized

department says there was sufficient competition, and this may have been a perfectly reasonable decision; an RFP process is used to produce the best bidder, who does not always provide the lowest price. However, the real terms of the competition were not visible in the Controlling Board request.

### **Department of Development**

One of the major responsibilities of the Controlling Board is overseeing certain activities of the development department. Most loans the department makes, spending for its business development and roadwork programs, authority under its enterprise bond fund, and technology and brownfields clean-up grants all go to the board for its approval. Figure 5 shows board approvals of development department requests during 2002.

Figure 5



Source: Policy Matters analysis of State Controlling Board data

The board has not always been forceful in its role as an overseer of department monies. As already seen in other areas, the board allows most requests to skate through with little question, and when it does question one, nonresponsive answers still often result in unanimous approval.

An example was the \$1 million request last August to use increased federal funds for an initiative to retain more college graduates in the state of Ohio, an element of Gov. Taft's Third Frontier economic development program. The request noted that Ohio falls in the bottom half of the

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database of vendors that express an interest in providing services. If only one proposal is received, the Department will review the process and determine if additional recruitment activities will be advantageous to the process. If we determine that additional recruitment will be advantageous to the Department, we will re-issue the RFP." (Sanders letter, p. 2)

country in the proportion of adults with a college degree. The department's representative, chief financial officer Tom Johnston, could not answer questions from Rep. Patton on how many college graduates leave the state, or what proportion of college students in Ohio were from out-of-state. Nor could he immediately answer a number of questions asked by Sen. Roberts about how the program would run. Rep. Patton voted against the item. Sen. Roberts said he would really like more details on the program, but that deferring the item would not change anything. Roberts said, "We assume that there is a brain drain, but we don't have more details."<sup>103</sup>

Even as Connecticut-based Stanley Works was gaining national notoriety last spring for moving its headquarters – on paper – to the Caribbean to avoid paying U.S. taxes, the Controlling Board was approving a development department request supporting the relocation of a Stanley Works facility within the Cleveland metropolitan area. On June 17, the board approved a release of \$100,000 from the state's Business Development Account to Stanley, helping the company move a plant from Mayfield Village to Highland Heights. The company said support from the state was critical to remaining in the area, but despite the national controversy over its tax-evasive tactics, the board approved the money without question.<sup>104</sup>

The board has approved financial support for a number of company relocations within Ohio. Though such support may be permitted under program rules and approved by the Department of Development, the subsidies may not be necessary and raise concerns that the state is helping one community at the expense of another.

In February of last year, the board approved without questions a \$500,000 roadwork grant to the City of Delaware to accommodate a new Kroger Co. distribution center.<sup>105</sup> The Kroger warehouse replaces three others in Ohio, and though it will generate new jobs, subsidies for it by the development department were harshly criticized last summer by the City of Columbus. Two facilities there are closing, one of which was located in the Columbus enterprise zone. "It is incongruous for state tax incentives to be offered for jobs moving out of our (enterprise zone)," wrote Mark Barbash, director of development for the city.<sup>106</sup>

Before the board approved 16 Clean Ohio Revitalization Fund grants worth close to \$40 million on Aug. 26, Rep. Calvert questioned whether the state had tried to recover clean-up costs for the areas in question from the polluting companies and whether the sites would generate revenue for the state in the future. However, in other instances, the board has backed without questions roadwork projects that are tied in with incentives the development department arranged in apparent violation of program guidelines. On Sept. 9, it approved without questions the release of \$1 million in roadwork development money to support what officials called "Project Blackbird," a new Target Corp. distribution center in West Jefferson, west of Columbus.<sup>107</sup> This new, \$96 million warehouse also is receiving incentives including a job creation tax credit worth

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<sup>103</sup> DEV319-03, Item 35, Aug. 26.

<sup>104</sup> DEV260-02, Item 27, June 17.

<sup>105</sup> DEV136-02, Item 14, Feb. 11.

<sup>106</sup> Letter from Mark Barbash to Daryl P. Hennessy, Executive Director, Ohio Tax Credit Authority, Ohio Department of Development, July 1, 2002.

<sup>107</sup> DEV322-03, Item 22, Sept. 9.

an estimated \$5 million over 10 years, approved by the Ohio Tax Credit Authority in what appears to have been a breach of its own rules.

Under the program's guidelines, companies may not receive such tax credits if they publicly announce a project prior to the credit's approval. The authority approved the tax credit on Aug. 26, 2002. That was almost three weeks after architects for Target discussed it at a meeting of the West Jefferson Planning and Zoning Commission, which voted to recommend that the village council approve a preliminary site plan for Target.<sup>108</sup> The Controlling Board similarly approved \$500,000 in roadwork money for a Wal-Mart distribution center in Washington Court House in 2001. In that case, the project had not simply been announced prior to tax credit approval, construction on the warehouse had already started.

Of course, it is the responsibility of the Department of Development to follow these rules, and the Controlling Board was reviewing roadwork, not the tax credits. However, the board's approval of these roadwork proposals again underlines a lack of real scrutiny of these overall projects.

### Access

The Controlling Board makes its agenda available on its web site, so anyone with Internet access can see what the board will consider almost a week before it takes the matter up. However, in other ways, access is difficult.

The Controlling Board resembles a legislative committee, but its meetings are nothing like a public hearing. The administration frames the requests, and the public has no opportunity to testify. The agenda, with paragraph-long descriptions of each item, sometimes does not give a complete idea of what is to be considered. It does not disclose if the item involves the operating or capital budgets, nor does it say the source of revenue.

Sometimes, items may be added to the agenda at the time of the meeting, with no previous indication. Each automatically is held for questions. Obviously, if there is an emergency, this is reasonable; the Controlling Board, in fact, took over much of the functions of the Emergency Board before the latter board was abolished.<sup>109</sup> During the first half of fiscal 2003, there were nine such add-ons, each of which was approved unanimously after discussion. Table 4 shows these add on items.

The list exposes another somewhat hidden practice. When companies win approval from the Development Financing Advisory Council for 166 Regional Loans – one of the department's business expansion programs – they still require Controlling Board approval. In the past, Dodge said, the board president would simply sign them. Now, she sends them to the board in advance of the meeting, where they will be added to the agenda if a member has a question. If not, Dodge just signs them. The development department obtained board approval for 49 such loans worth

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<sup>108</sup> Smith, Steve. "West Jefferson Officials Hear Target Plan," *The Madison Press*, Aug. 9, 2002; "Target Plans Area Distribution Center," *The Columbus Dispatch*, Aug. 8, 2002, p. 1D.

<sup>109</sup> Bloedel. *Members Only*, p.1.

\$11.1 million during fiscal 2002, only a small number of which went to a board meeting for approval, according to Johnston, the department's chief financial officer.<sup>110</sup>

Record-keeping and access to Controlling Board information is weak. When an item is revised and resubmitted after a deferral, the board does not keep a copy of the previous, unrevised version. Thus, it is difficult to know what, if any, changes might have been made.

Table 4

REQUESTS ADDED TO THE BOARD AGENDA, JULY - DECEMBER 2002					
	Agency	Agenda Date	Request Type*	Amount	Description
1	Board of Regents	7/1/02	W	\$ 33,000	For National Academies of Science to evaluate proposals for grants for biomedical/biotech research and commercialization.
2	Agriculture	7/29/02	A	\$ 287,749	To use U.S. funds to promote specialty crops.
3	Development	8/12/02	L	\$ 350,000	A 166 Regional Loan to Cast Nylons, Ltd. to purchase machinery and equipment.
4	University of Cincinnati	8/26/02	W	\$ 158,600	Contract to develop a software application package for the Information Technology Students on the Move project.
5	Adjutant General	8/26/02	R	\$ 25,267	To replace the chiller compressor at the Ohio Army National Guard Facility.
6	Natural Resources	9/9/02	R	\$ 6,250,000	For the Clean Ohio Trails Fund Grant Program.
7	University of Akron	9/23/02	R	\$ 163,530	For the Ballet Center East Roof Renovation Project in Summit County.
8	Ohio State University	9/23/02	R	\$ 274,670	For the ATI Shisler Center Courtyard project in Wooster, Wayne County.
9	Development	10/7/02	L	\$ 300,000	A 166 Regional Loan for HDB Investments LLC, in Birmingham, Erie County.

\* Request Type Key: A= Increase of Appropriation Authority; L=Loan; R=Release; W=Waiver of Competitive Selection

Source: State Controlling Board

The board was sharply criticized in 2001 for not maintaining good records. As part of his findings in an investigation of contract steering at the ODJFS, Inspector General Thomas P. Charles recommended that the board keep minutes that would allow an understanding of the business discussed.<sup>111</sup> *The Plain Dealer* editorialized soon after that the board "should upgrade

<sup>110</sup> Interview with Tom Johnston, March 26, 2003.

<sup>111</sup> State of Ohio, Office of Inspector General, Report of Investigation, File ID Numbers 2000047, 2000244, June 29, 2001, p. 90.

its shabby record-keeping.”<sup>112</sup> The board began keeping more extensive minutes, including descriptions of questions asked and responses from agency representatives. Previously, the minutes had not said which items were held for discussion, or anything about the substance of questions asked. It had simply been a record of board actions, and who voiced objections. The board also began tape recording its meetings in October, 2001. But incredibly, the same tape is used at the next meeting, so no tape or full transcript of the meetings exists.

The essence of what the Controlling Board considers is in the proposals agencies submit. It uses standard forms for different kinds of items. However, there is often no way to know with a waiver of competitive selection if a request-for-proposal or some other competitive bidding process was used.

For instance, Sen. Carnes asked the Attorney General’s office at a December meeting how it had chosen the two out-of-state firms that are being used to do DNA analysis for a total of more than \$1 million (a portion of the total of \$1,865,000 is to go to public law enforcement or coroner labs in Ohio). The AG’s Douglas E. Lumpkin explained that they had contacted companies that were accredited and being used by the FBI, which also is footing the bill, and asked them to give the department a price. They then took the lowest ones. That’s a fine way to operate, as Carnes noted. However, one has no way to know this unless a Controlling Board member asked about it. Asked in the written request if this was subject to an RFP process, the agency did not really answer the question.<sup>113</sup>

Availability of board requests is limited. The board staff is helpful and responded to numerous requests for information for this study, but lacks the resources that an important arm of state government should have.

### **The Board and the Law**

Comparatively few legal cases have been brought involving the Controlling Board. In the most significant case, the Ohio Supreme Court held in 1981 that the board’s authority to transfer funds from one fiscal year to the next was constitutional, as long as there was some indication of a legislative intent to allow such a transfer.<sup>114</sup> The transfer was not an unconstitutional delegation of legislative authority, the court ruled. It also rejected the argument that the transfer was illegal because six of the board’s seven members were legislators appointed by the General Assembly.

The Ohio Supreme Court also has upheld the right of the General Assembly to let the Controlling Board approve or deny an agency director’s request to spend certain money. It found in a 1950 case that this was a legitimate exercise of administrative power.<sup>115</sup>

In one 1963 ruling, an Ohio appeals court found that the board’s decision to bypass competitive bidding and approve a purchase was invalid without a showing that an emergency existed.<sup>116</sup>

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<sup>112</sup> “A Few Minutes Please. State Controlling Board’s Lack of Meeting Records Leaves Ohioans to Guess Why Decisions were Made,” *The Plain Dealer*, July 24, 2001, p. B8.

<sup>113</sup> AGO219-03, Item 5, Dec. 16.

<sup>114</sup> State, Ex rel. Meshel v. Keip, 423 N.E.2d 60 (1981).

<sup>115</sup> State, Ex. Rel. Kauer, Dir. Of Dept. of Highways, v. Defenbacher, Dir of Dept .of Finance, et al., 91 NE.2d 60 (1950).

However, in a 1983 decision, that court accepted as an “emergency or sufficient economic reason” that the lottery game in question would generate millions of dollars for the state of Ohio, money that could be lost due to delays caused by soliciting competitive bids. It further held that the board did not have to strictly adhere to its own procedures in considering the lottery commission’s request. In order to prevail, it said, “the plaintiff must be able to demonstrate either that the procedural defects that occurred were so substantial that the basic integrity of the Controlling Board and its operations was threatened, or that the defects were of such a nature that the plaintiff was prejudicially affected.”<sup>117</sup> This is an extremely high standard to follow, and there do not appear to be any cases where the actions of the Controlling Board in denying competitive bidding were so egregious or so prejudicial to prospective bidders that a court overturned a board decision.

### Other States

No other state has a body exactly like Ohio’s Controlling Board. However, other states do have procedures and sometimes official bodies to handle most of the matters for which the Controlling Board is responsible.

Many states have a mechanism for certain fund transfers of one type or another after their budgets are enacted, according to a 1999 survey by the National Conference of State Legislatures.<sup>118</sup> Most, like Ohio, do not allow the governor to transfer funds between departments. However, most states allow the executive branch limited authority to transfer money between programs in a department, which in Ohio requires Controlling Board approval. Generally among the states, the legislature has a role in approving such transfers, often through a committee. According to the survey, only a half dozen or so have a body like Ohio’s to approve transfers that contains members from both the executive and legislative branches. Commonly, legislatures must approve transfers of funds between departments. A few states go further: Indiana statutes provide for no transfers, the Missouri legislature must amend the appropriations act for transfers of any sort and Massachusetts requires legislative approval for program transfers within a department.

According to a 1995 NCSL survey, now in the process of being updated, Ohio is one of 14 states in which the executive and legislative branches share control over the use of unanticipated federal funds.<sup>119</sup> Ohio’s Controlling Board makes it one of seven states in which executive and legislative members sit on a board and share decision-making over unexpected U.S. funds. That gives the Ohio General Assembly more power than most states in this area, but less than the 13 in which the executive branch must get prior or subsequent legislative approval to spend such money.

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<sup>116</sup> Columbus Blank Book Co. v. Maloon, 188 N.E.2<sup>nd</sup> 431 (Ohio App. 1963).

<sup>117</sup> Control Data v. Controlling Board of Ohio, 474 N.E.2<sup>nd</sup> 336 (Ohio App. 1983).

<sup>118</sup> National Conference of State Legislatures. “Legislative Budget Procedures, A Guide to Appropriations and Budget Processes in the States, Commonwealths and Territories.” Update 3. May 1999.

<sup>119</sup> Perez, Arturo, National Conference of State Legislatures. “Legislative Oversight of Federal Funds.” *Legislative Finance Paper*, No. 98, June 1995. In 11 states the legislature does so alone, while in 25, the executive branch has authority.

States generally recognize the need for noncompetitive awards of contracts in specific situations. It's a standard practice for emergency situations and those where only a sole source of supply is available. Many states also allow such awards for testing purposes.<sup>120</sup>

States follow a wide variety of practices in their requirements covering waivers of competitive selection, according to John Short, retired director of what was then the state bureau of purchases and services for the state of Wisconsin and a long-time expert on state purchasing practices.<sup>121</sup> "Some are very pro forma, and whether they protect the taxpayers interest is an open question," Short said.

Like Ohio, a number of states have review commissions or boards. Wisconsin requires publication of a legal notice, just as there would be for a sealed bid, saying that the state proposes to buy from a specific company only. This has two effects, Short noted: It may stir up competition, if any exists, and it demonstrates openness. In many states, he said, agencies have a certain amount of authority to make sole-source purchases, referring them back to the central procurement office for approval. "I'm afraid in some cases it's just a rubberstamp transaction," Short said.

The American Bar Association's Model Procurement Code for State and Local Governments includes standard waivers for small purchases, emergencies and sole-source contracts, with certain safeguards. About 17 states have adopted major portions of the code, according to Margaret E. McConnell, former state procurement administrator for Arizona, who worked on both the 1979 and 2000 code projects.

The latest version of the model code also would allow purchases without competition in "unusual or unique" situations when it would best serve the interests of the state. In these very limited circumstances, it calls for the chief procurement officer or head of a purchasing agency to make that decision, with prior public notice, and a written determination made of the basis for it and for the selection of the particular contractor. It also calls for an annual report describing all such determinations. This new section of the code is based on versions of the code adopted in Arizona and Alaska.<sup>122</sup>

## **Recommendations**

In some ways, it seems as if the board has changed little since 1985, when Thomas Suddes of *The Plain Dealer* wrote: "On a good day, the board seems like a reproduction of those silly rumpus-room engravings of pedigreed dogs sitting around a card table playing poker. On a bad day, a controlling board meeting can seem like a root canal done by committee."<sup>123</sup>

Some things have changed. For instance, the Controlling Board no longer has access to as much in its own funds, which gave it additional power. Lately, it has been receiving about \$5 million a

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<sup>120</sup> The National Association of State Procurement Officials. "2001 Survey of State and Local Government Purchasing Practices." p. 76.

<sup>121</sup> Interview with John Short, March 7, 2003.

<sup>122</sup> American Bar Association. "The 2000 Model Procurement Code for State and Local Governments." Section, 3-207, p. 30.

<sup>123</sup> Suddes, Thomas. "This Board Knows No Controls." *The Plain Dealer*, March 3, 1985.

year of its own to spend for emergency purposes, and the board has not been spending all it has been appropriated.

Some critics of the Controlling Board would simply abolish it for usurping the role of the legislature. While that may be impractical, concentrating the power of the legislature in the hands of a few is not good government. The board's authority over normal activities of the General Assembly should be sharply curtailed. To the degree that the board provides a check on executive power, its duties are worth preserving, but steps should be taken to ensure that it provides the needed oversight. To accomplish that, the General Assembly should:

- Assess the board's far-flung powers and responsibilities, and eliminate them if not strictly necessary to provide additional oversight of the executive branch.
- Specifically, curb its transfer powers, which can be readily assumed by a full-time legislature. Only the most routine, such as those that involve the movement of funds from a general line item where they are temporarily held to a more specific one, should be permitted. When it was first established, the board required a supermajority (then four out of five votes) to approve an appropriation transfer.<sup>124</sup> That requirement should be reestablished for transfers and changes in appropriation authority.
- Scrutinize the grant, loan and bond requests of the development department more closely to ensure that they do not improperly benefit one Ohio community at the expense of another and that the state will receive real economic gains.
- Consider an overhaul of the state purchasing process that now provides for waivers of competitive selection. The release and permit process which is a necessary prelude to such waivers should be tightened, so that citizens can be certain avoidance of the usual competitive process is absolutely necessary.
- To the degree that any power to approve competitive waivers is retained, the existing law that requires "an emergency or sufficient economic reason" for the approval of such expenditures should be beefed up. Then, it should be rigorously enforced, so that such waivers are subject to rigorous scrutiny. The board should require an explanation in every case of what competitive selection process was used to award each contract. Agencies should be required to explain efforts they have made to seek new vendors before any renewal of a non-competitive contract.
- Tighten up on what departments must do if they are to get approval for use of outside contractors. As recommended in a previous Policy Matters Ohio report on state contracting, the Controlling Board and the Department of Administrative Services should implement new requirements for cost comparisons between public and private provision of services. The board should include among its required questions whether a service has previously been performed by agency employees, and why it is more efficient and effective to contract with an outside vendor rather than having state employees perform the service. The Controlling Board Manual includes in its appendix a July 1, 1997, memo from DAS on independent contractor guidelines which says, "Typically, the personal services of an independent contractor should not be long term, and contractors should not be hired to perform work that could be performed by state employees."<sup>125</sup>

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<sup>124</sup> *Controlling Board Manual*, Section I, p. 9.

<sup>125</sup> *Controlling Board Manual*, Appendix, p. 21.

In 1977, the General Assembly specifically provided that to approve competitive waivers for consulting contracts, the Controlling Board should establish criteria “to include the use of formal ‘requests for proposals,’ maximum payment schedules, demonstration that state employee classifications are not able to accomplish the designated tasks and any other criteria considered appropriate to ensure the judicious use of tax resources and adequate public accountability for such use.” Requests that didn’t meet the criteria would be automatically denied.<sup>126</sup>

The board adopted criteria including the use of requests for proposals for all personal service contracts except those with individuals — and mandated that the requests, along with copies of the proposals received, be attached to any Controlling Board request. A number of the other criteria remain among the questions agencies may answer when the board is considering such contracts now. For instance, the Department of Mental Health in such contracts indicates what the equivalent civil service classification is, and provides an explanation for why the services are not performed through a civil service position. However, other agencies do not necessarily include those questions among those they answer. The state law requiring these criteria was repealed in 1981.<sup>127</sup> The General Assembly should reinstate the repealed section of the law and include strict criteria for non-competitive consulting contracts.

The board long has required that specific information be included in requests made to it; its manual details required questions that must be answered in requests.<sup>128</sup> Only requests that transparently describe what the action will accomplish should be considered. With contracts for management information systems or similar services which may turn into long-term arrangements that were not initially considered, for instance, the board should require that the initial request include a description of whether approval is likely to mean future purchases beyond any renewals in the agreement, if it means locking in a long-term arrangement with a vendor, and estimate costs in the future.

When the board considers competitive waivers, it often is acting at the end of a long process. A contract may be about to be signed, and if an RFP is involved, it may have been issued many months earlier. The selection process is all but complete, the services may be needed soon and a board rejection of the request may generate problems and additional expense. This does not allow for objective consideration of the request. The board should be notified earlier in the process, making it easier for it to hold up unnecessary or ill-conceived waivers.

Beyond these changes, the board must operate in full sunlight and expand access to its decision-making and records. To bring that about, it should devote the necessary resources to:

- Post all requests on its website at the same time as its agenda, a week in advance of its meetings
- Provide public notice on its web site when a request is originally filed, 18 days before the meeting,

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<sup>126</sup> Sheridan, Richard. *State Budgeting in Ohio*, 1978, p. 217.

<sup>127</sup> *Ohio Revised Code*, Section 127.161.

<sup>128</sup> See *Controlling Board Manual*, Section III, p. 68.

- Provide easy public access to the LSC green sheets by posting them on the Controlling Board web site, too.
- Allow legislators' staff to question agency representatives at Controlling Board meetings, and provide an opportunity for members of the public to testify.
- Keep a taped copy and make a transcript of each meeting.

Some of the Controlling Board's responsibilities should be eliminated. It should do a better oversight job with those that remain.

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