

1 HB678  
2 138053-2  
3 By Representatives DeMarco, Sanderford, Ball, Johnson (W),  
4 Farley, Greeson, McClurkin, Treadaway, Carns, Payne,  
5 Johnson (R) and Beckman  
6 RFD: Judiciary  
7 First Read: 10-APR-12

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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 may be established by  
25                  executive order of the Governor.

26                  "Nothing in this article and nothing in Chapter 15  
27                  of Title 36 modifies or repeals the exclusive authority of the

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

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

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

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

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

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

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

24            "(i) Whether there exist sufficient and appropriate  
25 legal and financial resources within the state to handle the  
26 matter.

1           "(ii) The expected time and labor required; the  
2 novelty, complexity, and difficulty of the questions involved;  
3 and the skill requisite to perform the attorney services  
4 properly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22           "(iv) Any defendant that is the subject of the  
23 litigation may contact the lead government attorney or  
24 attorneys directly, without having to confer with contingency  
25 fee counsel.

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           "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 5.

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

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



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

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

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

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

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

25 "b. Resources available to perform the work,  
26 including any specialized services within the specified time  
27 limits for the project.

1            "c. Record of past performance, quality of work,  
2            ability to meet schedules, cost control, and contract  
3            administration.

4            "d. Availability to and familiarity with the project  
5            locale.

6            "e. Proposed project management techniques.

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

22           "(4) The Director of Finance, through the Division  
23           of Purchasing of the Department of Finance, shall establish  
24           and maintain lists of professional service providers, other  
25           than those specifically named in this section, which may be  
26           required from time to time by any state agency, department,  
27           board, bureau, commission, authority, public corporation, or

1 instrumentality. When such professional services are needed,  
2 the purchasing state entity shall solicit proposals from the  
3 professional service providers desiring to receive requests  
4 for proposals. The purchasing state entity shall select the  
5 professional service provider that best meets the needs of the  
6 purchasing entity as expressed in the request for proposals.  
7 Price shall be taken into consideration. In the event the fees  
8 paid to the selected professional service provider exceed by  
9 10 percent the professional service fee offered by the lowest  
10 qualified proposal, the reasons for selecting a professional  
11 service provider must be stated in writing, signed by the  
12 director of the purchasing state entity, and made a part of  
13 the selection record.

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

19 "(6) Should an emergency affecting the public  
20 health, safety, convenience, or the economic welfare of the  
21 State of Alabama so declared in writing under oath to the  
22 Governor and the Attorney General by the state entity  
23 requiring the professional services arise, the professional  
24 services required to alleviate the emergency situation may be  
25 procured from any qualified professional service provider  
26 without following the process or procedure required by this  
27 article.

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

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

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

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