

1 HB227  
2 147445-1  
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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8 SYNOPSIS: Under existing law, attorneys retained to  
9 represent the state in litigation are required to  
10 be appointed by the Attorney General in  
11 consultation with the Governor. Existing law does  
12 not regulate the state agencies entering into a  
13 contingency fee contract with an attorney in  
14 private practice.

15 This bill would regulate state agencies  
16 entering contingency fee contracts with private  
17 attorneys representing the state in litigation.

18  
19 A BILL  
20 TO BE ENTITLED  
21 AN ACT

22  
23 Relating to state agencies and private attorneys  
24 representing the state in litigation; to amend Section  
25 41-16-72 of the Code of Alabama 1975, to regulate contingency  
26 fee contracts.

27 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

3                   Section 2. Section 41-16-72 of the Code of Alabama  
4                   1975, is amended to read as follows:

5                   "§41-16-72.

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

11                  "(1)a. Except as otherwise provided herein,  
12                  attorneys retained to represent the state in litigation shall  
13                  be appointed by the Attorney General in consultation with the  
14                  Governor from a listing of attorneys maintained by the  
15                  Attorney General. All attorneys interested in representing the  
16                  State of Alabama may apply and shall be included on the  
17                  listing. The selection of the attorney or law firm shall be  
18                  based upon the level of skill, experience, and expertise  
19                  required in the litigation and the fees charged by the  
20                  attorney or law firm shall be taken into consideration so that  
21                  the State of Alabama receives the best representation for the  
22                  funds paid. Fees shall be negotiated and approved by the  
23                  Governor in consultation with the Attorney General. Maximum  
24                  fees paid for legal representation that does not involve a  
25                  contingency fee contract as defined in subparagraph f.1. of  
26                  subdivision (1), may be established by executive order of the  
27                  Governor.

1                   "Nothing in this article and nothing in Chapter 15  
2 of Title 36 modifies or repeals the exclusive authority of the  
3 governing boards of the public institutions of higher  
4 education to direct and control litigation involving their  
5 respective universities and to employ and retain legal counsel  
6 of their own choice, consistent with their broad powers of  
7 management and control set forth in Chapters 47-56 of Title 16  
8 and in the constitution. Provided further, nothing in this  
9 article modifies or repeals the authority of the Attorney  
10 General to direct and control litigation involving the state  
11 or any agency, department, or instrumentality of the state, or  
12 the authority of the Governor to appear in civil cases in  
13 which the state is interested.

14                   "b. Attorneys retained by any state purchasing  
15 entity to render nonlitigation legal services shall be  
16 selected by such entity from a listing of attorneys maintained  
17 by the Legal Advisor to the Governor. All attorneys interested  
18 in representing any purchasing state entity may apply and  
19 shall be included on the listing. The selection of the  
20 attorney or law firm shall be based upon the level of skill,  
21 experience, and expertise required for the services, but the  
22 fees charged by the attorney or law firm shall be taken into  
23 consideration so that such state entity shall receive the best  
24 representation for the funds paid. Fees for such services  
25 shall be negotiated by the state entity requiring the services  
26 and shall be subject to the review and approval of the

1 Governor or the Director of Finance when so designated by the  
2 Governor.

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

5 "d. This article shall not apply to the retention of  
6 experts by the state for the purposes of litigation, or  
7 avoidance of litigation.

8 "e. Nothing in this article shall be construed as  
9 altering or amending the Governor's authority to retain  
10 attorneys pursuant to Section 36-13-2, however, the Governor  
11 shall select such attorneys from three proposals received from  
12 attorneys included on the listing maintained by the Attorney  
13 General.

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

16 (i) Contingency Fee Contract. An agreement, express  
17 or implied, for litigation legal services of an attorney or  
18 attorneys, including any associated counsel, under which  
19 compensation is contingent in whole or in part upon the  
20 successful accomplishment or disposition of the subject matter  
21 of the agreement. The payment may be in an amount which either  
22 is fixed or is to be determined under a formula.

23 "(ii) Contracting Agency. The Governor, Attorney  
24 General, or director of a state agency, department, bureau,  
25 commission, authority, public corporation, or instrumentality  
26 of the State of Alabama that seeks to enter a contingency fee  
27 contract.

1           "2. The state may not enter into a contingency fee  
2 contract with any attorney or law firm unless the contracting  
3 agency makes a written determination prior to entering into a  
4 contingency fee contract that contingency fee representation  
5 is both cost-effective and in the public interest. Any written  
6 determination shall include specific findings for each of the  
7 following factors:

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

11           "(ii) The expected time and labor required; the  
12 novelty, complexity, and difficulty of the questions involved;  
13 and the skill requisite to perform the attorney services  
14 properly.

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

17           "(iv) The amount of experience desired for the  
18 particular kind of attorney services to be provided and the  
19 nature of the private attorney's experience with similar  
20 issues or cases.

21           "3. The state may not enter into a contingency fee  
22 contract that provides for the private attorney to receive an  
23 aggregate contingency fee, exclusive of expenses, in excess  
24 of:

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

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

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

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

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

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

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

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

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

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

25           "(iv) Any defendant that is the subject of the  
26 litigation may contact the lead government attorney or  
27 attorneys directly, without having to confer with contingency

1 fee counsel, unless directed to do otherwise by the lead  
2 government attorney for the litigation matter.

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

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

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

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

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



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

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

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

20 "(3) Professional services of architects, landscape  
21 architects, engineers, land surveyors, geoscience, and other  
22 similar professionals shall be procured in accordance with  
23 competitive, qualification-based selection policies and  
24 procedures. Selection shall be based on factors to be  
25 developed by the procuring state entity which may include,  
26 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.