

1 HB409  
2 198923-1  
3 By Representative Pringle  
4 RFD: State Government  
5 First Read: 11-APR-19

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8 SYNOPSIS: Under existing law, when an emergency  
9 affecting the public health, safety, convenience,  
10 or the economic welfare of the State of Alabama is  
11 declared by the Governor and the Attorney General,  
12 the professional services required by a state  
13 entity to alleviate the emergency situation may be  
14 procured from any qualified professional services  
15 provider without following competitive bidding  
16 procedures.

17 This bill would delete the exemption for  
18 convenience purposes.

19  
20 A BILL  
21 TO BE ENTITLED  
22 AN ACT

23  
24 To amend Section 41-16-72, Code of Alabama 1975,  
25 relating to competitive bidding on contracts for goods and  
26 services by state entities; to delete the exemption from  
27 competitive bidding procedures on the basis of convenience for

1 professional service contracts required by a state entity  
2 during a declared emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

4 Section 1. Section 41-16-72 of the Code of Alabama  
5 1975, is amended to read as follows:

6 "§41-16-72.

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

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

1 ~~subdivision (1)~~, may be established by executive order of the  
2 Governor.

3 "Nothing in this article and nothing in Chapter 15  
4 of Title 36 modifies or repeals the exclusive authority of the  
5 governing boards of the public institutions of higher  
6 education or public pension funds to direct and control  
7 litigation involving their respective universities or public  
8 pension fund and to employ and retain legal counsel of their  
9 own choice, consistent with their broad powers of management  
10 and control set forth in Chapters ~~47-56~~ 47 to 56, inclusive,  
11 of Title 16 and in the constitution, Chapter 25 of Title 16,  
12 and Chapter 27 of Title 36, respectively. Provided further,  
13 nothing in this article modifies or repeals the authority of  
14 the Attorney General to direct and control litigation  
15 involving the state or any agency, department, or  
16 instrumentality of the state, or the authority of the Governor  
17 to appear in civil cases in which the state is interested.

18 "b. Attorneys retained by any state purchasing  
19 entity to render nonlitigation legal services shall be  
20 selected by ~~such~~ the entity from a listing of attorneys  
21 maintained by the ~~Legal Advisor~~ legal advisor to the Governor.  
22 All attorneys interested in representing any purchasing state  
23 entity may apply and shall be included on the listing. The  
24 selection of the attorney or law firm shall be based upon the  
25 level of skill, experience, and expertise required for the  
26 services, but the fees charged by the attorney or law firm  
27 shall be taken into consideration so that ~~such~~ the state

1 entity shall receive the best representation for the funds  
2 paid. Fees for ~~such~~ services shall be negotiated by the state  
3 entity requiring the services and shall be subject to the  
4 review and approval of the Governor or the Director of Finance  
5 when so designated by the Governor.

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

8 "d. This article shall not apply to the retention of  
9 experts by the state for the purposes of litigation, or  
10 avoidance of litigation.

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

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

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

26 "(ii) Contracting Agency. The Governor, Attorney  
27 General, or director of a state agency, department, bureau,

1 commission, authority, public corporation, or instrumentality  
2 of the State of Alabama that seeks to enter a contingency fee  
3 contract.

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

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

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

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

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

24 "3. The state may not enter into a contingency fee  
25 contract that provides for the private attorney to receive an  
26 aggregate contingency fee calculated from the gross recovery

1 resulting from a ~~judgement~~ judgment or settlement in each  
2 action, exclusive of expenses, in excess of:

3 "(i) Twenty-two percent of any recovery of up to ten  
4 million dollars (\$10,000,000); plus

5 "(ii) Twenty percent of any portion of such recovery  
6 between ten million dollars (\$10,000,000) and twenty-five  
7 million dollars (\$25,000,000); plus

8 "(iii) Sixteen percent of any portion of such  
9 recovery between twenty-five million dollars (\$25,000,000) and  
10 fifty million dollars (\$50,000,000); plus

11 "(iv) Twelve percent of any portion of such recovery  
12 between fifty million dollars (\$50,000,000) and seventy-five  
13 million dollars (\$75,000,000); plus

14 "(v) Eight percent of any portion of such recovery  
15 between seventy-five million dollars (\$75,000,000) and one  
16 hundred million dollars (\$100,000,000); plus

17 "(vi) Seven and one-tenth (7.1) percent of any  
18 portion of such recovery exceeding one hundred million dollars  
19 (\$100,000,000).

20 "(vii) The aggregate fee paid to contingency fee  
21 counsel shall not exceed seventy-five million dollars  
22 (\$75,000,000) per action.

23 "4. All litigation expenses incurred by the private  
24 attorney shall be paid or reimbursed upon approval on a  
25 monthly basis upon presentation of documentation of the  
26 expenses to the contracting agency.

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

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

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

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

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

21           "(iv) After giving reasonable notice to the  
22 contingency fee counsel, any defendant that is the subject of  
23 the litigation may contact the lead government attorney or  
24 attorneys directly unless directed to do otherwise by the lead  
25 government attorney for the litigation matter. Contingency fee  
26 counsel ~~shall have the right to~~ may participate in ~~such the~~  
27 discussions with the lead government attorney or attorneys

1 unless, after consultation with contingency fee counsel, the  
2 lead government attorney agrees to ~~such~~ those discussions  
3 without contingency fee counsel being present.

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

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

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

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

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

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

10 "10. Any contingency fee paid to a private attorney  
11 or law firm shall be paid from the State Treasury from the  
12 funds recovered as a result of the contingent fee contract  
13 within ~~thirty~~ 30 days of receipt thereof unless ordered to do  
14 otherwise by a court with jurisdiction over the litigation  
15 subject to the contingency contract.

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

22 "(3) Professional services of architects, landscape  
23 architects, engineers, land surveyors, geoscience, and other  
24 similar professionals shall be procured in accordance with  
25 competitive, qualification-based selection policies and  
26 procedures. Selection shall be based on factors to be

1 developed by the procuring state entity which may include,  
2 among others, the following:

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

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

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

12 "d. Availability to and familiarity with the project  
13 locale.

14 "e. Proposed project management techniques.

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

1 approval of the Director of the Alabama Building Commission  
2 and the Governor.

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

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

1           "(6) Should an emergency affecting the public  
2 health, safety, ~~convenience,~~ or the economic welfare of the  
3 State of Alabama so declared in writing under oath to the  
4 Governor and the Attorney General by the state entity  
5 requiring the professional services arise, the professional  
6 services required to alleviate the emergency situation may be  
7 procured from any qualified professional service provider  
8 without following the process or procedure required by this  
9 article.

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

1 of Education shall follow the provisions of law applicable to  
2 local boards of education for services related to the local  
3 board of education subject to intervention. The Alabama  
4 Medicaid Agency shall not be subject to the provisions of this  
5 article requiring the process set forth herein for the  
6 selection of professional service providers for contracts with  
7 physicians, pharmacists, dentists, optometrists, opticians,  
8 nurses, and other health professionals which involve only  
9 service on agency task forces, boards, or committees.

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

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

21 Section 2. This act shall become effective on the  
22 first day of the third month following its passage and  
23 approval by the Governor, or its otherwise becoming law.