SB418

138053-2

By Senator Ward

RFD: Judiciary

First Read: 15-MAR-12
SYNOPSIS: Under existing law, attorneys retained to represent the state in litigation are required to be appointed by the Attorney General in consultation with the Governor. Existing law does not regulate the state agencies entering into a contingency fee contract with an attorney in private practice.

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

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 State of Alabama may apply and shall be included on the listing. The selection of the attorney or law firm shall be based upon the level of skill, experience, and expertise required in the litigation and the fees charged by the attorney or law firm shall be taken into consideration so that the State of Alabama receives the best representation for the funds paid. Fees shall be negotiated and approved by the Governor in consultation with the Attorney General. Maximum fees paid for legal representation may be established by executive order of the Governor.

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

"b. Attorneys retained by any state purchasing
entity to render nonlitigation legal services shall be
selected by such entity from a listing of attorneys maintained
by the Legal Advisor to the Governor. All attorneys interested
in representing any purchasing state entity may apply and
shall be included on the listing. The selection of the
attorney or law firm shall be based upon the level of skill,
experience, and expertise required for the services, but the
fees charged by the attorney or law firm shall be taken into
consideration so that such state entity shall receive the best
representation for the funds paid. Fees for such services
shall be negotiated by the state entity requiring the services
and shall be subject to the review and approval of the
Governor or the Director of Finance when so designated by the
Governor.
"c. This article shall not apply to the appointment by a court of attorneys or experts.

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

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

"f. 1. As used in this paragraph, the term "contracting agency" refers to the Governor, Attorney General, or director of a state agency, department, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama that seeks to enter a contingency fee contract.

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

"(i) Whether there exist sufficient and appropriate legal and financial resources within the state to handle the matter.
"(ii) The expected time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

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

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

3. If the contracting agency makes the determination described in subsection (a), the contracting agency shall request proposals from private attorneys to represent the department on a contingency fee basis, unless the contracting agency determines that requesting proposals is not feasible under the circumstances and sets forth the basis for this determination in writing.

4. The state may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

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

"(ii) Twenty percent of any portion of such recovery between ten million dollars ($10,000,000) and fifteen million dollars ($15,000,000); plus
"(iii) Fifteen percent of any portion of such recovery between fifteen million dollars ($15,000,000) and twenty million dollars ($20,000,000); plus

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

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

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

"5. The state may not enter into a contract for contingency fee attorney services without written approval of the Governor and unless all of the following requirements are met throughout the contract period and any extensions thereof:

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

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

"(iii) A government attorney or attorneys retains veto power over any decisions made by outside counsel.

"(iv) Any defendant that is the subject of the litigation may contact the lead government attorney or attorneys directly, without having to confer with contingency fee counsel.
"(v) A government attorney with supervisory authority for the case shall attend all settlement conferences.

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

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

"7. Copies of any executed contingency fee contract and the contracting agency's written determination to enter into a contingency fee contract with the private attorney and any payment of any contingency fees shall be posted online pursuant to Section 41-4-65(b), Code of Alabama 1975.

"8. Any private attorney under contract to provide services to the state on a contingency fee basis, from the inception of the contract until at least four years after the contract expires or is terminated, shall maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney services. The private attorney shall make all the records available for inspection and copying upon request. In addition, the private attorney shall maintain
detailed contemporaneous time records for the attorneys and
paralegals working on the contract in increments not greater
than 1/10 of an hour and shall promptly provide these records
to the Governor, Attorney General, or contracting agency, upon
request.

"9. Any contingency fee paid to a private attorney
or law firm shall be paid from the State Treasury from the
funds recovered as a result of the contingent fee contract.

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

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

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

"b. Resources available to perform the work,
including any specialized services within the specified time
limits for the project.
"c. Record of past performance, quality of work, ability to meet schedules, cost control, and contract administration.

d. Availability to and familiarity with the project locale.

e. Proposed project management techniques.

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

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

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

"(6) Should an emergency affecting the public health, safety, convenience, or the economic welfare of the State of Alabama so declared in writing under oath to the Governor and the Attorney General by the state entity requiring the professional services arise, the professional services required to alleviate the emergency situation may be procured from any qualified professional service provider without following the process or procedure required by this article.
"(7) The process set forth herein for the selection of professional service providers shall not apply to the Legislature, the Alabama State Port Authority, or to colleges and universities governed by a board of trustees or by the Department of Postsecondary Education. The State Department of Education shall not be subject to the provisions of this article, requiring the process set forth herein for the selection of professional service providers, except for the future acquisition of professional services in support of computer technology on a statewide basis which exceeds the amount of expenditures set forth within this chapter. However, if a state agency or department is able to provide the necessary computer networking services, then the services shall be provided by the agency or department without being contracted to an outside provider. In the event the State Department of Education has intervened into the financial operations of a local board of education, the State Department of Education shall follow the provisions of law applicable to local boards of education for services related to the local board of education subject to intervention. The Alabama Medicaid Agency shall not be subject to the provisions of this article requiring the process set forth herein for the selection of professional service providers for contracts with physicians, pharmacists, dentists, optometrists, opticians, nurses, and other health professionals which involve only service on agency task forces, boards, or committees.
"(8) Under any contract letting process in this section, all requests for proposals from any state entity purchasing professional services shall be sent to all professional service providers regardless of race that have notified the state of their interest in receiving state business.

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

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