

1 HB227
2 147445-2
3 By Representatives DeMarco, Wood, Williams (J), Sanderford,
4 Beckman, McClurkin, Greeson, Faust, Johnson (W), Ball, Rich
5 and Farley
6 RFD: Judiciary
7 First Read: 07-FEB-13

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ENGROSSED

A BILL
TO BE ENTITLED
AN ACT

Relating to state agencies and private attorneys representing the state in litigation; to amend Section 41-16-72 of the Code of Alabama 1975, to regulate contingency fee contracts.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known as the Transparency in Private Attorney Contracts Act.

Section 2. Section 41-16-72 of the Code of Alabama 1975, is amended to read as follows:

"§41-16-72.

"Any other provision of law notwithstanding, the procurement of professional services by any agency, department, board, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama shall be conducted through the following selection process:

"(1)a. Except as otherwise provided herein, attorneys retained to represent the state in litigation shall be appointed by the Attorney General in consultation with the Governor from a listing of attorneys maintained by the Attorney General. All attorneys interested in representing the

1 State of Alabama may apply and shall be included on the
2 listing. The selection of the attorney or law firm shall be
3 based upon the level of skill, experience, and expertise
4 required in the litigation and the fees charged by the
5 attorney or law firm shall be taken into consideration so that
6 the State of Alabama receives the best representation for the
7 funds paid. Fees shall be negotiated and approved by the
8 Governor in consultation with the Attorney General. Maximum
9 fees paid for legal representation that does not involve a
10 contingency fee contract as defined in subparagraph f.1. of
11 subdivision (1), may be established by executive order of the
12 Governor.

13 "Nothing in this article and nothing in Chapter 15
14 of Title 36 modifies or repeals the exclusive authority of the
15 governing boards of the public institutions of higher
16 education or public pension funds to direct and control
17 litigation involving their respective universities or public
18 pension fund and to employ and retain legal counsel of their
19 own choice, consistent with their broad powers of management
20 and control set forth in Chapters 47-56 of Title 16 and in the
21 constitution, Chapter 25 of Title 16, and Chapter 27 of Title
22 36, respectively. Provided further, nothing in this article
23 modifies or repeals the authority of the Attorney General to
24 direct and control litigation involving the state or any
25 agency, department, or instrumentality of the state, or the
26 authority of the Governor to appear in civil cases in which
27 the state is interested.

1 "b. Attorneys retained by any state purchasing
2 entity to render nonlitigation legal services shall be
3 selected by such entity from a listing of attorneys maintained
4 by the Legal Advisor to the Governor. All attorneys interested
5 in representing any purchasing state entity may apply and
6 shall be included on the listing. The selection of the
7 attorney or law firm shall be based upon the level of skill,
8 experience, and expertise required for the services, but the
9 fees charged by the attorney or law firm shall be taken into
10 consideration so that such state entity shall receive the best
11 representation for the funds paid. Fees for such services
12 shall be negotiated by the state entity requiring the services
13 and shall be subject to the review and approval of the
14 Governor or the Director of Finance when so designated by the
15 Governor.

16 "c. This article shall not apply to the appointment
17 by a court of attorneys or experts.

18 "d. This article shall not apply to the retention of
19 experts by the state for the purposes of litigation, or
20 avoidance of litigation.

21 "e. Nothing in this article shall be construed as
22 altering or amending the Governor's authority to retain
23 attorneys pursuant to Section 36-13-2, however, the Governor
24 shall select such attorneys from three proposals received from
25 attorneys included on the listing maintained by the Attorney
26 General.

1 "f. 1. For the purposes of this paragraph, the
2 following terms shall have the following meanings:

3 (i) Contingency Fee Contract. An agreement, express
4 or implied, for litigation legal services of an attorney or
5 attorneys, including any associated counsel, under which
6 compensation is contingent in whole or in part upon the
7 successful accomplishment or disposition of the subject matter
8 of the agreement. The payment may be in an amount which either
9 is fixed or is to be determined under a formula.

10 "(ii) Contracting Agency. The Governor, Attorney
11 General, or director of a state agency, department, bureau,
12 commission, authority, public corporation, or instrumentality
13 of the State of Alabama that seeks to enter a contingency fee
14 contract.

15 "2. The state may not enter into a contingency fee
16 contract with any attorney or law firm unless the contracting
17 agency makes a written determination prior to entering into a
18 contingency fee contract that contingency fee representation
19 is both cost-effective and in the public interest. Any written
20 determination shall include specific findings for each of the
21 following factors:

22 "(i) Whether there exists sufficient and appropriate
23 legal and financial resources within the state to handle the
24 matter without a contingency contract.

25 "(ii) The expected time and labor required; the
26 novelty, complexity, and difficulty of the questions involved;

1 and the skill requisite to perform the attorney services
2 properly.

3 "(iii) The geographic area where the attorney
4 services are to be provided.

5 "(iv) The amount of experience desired for the
6 particular kind of attorney services to be provided and the
7 nature of the private attorney's experience with similar
8 issues or cases.

9 "3. The state may not enter into a contingency fee
10 contract that provides for the private attorney to receive an
11 aggregate contingency fee, exclusive of expenses, in excess
12 of:

13 "(i) Twenty-five percent of any recovery of up to
14 ten million dollars (\$10,000,000); plus

15 "(ii) Twenty percent of any portion of such recovery
16 between ten million dollars (\$10,000,000) and fifteen million
17 dollars (\$15,000,000); plus

18 "(iii) Fifteen percent of any portion of such
19 recovery between fifteen million dollars (\$15,000,000) and
20 twenty million dollars (\$20,000,000); plus

21 "(iv) Ten percent of any portion of such recovery
22 between twenty million dollars (\$20,000,000) and twenty-five
23 million dollars (\$25,000,000); plus

24 "(v) Five percent of any portion of such recovery
25 between twenty-five million dollars (\$25,000,000) and fifty
26 million dollars (\$50,000,000); plus

1 "(vi) One percent of any portion of such recovery
2 exceeding fifty million dollars (\$50,000,000).

3 "4. The Attorney General may certify in writing to
4 the Governor that, in the opinion of the Attorney General, an
5 issue affecting the public health, safety, convenience, or
6 economic welfare of the State of Alabama exists that justifies
7 that the contingency fee limitations set forth in subsection 3
8 of this section be suspended in the case of a particular
9 contingency fee contract. Upon receipt of the written
10 certification, the Governor, by the issuance of an Executive
11 Order, may waive the limitations with respect to the specified
12 contingency fee contract.

13 "4. 5. The state may not enter into a contract for
14 contingency fee attorney services unless all of the following
15 requirements are met throughout the contract period and any
16 extensions thereof:

17 "(i) A government attorney or attorneys retains
18 complete control over the course and conduct of the case.

19 "(ii) A government attorney with supervisory
20 authority is personally involved in overseeing the litigation.

21 "(iii) A government attorney or attorneys retains
22 veto power over any decisions made by a private attorney.

23 "(iv) Any defendant that is the subject of the
24 litigation may contact the lead government attorney or
25 attorneys directly, without having to confer with contingency
26 fee counsel, unless directed to do otherwise by the lead
27 government attorney for the litigation matter.

1 "(v) A government attorney with supervisory
2 authority for the case shall attend all settlement
3 conferences.

4 "(vi) Decisions regarding settlement of the case
5 shall be reserved exclusively to the discretion of the
6 government attorney or attorneys and the state.

7 ~~"5-~~ 6. The Attorney General shall develop a standard
8 addendum to every contract for contingent fee attorney
9 services that shall be used in all cases, describing in detail
10 what is expected of both the contracted private attorney and
11 the state, including, without limitation, the requirements
12 listed in paragraph 4.

13 ~~"6-~~ 7. Copies of any executed contingency fee
14 contract and the contracting agency's written determination to
15 enter into a contingency fee contract with the private
16 attorney and any payment of any contingency fees shall be
17 posted online pursuant to Section 41-4-65(b).

18 ~~"7-~~ 8. Any private attorney under contract to
19 provide services to the state on a contingency fee basis, from
20 the inception of the contract until at least four years after
21 the contract expires or is terminated, shall maintain detailed
22 current records, including documentation of all time records,
23 expenses, disbursements, charges, credits, underlying receipts
24 and invoices, and other financial transactions that concern
25 the provision of the attorney services. The private attorney
26 shall make all the records available for inspection and
27 copying upon request by the Governor, Attorney General, or

1 contracting agency. In addition, the private attorney shall
2 maintain detailed contemporaneous time records for the
3 attorneys and paralegals working on the contract in increments
4 not greater than 1/10 of an hour and shall promptly provide
5 these records to the Governor, Attorney General, or
6 contracting agency, upon request.

7 "8. 9. Any contingency fee paid to a private
8 attorney or law firm shall be paid from the State Treasury
9 from the funds recovered as a result of the contingent fee
10 contract unless ordered to do otherwise by a court with
11 jurisdiction over the litigation subject to the contingency
12 contract.

13 "(2) Physicians retained to provide medical services
14 to the state shall be selected by the purchasing state entity
15 from a list of qualified physicians maintained by the Alabama
16 Medical Licensure Commission. All physicians interested in
17 providing medical services to the State of Alabama may apply
18 and shall be included on the listing.

19 "(3) Professional services of architects, landscape
20 architects, engineers, land surveyors, geoscience, and other
21 similar professionals shall be procured in accordance with
22 competitive, qualification-based selection policies and
23 procedures. Selection shall be based on factors to be
24 developed by the procuring state entity which may include,
25 among others, the following:

1 "a. Specialized expertise, capabilities, and
2 technical competence, as demonstrated by the proposed approach
3 and methodology to meet project requirements.

4 "b. Resources available to perform the work,
5 including any specialized services within the specified time
6 limits for the project.

7 "c. Record of past performance, quality of work,
8 ability to meet schedules, cost control, and contract
9 administration.

10 "d. Availability to and familiarity with the project
11 locale.

12 "e. Proposed project management techniques.

13 "f. Ability and proven history in handling special
14 project contracts. Notice of need for professional services
15 shall be widely disseminated to the professional community in
16 a full and open manner. Procuring state entities shall
17 evaluate such professionals that respond to the notice of need
18 based on such state entity's qualification-based selection
19 process criteria. Any such procuring state entity shall then
20 make a good faith effort to negotiate a contract for
21 professional services from the selected professional after
22 first discussing and refining the scope of services for the
23 project with such professional. Where the Alabama Building
24 Commission has set a fee schedule for the professional
25 services sought, fees shall not exceed the schedule without
26 approval of the Director of the Alabama Building Commission
27 and the Governor.

1 "(4) The Director of Finance, through the Division
2 of Purchasing of the Department of Finance, shall establish
3 and maintain lists of professional service providers, other
4 than those specifically named in this section, which may be
5 required from time to time by any state agency, department,
6 board, bureau, commission, authority, public corporation, or
7 instrumentality. When such professional services are needed,
8 the purchasing state entity shall solicit proposals from the
9 professional service providers desiring to receive requests
10 for proposals. The purchasing state entity shall select the
11 professional service provider that best meets the needs of the
12 purchasing entity as expressed in the request for proposals.
13 Price shall be taken into consideration. In the event the fees
14 paid to the selected professional service provider exceed by
15 10 percent the professional service fee offered by the lowest
16 qualified proposal, the reasons for selecting a professional
17 service provider must be stated in writing, signed by the
18 director of the purchasing state entity, and made a part of
19 the selection record.

20 "(5) Contracts for professional services shall be
21 limited only to that portion of a contract relating to the
22 professional service provided. Goods purchased by the state in
23 conjunction with the contract for professional services shall
24 be purchased pursuant to Section 41-16-20.

25 "(6) Should an emergency affecting the public
26 health, safety, convenience, or the economic welfare of the
27 State of Alabama so declared in writing under oath to the

1 Governor and the Attorney General by the state entity
2 requiring the professional services arise, the professional
3 services required to alleviate the emergency situation may be
4 procured from any qualified professional service provider
5 without following the process or procedure required by this
6 article.

7 "(7) The process set forth herein for the selection
8 of professional service providers shall not apply to the
9 Legislature, the Alabama State Port Authority, or to colleges
10 and universities governed by a board of trustees or by the
11 Department of Postsecondary Education. The State Department of
12 Education shall not be subject to the provisions of this
13 article, requiring the process set forth herein for the
14 selection of professional service providers, except for the
15 future acquisition of professional services in support of
16 computer technology on a statewide basis which exceeds the
17 amount of expenditures set forth within this chapter. However,
18 if a state agency or department is able to provide the
19 necessary computer networking services, then the services
20 shall be provided by the agency or department without being
21 contracted to an outside provider. In the event the State
22 Department of Education has intervened into the financial
23 operations of a local board of education, the State Department
24 of Education shall follow the provisions of law applicable to
25 local boards of education for services related to the local
26 board of education subject to intervention. The Alabama
27 Medicaid Agency shall not be subject to the provisions of this

1 article requiring the process set forth herein for the
2 selection of professional service providers for contracts with
3 physicians, pharmacists, dentists, optometrists, opticians,
4 nurses, and other health professionals which involve only
5 service on agency task forces, boards, or committees.

6 "(8) Under any contract letting process in this
7 section, all requests for proposals from any state entity
8 purchasing professional services shall be sent to all
9 professional service providers regardless of race that have
10 notified the state of their interest in receiving state
11 business.

12 "(9) Under any contract letting process in this
13 section, all lists containing professional service providers
14 and contractors for contracts under the provisions of this
15 article shall seek the racial and ethnic diversity of the
16 state."

17 Section 3. This act shall become effective on the
18 first day of the third month following its passage and
19 approval by the Governor, or its otherwise becoming law.

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House of Representatives

Read for the first time and re-
ferred to the House of Representa-
tives committee on Judiciary 07-FEB-13

Read for the second time and placed
on the calendar 1 amendment 28-FEB-13

Read for the third time and passed
as amended..... 16-APR-13

Yeas 69, Nays 26, Abstains 1

Jeff Woodard
Clerk