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**Professional Services Contracts
with
Mississippi Governmental Entities
and the
Revamped Personal Services Contract Review Board**

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APPENDIX A - Agencies under PSCRB Purview

Professional Services Contracts with Mississippi Governmental Entities and the Revamped Personal Services Contract Review Board

I. Mississippi’s Personal Services Contract Review Board (“PSCRB”)

The Personal Services Contract Review Board plays an integral role in how personal services are procured for the State of Mississippi. In 1997, the Legislature established the Board (hereinafter “PSCRB”), and authorized it to “[p]romulgate rules and regulations governing the solicitation and selection of contractual services personnel” Miss. Code Ann. § 25-9-120(3)(a) (1972, as amended). The purpose of the Personal Service Contract Review Board Rules and Regulations is to set forth rules and regulations, along with other pertinent information, that agencies should follow in the procurement of personal services.

The policies and procedures of the PSCRB apply only to those agencies which fall under its authority. With the exception of the Mississippi Department of Transportation and contracts entered into for computer or information technology-related services governed by the Mississippi Department of Information Technology Services, agencies under the authority of the PSCRB include those agencies under the authority of the Mississippi State Personnel Board (hereinafter “MSPB”). See Appendix A hereto.¹ There is a caveat to this description hereafter.

It is worth noting that the Rules and Regulations specifically state that they “shall serve as a source of information for contractors, instructing them as to the proper procedures that must be followed in doing business with the State of Mississippi.” This is further discussed below in Final Caveats.

The PSCRB was established to ensure that quality services are provided at reasonable prices, with terms that are favorable to the State and with limited risk of liability. The PSCRB develops the policies and procedures that ensure that personal services are obtained in a competitive manner, and approve contracts in excess of \$75,000.

The PSCRB is responsible for administering standards for the issuance of invitations for bid and requests for proposals, and the award of those bids. It also oversees the consideration of costs and quality of services proposed, the contract negotiations, and the administrative monitoring of contract performance by agencies, as well as the necessary steps in terminating a contract.

¹ Rule 1-201.01 defines an “Agency” as “any state board, commission, committee, council, department or unit thereof created by the constitution or statutes if such board, commission, committee, council, department, unit or the head thereof is authorized to appoint subordinate staff by the constitution or statute, except a legislative or judicial board, commission, committee, council, department or unit thereof, Institutes of Higher Learning and the Mississippi Department of Transportation.”

Administering standards for the procurement of personal and professional services through the use of emergency and sole-source contracts is also a responsibility of the PSCRB.²

The present members of the PSCRB are Chairman Deanne Mosley (Executive Director of the State Personnel Board); Vice-Chair Bill Morgan, Jeffrey Belk, Tony Greer and Rita Wray, with Kevin Upchurch (DFA Director) as an ex-officio member. The Personnel Board is always the chair of the Board with the other four (4) voting members being appointed, two each, by the Governor and Lt. Governor.

The 2015 Mississippi Legislature, in response to recent revelations of misconduct, primarily in the Department of Corrections and primarily in regard to single-source/sole-source contracting, made significant changes to the to the State of Mississippi's Personal Services Contract Review Board in 2015 *Miss. ALS* 431; 2015 *Miss. Gen. Laws* 431; 2015 *Miss. H.B.* 825.

In summary, the bill generally known as **HB 825** provided for the following changes:

- revised the membership of the personal service contract review board;
- prohibited any person, employee or owner of a company that receives any grants, procurements or contracts subject to approval under this section from being appointed to the personal service contract review board;
- removed certain exemptions of personal services contracts from board review;
- reduced the threshold amount of expenditure in contracts that require approval by the board;
- required certain reports to be submitted to the chairmen of the Accountability, Efficiency and Transparency Committees of the Senate and House of Representatives;
- authorized and directed the Personal Service Contract Review Board to develop and issue regulations to define standards for contract employees that are in conformity with Federal Internal Revenue Service regulations;
- required certain recordkeeping for all sole source procurements for personal and professional services;

² Mississippi Personnel Board website: Personal Services Contract Review Board; <http://www.mspb.ms.gov/personal-service-contract-review-board.aspx>

- created a new section requiring the PEER Committee to evaluate on a biennial basis the procurement process utilized by all state agencies;
- amended §25-1-100, *Mississippi Code of 1972*, to provide that contracts for personal and professional services awarded or executed by the Department of Information Technology Services and the Department of Transportation shall not be exempt from the *Mississippi Public Records Act*;
- amended §26-61-9, *Mississippi Code of 1972*, to provide that certain provisions of all procurement contracts awarded by state agencies shall not be deemed to be a trade secret or confidential information under the *Mississippi Public Records Act*;
- amended §§27-104-155 and 27-104-161, *Mississippi Code of 1972*, to clarify that personal and professional service contracts shall be included on the *Mississippi Transparency Website*;
- amended §§5-8-3 and 5-8-7, *Mississippi Code of 1972*, to provide that any individual who performs both consulting and lobbying services for a public entity shall be considered a lobbyist and shall not be exempt from any lobbying law;
- and for related purposes.

The primary portions of HB 825 are contained in Section 25-9-120 of the Mississippi Code of 1972, and §25-9-120(3)(a) and (b) expresses the PSCRB's authority.

(3) The Personal Service Contract Review Board shall have the following powers and responsibilities:

(a) Promulgate rules and regulations governing the solicitation and selection of **contractual services personnel including personal and professional services** contracts for any form of consulting, policy analysis, public relations, marketing, public affairs, legislative advocacy services **or any other contract that the board deems appropriate for oversight**, *with the exception* of any personal service contracts entered into for computer or information technology-related services governed by the Mississippi Department of Information Technology Services, any personal service contracts entered into by the Mississippi Department of Transportation, and **any contract for** attorney, accountant, auditor, architect, **engineer**, and utility rate expert services. Any such rules and regulations shall provide for maintaining continuous internal audit covering the activities of such agency affecting its revenue and expenditures as required under Section 7-7-3(6)(d), Mississippi Code of 1972. Any rules and regulation changes related to personal and professional services contracts that may be proposed by the Personal Service Contract Review Board shall be submitted to the Chairmen of

the Accountability, Efficiency and Transparency Committees of the Senate and House of Representatives at least fifteen (15) days prior to the board voting on the proposed changes, and such rules and regulation changes, if adopted, shall be promulgated in accordance with the Mississippi Administrative Procedures Act;

(b) Approve all personal and professional services contracts involving the expenditures of funds in excess of Seventy-five Thousand Dollars (\$ 75,000.00);

(c) Develop mandatory standards with respect to contractual services personnel which require invitations for public bid, requests for proposals, record keeping and financial responsibility of contractors. The Personal Service Contract Review Board shall, unless exempted under this paragraph (c) or under paragraph (d) or (j) of this subsection (3), require the agency involved to advertise such contract for public bid, and may reserve the right to reject any or all bids.³

Section 3(a) states that the PSCRB will establish rules and regulations “governing the solicitation and selection of contractual services personnel,” and provides for certain exceptions to this rule making, notably:

- any personal service contracts entered into for computer or information technology-related services governed by the Mississippi Department of Information Technology Services,
- any personal service contracts entered into by the Mississippi Department of Transportation, and
- any contract for attorney, accountant, auditor, architect, *engineer*, and utility rate expert services.

What Personal/Professional Services Contracts are Subject to PSCRB Regulation and Approval?

Are Engineering Contracts Subject to PSCRB Regulation and Approval?

Section 3(b) begins with the broad grant of jurisdiction that the Board shall approve *all* personal and professional service contracts over \$75,000.⁴ By its terms, §3(b) *exempts* personal and

³ Subsections of §25-9-120(c) provide that any agency may seek relief from the PSCRB and its requirements concerning the use of competitive bidding as a procurement method.

⁴ *MS. AG Op. No. 2008-00233, Gore* (June 4, 2008), 2008 Miss. AG LEXIS 193 notes that, “This office has previously opined that contracts of local governmental entities are not subject to review by the Personal Services Contract Review Board. *MS AG Op., Meadows* (Oct. 26, 2001).”

professional services contracts with State agencies which *do not exceed \$75,000* from Board approval. Section 3(a) *excepts the solicitation and selection* of engineers and other professionals (as well as contracts with MDOT and ITS) *from the PSCRB's rules* and regulations. However, exempting professional services from the rules and regulations of the Board does not necessarily seem to exclude such contracts from the need for approval by the Board if they exceed \$75,000. By the same token, unless exempted from rules and regulations under 3(a), it would appear that the PSCRB may (or may not, if it chooses) provide for competitive procurement for contracts under \$75,000. This statute is not as clear or free of ambiguity as it might be.

At least one opinion of the Attorney General addresses this issue with regard to a previous version of the statute, though the earlier version had essentially identical language. Therein, the Attorney General opined that both personal service contracts under \$75,000 and those excepted in §3(a) (*e.g.*, certain professional service contracts, including those with engineers) were not subject to Board approval.

The Personal Service Contract Review Board's authority over contracts for contractual workers and contracts for independent contractors is the same. However, we note that *certain types of contracts are excepted from the requirement for board approval in Section 25-9-120(3)(a)* and other contracts of \$100,000.00 or less are not subject to board approval under Section 25-9-120(3)(b).

MS AG Op. No. 2009-00574, Fitch (October 9, 2009); 2009 *Miss. AG LEXIS* 363.

While this writer does not necessarily agree with the Attorney General's conclusion that the exceptions to rulemaking in §3(a) translate to exemptions from Board approval under §3(b), that is the apparent position of the Attorney General, at least until the question is asked again.⁵

A recent opinion of the Attorney General may indicate some re-trenching of the AG's opinion on the scope of the "exemptions" in 3(a) and (b). While the *Fitch Opinion* states that, "contracts of \$100,000.00 or less are not subject to board approval under Section 25-9-120(3)(b)," that does not apparently, necessarily except such contracts from the rules and regulations of the PSCRB regarding advertising and selection of contractors for personal services. According to the Attorney General, it is within the authority of the Board to decide whether or not contracts below the current \$75,000 threshold will be exempted from competitive bidding requirements. Thus, it must be concluded that until the Board exempts contracts below \$75,000 from

⁵ Opinions of the Attorney General do not have the force of law. They are just that, opinions, and they only protect the particular party to whom they are written from personal liability. This issue is discussed later in this paper.

competitive bidding requirements, they remain subject thereto. The only caveat being the “exemptions”, if that is what they are, in §3(a) for certain professionals, MDOT and ITS.

In response to your second inquiry, Sections 25-9-120(a) and (c)(i) specifically authorize the PSCRB to develop rules, regulations and standards with respect to the solicitation of contractual services personnel. In addition, approval by the PSCRB of all personal and professional services contracts involving the expenditures of funds in excess of Seventy-five Thousand Dollars (\$75,000.00) is required pursuant to Section 25-9-120. Thus, the PSCRB is authorized to develop rules and regulations with respect to the solicitation of contractual services personnel, *which may include an exemption from competitive procurement* of contracts involving expenditures of funds in an amount less than Seventy-five Thousand Dollars (\$75,000.00).

MS AG Op. No. 2015-00361, Mosley (October 23, 2015); 2015 *Miss. AG LEXIS* 224.

Rule 3-101.02 of the PSCRB sets forth **exemptions from solicitation and approval requirements**. The following services are listed in the Rule as exempt from the purview of the PSCRB: (a) Accountant; (b) Dentist; (c) Actuary; (d) *Engineer*; (e) Architect; (f) Physician; (g) Attorney; (h) Utility rate expert services; (i) Auditor; (j) Veterinarian; and, (k) any contracting authority exempt by State statute (Miss. Code Ann. § 25-9-120 (1972, as amended)) including, but not limited to- 1) computer or information technology related services governed by the Mississippi Department of Information Technology Services; 2) personal service contracts entered into by the Mississippi Department of Transportation; and, 3) contracts for equipment repairs governed by *Miss. Code Ann.* §31-7-13(1972, as amended).

Rule 3.101.02 asserts that it is in accordance with *Miss. Code Ann.* §25-9-120(3)(a) (1972, as amended) and as determined by the PSCRB. This places the Board in agreement with the AG’s *Fitch Opinion* in finding that §3(a) actually creates exemptions from PSCRB approval rather than just exemption from the PSCRB’s rules and regulations.

In addition, Rule 3.101.02 provides that service contracts of \$75,000 or less do not require approval of the PSCRB. Procurement of such contracts is to follow the procedures of Rule 3-204 (Small Purchases).

Acquisition of Services Under the \$75,000 Threshold.

The Regulations direct that acquisitions of services under the threshold amount, now \$75,000, be pursuant to §3-204, Small Purchases. If Small Purchases procedures are not used, Rule 3-204.02.1 requires that one of the other methods of selection set forth in Rule 3-201 be used.

For Small Purchases between \$50,000 and \$75,000, "no less than three (3) sources shall be solicited to submit written responses that are recorded and placed in the procurement file," which shall include (a) a statement of price; (b) terms of the agreement; (c) description of services offered by the contractor to the agency; and, (d) name, address and telephone number of the offeror. The award "shall be made to the business offering the lowest and best bid or proposal." In the event three written responses are not obtained, the agency shall include a memo to the procurement file explaining why this was not accomplished. Rule 3-204.03.1

Rule 3-204.04 governs purchases of less than \$50,000 and requires that the Agency Head adopt "operational procedures . . . [which] shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency." No approval by the PSCRB is required for these purchases. Nevertheless, revised §25-9-120(3)(c)(ii) also requires that the PSCRB and the Agency "ensure open, transparent procedures for making a selection." Such procedures shall include, but are not be limited to, "qualifications based selection or requests for qualifications."

Based on an analysis of Attorney General's opinions, it would appear that *State agency contracts with engineers, and particularly those with MDOT and ITS do not require competitive bidding procedures or approval by the Personal Services Contract Review Board*. However, **CAUTION** should be exercised in this, as 1) there is no case law governing this issue, 2) previous Attorney General opinions are no protection for anyone to whom they are not directly addressed, 3) the language of the statute is not clear, at least in this writer's interpretation, and 4) it cannot necessarily be concluded that the provision excluding certain personal/professional service contracts from PSCRB regulation necessarily exempts those contracts from approval by the PSCRB to the extent they exceed \$75,000.⁶

Breadth of PSCRB Rules and Rulemaking.

The *Fitch Opinion* also notes that the Board may make rules and regulations whereby certain kinds of contracts do not have to be submitted to the Board beforehand or later.

It is the opinion of this office that the Personal Service Contract Review Board's authority over contracts for contractual workers and contracts for independent contractors is the same. There is **no statutory requirement** that contracts entered into by agency heads, **under circumstances prescribed** by the Personal Service

⁶ If professional engineering services and consultation relating to energy efficiency projects under §31-7-14 do not involve the purchase of commodities, equipment, or furniture or the performance of construction, public advertisement and bids are not required; such contracts may come under the jurisdiction of the Personal Service Contract Review Board, pursuant to §25-9-120. *MS AG Op.* No. 98-0631, Williams (October 9, 1998); 1998 *Miss. AG LEXIS* 493. This follows the rule that such professional services are not subject to public advertisement and bids wherein local governments, as opposed to State government, is involved.

Contract Review Board but without the prior approval of the board, be submitted for board approval after the fact. However, the **board, in its discretion, may require submission** of such contracts for later approval **by the board by adopting a regulation or policy to that effect.**

The *Fitch Opinion* goes on to opine on §3(d), which allows the PSCRB to make rules which would allow agency heads to make certain contracts without prior approval. This is an obvious exception to §3(b)'s requirement that the Board "approve all personal and professional services contracts involving the expenditures of funds in excess of Seventy-five Thousand Dollars (\$75,000.00)."

Section 25-9-120(3)(d) authorizes the Personal Service Contract Review Board to "prescribe circumstances whereby agency heads may enter into contracts for personal and professional services without receiving prior approval from the Personal Service Contract Review Board." The question of whether such contracts must then be submitted to the Personal Service Contract Review Board would *depend on the wording of the regulation or policy adopted by the board. There is no statutory requirement that such contracts be submitted for board [*7] approval, however, the board may require submission by regulation or policy.*

This, then, would seem to further illustrate the rather broad authority that the PSCRB has over personal and professional service contracts, particularly through the adoption of regulations and policies concerning contracts within its jurisdiction. Thus, the rules and regulations of the PSCRB are particularly relevant to any question revolving contracting with State agencies.

New Rules and Regulations in the Offing?

Currently, the PSCRB Rules and Regulations published on the State Personnel Board's website are those which became effective on January 16, 2015, prior to the most recent amendment to the statute, HB 825. This writer has been unable to find any amendments to these Rules and Regulations to conform them with the amended statute, though a significant portion of the previous statutory language was brought forward and certain changes, such as the threshold amount for approval being reduced from \$100,000 to \$75,000, are easily made by implication. The existing rules, then, may be consulted and adapted to current situations, but an eye must be kept to any contradiction between the amended statute and the old rules, as the provisions of the amended statute will certainly prevail over the older regulations. It may reasonably be assumed that such amended or revised rules and regulations will be forthcoming in the relatively near future. Nevertheless, the PSCRB Rules and Regulations may be found on the State Personnel Board's website: <http://www.mspsb.ms.gov/personal-service-contract-review-board/pscrb-rules-regulations.aspx>

What Competitive Procurement Methods are Acceptable?

In her October 2015 request to the Attorney General (referred to above), Personnel Board Executive Director Deanne Mosley (chair of the PSCRB) also sought an opinion from the Attorney General as follows:

I respectfully request an official opinion from your office to clarify whether these three prescribed competitive procurement methods (**invitations for bid, requests for proposals, and requests for qualifications**) [*4] satisfy the requirement in *Miss. Code Ann.* Section 25-9-120 that an agency use "competitive bidding" as a procurement method.

MS AG Op. No. 2015-00361, Mosley (October 23, 2015); 2015 *Miss. AG LEXIS* 224.

According to the Attorney General, "public bid" and "competitive bidding" as contemplated in *Miss. Code Ann.* (1972) Section 25-9-120 "include invitations for bids, requests for proposals, requests for qualifications and any other generally-accepted method of competitive procurement." Thus, to the extent personal and professional services contracts are subject to PSCRB jurisdiction, their solicitation and approval must be subject to a generally accepted method of competitive procurement, subject to, rules or regulations of the PSCRB excepting or exempting them from such requirements.

PSCRB Rule 3-201 sets forth the acceptable methods of source selection, as determined by the PSCRB:

- Competitive Sealed Bidding, Section 3-202;
- Competitive Sealed Proposals, Section 3-203;
- Small Purchases, Section 3-204;
- Sole-Source Procurement, Section 3-205; or,
- Emergency Procurement, Section 3-206.

Sole Source Procurement.

Rule 3-205 is the current rule addressing sole source procurement, *i.e.*, where there is only one source for the required service and there will be no competition. However, it is problematic whether these rules can be applied at all in their present form since one of the major overhauls in the 2015 Amendments (HB 825) was with regard to sole source procurement which appears to have been a major issue at the heart of the problems with the Mississippi Department of Corrections which led to the adoption of that legislation. The new statute governs over the old rules. For the present, and until new Rules and Regulations are adopted, it is recommended that any attempt at sole source procurement rely on the provisions of present §25-9-120(2)(j), which sets forth extensive procedures different for the current regulations and the former statute.

List of State Agencies Under PSCRB Jurisdiction.

Also note that the PSCRB has published a list of Agencies under PSCRB Purview. (See Appendix A attached hereto for the current list.) If work is being done for one of these agencies you will want to consult the PSCRB regulations and satisfy yourself that any contract with the agency for personal or professional services, whether you are the contractor/professional, or whether you will be involved in obtaining or supervising obtaining such services comply with current PSCRB regulations. Presumably if a State agency is not on this list it is not subject to the PSCRB. However, cautious contractors will not rely on the absence of an agency from that list if the agency is otherwise within the description of the PSCRB's jurisdiction.

Pre-Approved Vendors.

Section 25-9-120(3)(d) makes provision for the PSCRB to create a list of preapproved vendors, i.e., a state contract list for personal service vendors. This language was brought forward from the previous version of the statute.

The Personal Service Contract Review Board may establish a preapproved list of providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board;

There is presumably no statutory limitation on what services could be placed on the list. Currently the PSCRB's website lists security service vendors, janitorial services vendors, nursing services vendors, temporary staffing vendors, background screening vendors and on-site mobile shredding service vendors.

Retroactive Approval of Contracts.

Periodically the question may arise as to whether or not a contract already entered into required PSCRB approval. *MS AG Op.* No. 1999-0272, Stringer (June 25, 1999) (1999 *Miss. AG LEXIS* 204) directly addresses this question.

Finally, in answer to your last question as to the legality of approving Contract Request 4088 for which service had already begun, the Attorney General's Office previously opined in 1993 in an opinion to the State Personnel Board, that the Personnel Board could approve [*5] a legal services contract previously entered into by a state agency even when the services had already begun being provided. We *cautioned* however that *any agency that entered into such an arrangement did so at its own risk without any*

assurances that the Board would also agree with the decision.

The Legislature subsequently enacted legislation establishing the Personal Service Contract Review Board and has given that entity broad supervision over personal service contracts. That Board has the authority to develop standards to which state agencies must adhere when entering personal services contracts. **In the absence of a legislative prohibition against the Review Board giving retroactive approval to contracts, this Office is unwilling to opine that the Review Board has no such authority.** We feel this is a matter best left to the discretion of the Review Board, the entity charged by the Legislature with overseeing and managing this subject matter.

The 1999 *Stringer Opinion* also notes that it is the AG's opinion that it is "not legally possible to modify a contract with a state agency which has already expired by its own terms. The parties may, of course, enter into a new contract on the same terms after satisfying all legal requirements." This latter sentence is both instructive and useful and may also apply to the next section of this discussion as to subsequent amendments to contracts.

Subsequent Amendment of Contracts.

In 2003 the Attorney General issued another opinion concerning amendments to contracts subsequent to their adoption. In this instance MDHS sought approval of an increase in rate per mile for their transportation contracts which were originally approved by this Board. According to MDHS, it "found no evidence that this rate increase is contemplated by the original Request for Proposal (RFP) or the original Contract." The Attorney General found that such an amendment was violative of Mississippi's Constitution.

Article 4, Section 96 of the Constitution of 1890 provides:

The legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrections.

In *Clark v. Miller*, 105 So. 502, 506 (1925), the Supreme Court held that compensation paid by the Yazoo Mississippi Levee Board to a contractor for building a levee, in excess of that provided by

contract, was prohibited by *Const.1890*, [*3] *Section 96*, and the excess funds paid could be recovered from the contractor by the levee board or state revenue agent.

Further, in *Farrish Gravel Company v. Mississippi State Highway Commission*, 458 So. 2d. 1066, 1069 (1984), the Supreme Court held that the constitutional section providing that the legislature shall never grant extra compensation to any contractor after service is rendered or contract made is controlling on the legislature and any state agency created by the legislature.

Therefore, this office is of the opinion that the proposed modification of a Department of Human Services contract increasing the rate per mile in their transportation contract is a grant of "extra compensation" within the plain meaning of Article 4, Section 96 of the Constitution of 1890 and is clearly prohibited.

MS AG Op. No. 2003-0081, Stringer (March 10, 2003); 2003 *Miss. AG LEXIS* 299

Subsequently, the PSCRB adopted the following regulations in regard to contract modifications.

Rule 1-201.01(h)

Contract Modification means *any written alteration* in contract requirements, deliverables, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

Rule 7-109 MODIFICATIONS

A request to modify an existing PSCRB-approved contract is to be submitted to the PSCRB at least 15 working days prior to a PSCRB meeting date which precedes the modification effective date. Any request for exception to this deadline must follow the same procedure as outlined in 7-105 (Deadline Exception Requests). *Modifications shall not grant extra compensation, fee, or allowance to any contractor after service is rendered or contract is made, unless contemplated within the contract itself or unless the scope of services is increased.* The extension of a contract is considered a modification wherein the specified contractual services have not been completed by the end date stipulated in the original terms of the contract. Modifications cannot be made to expired contracts. (Emphasis supplied)

7-115 EXECUTED CONTRACTS

After the approval of a contract by the PSCRB, the contract may be executed by the agency and the vendor and a copy of the executed contract must be electronically submitted to the PSCRB as soon as practicable. The executed contract must be identical to the proposed contract approved by the PSCRB. *If a change is to be made to the contract after approval by the PSCRB but before execution, the change must be brought before the PSCRB for approval.*

If confronted with this issue and a real need for a contract modification, reference to the 1999 Stringer Opinion to the effect that, “parties may, of course, enter into a new contract on the same terms after satisfying all legal requirements.” It might be necessary to go through procurement all over again, whatever more or less may be required, but it is an available route.

In addition, be aware that Rule 2-103.02 Discretionary Authority provides, “The PSCRB shall have the discretion to grant exceptions to these regulations when it is determined that it is in the best interest of the State to do so.”

Final Caveats.

PSCRB is in transition right now. The 2015 revised statute creates a number of new procedures and protections, especially in the area of sole source contracting, and new regulations have not yet been adopted to conform with the amended statute. It may be difficult or impossible to reconcile regulations, practices or procedures with the revised statute. Great care and caution should be taken with any matter which is or may be within the purview of the PSCRB.

Remember that a contractor with State is charged with knowledge of the law and its requirements and has an affirmative duty to see that they are complied with. Relying upon an agency’s practices or representations may not be enough to protect you. It may prohibit you from getting paid.

The recent Mississippi Supreme Court opinion in *Wellness, Inc. v. Pearl River County Hospital*, No. 2014-CA-01696-SCT (MS. Supreme Court, November 19, 2015) illustrates the problem and the risk. The particulars of Wellness’ contract were not properly or adequately spread upon the Hospital board’s minutes. In disallowing payment of Wellness, the Court stated,

Wellness had a clear and well-established duty to ensure that sufficient terms of its contract with the hospital were spread upon the Board's minutes. Its failure to fulfill its own duty does not entitle it to an exception from the enforcement of a well-established policy that allows members of the tax-paying public to consult a Board's minutes to "see what was actually

done." *Lee County*, 174 So. at 77. "[T]he importance of the public policy involved will be the overriding factor in such disputes *even when the rule may work an apparent injustice*." *Butler*, 659 So. 2d at 582.⁷

Contractors who deal with a public entity are charged with notice of the extent and limitations of the authority of the public body and with notice of the way the public body must do things. A contractor who fails to ensure that both the authority and mechanism for his/her employment or that which he/she oversees in anyway is at serious risk of both the inability to get paid for its work as well as the possible creation of liability over and above its fees for its errors.

It should also be noted that *Miss. Code Ann.*, §31-7-57 (1972, as amended), holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of law. See also PSCRB Rule 3-101.03.

No professional wants to “get sideways” with a client, much less a governmental client, over matters which diligence and awareness could avoid. Engineers should be aware of the existence of the Personal Services Contracts Review Board, its rules, regulations and governing statute and keep them in mind whenever working for a State agency, whether as to the engineer’s own contract or those it may be assisting in obtaining or administering. It is always much easier and much less expensive to spend a little additional time and effort on the front end rather than to try to fix a problem later.

II. Definitions of “Professional Services”

In Mississippi, §19-3-69, *Miss. Code Ann.* (1972) provides the authority for a board of supervisors to contract for professional services when the board determines that such professional services are necessary and in the best interest of the county. The board may, but is not required to, request and consider the price of the services in its initial and subsequent contact with professionals.

A professional within the meaning of this section shall be *limited to*:

- a. **Attorneys** at law, admitted to practice law in this state by the State Board of Bar Admissions;
- b. **Accountants**, certified by the State Board of Public Accountancy;
- c. **Architects**, licensed by the State Board of Architecture;
- d. *Engineers and land surveyors*, registered by the State Board of Registration for Professional Engineers and Land Surveyors;

⁷ *Lee County v. James*, 174 So. 76, 77 (Miss. 1937); *Butler v. Bd. of Supervisors for Hinds County*, 659 So. 2d 578, 579 (Miss. 1995).

- e. **Physicians**, licensed by the State Board of Medical Licensure;
- f. **Appraisers**, licensed by the Mississippi Real Estate Commission or as otherwise provided by law or ad valorem appraisers holding the MAE designation from the Department of Revenue;
- g. **Real estate brokers**, licensed by the Mississippi Real Estate Commission;
- h. In the sale of personal property pursuant to the provisions of Section 19-7-5, **auctioneers** who meet standards established by the State Department of Audit.

As opposed to State agencies, there is no requirement of competitive procurement for counties for these services under §19-3-69 unless another statute requires competitive procurement for a particular service.⁸ An Attorney General's Opinion concerning a proposed contract for tax mapping fairly summarizes the issue with regard to non-State agencies.

Section 19-3-69 permits counties to contract with certain professionals therein listed, including engineers, without the necessity of competitive bidding therefor. However, Section 27-35-101 requires competitive bidding if the purpose for which an engineer or surveyor will be hired is to obtain tax parcel mapping. See *MS AG Op.*, Mullins (April 12, 1994), a copy [*4] of which is enclosed. In said opinion, regarding the employment of land surveyors, we opined that *if the purpose of employing land surveyors was to accomplish survey and appraisal of the county as contemplated by Section 27-35-101, then the competitive bidding process set out in that statute must be followed*, but if some other purpose was to be accomplished, the employment may be made under Section 19-3-69 which does not require the county to follow the competitive bidding procedure. See also *MS AG Op.*, Bean (January 23, 1998), a copy of which is also enclosed.

MS AG OP. No. 2000-0082, Yancey (March 3, 2000) 2000 *Miss. AG LEXIS* 107.

Additionally, the general Mississippi procurement statutes, §31-7-1, *et seq.*, (particularly §31-7-13), which apply to all units of local government, *i.e.*, non-State agencies, does not require that the acquisition of services be advertised for bid. The following quote from a 2008 AG Opinion fairly summarizes the rule.

Unless specifically required by statute or unless such services are provided in conjunction with the purchase of commodities,

⁸ *E.g.*, see: *State ex rel. Hood v. Madison County*, 873 So. 2d 85 (Miss. 2004)(holding that a particular statute required competitive procurement).

equipment, construction, or other purchases governed by Section 31-7-1 *et seq.*, contracts for services are not required to be advertised for bid. We know of no statutory provision which requires contracts for hospital staff services to be advertised for bids.

MS. AG Op. No. 2008-00233, Gore (June 4, 2008), 2008 *Miss. AG LEXIS* 193.

“Services” have been given a broad definition under this statute and surely include more than “professional services”. In *MS. AG Op. No. "Unnumbered"*, Bean (January 23, 1998), 1998 *Miss. AG LEXIS* 54, the Attorney General opined:

Often the definition of "professional services" is relevant to determine whether or not competitive bidding is required for a certain project or work. In that context, *this office has consistently held that contracts for services, particularly professional services and services requiring special training and skill, are an exception to the competitive bidding requirements of state law*. *MS AG Op, Phillips* (July 31, 1991).

To the same point is *MS. AG Op. No. 10516*, Campbell (March 11, 1986), 1986 WL 81632 which states, “As pointed out in a recent opinion . . . *contracts executed for the purpose of obtaining a type of specialized or professional service are not subject to competitive bidding under the [*24] Public Purchasing Laws.*”

"Professional services" are no longer limited to the traditional professions such as law, medicine, engineering, etc., and this is generally true nationally. In *Autotote Limited v. New Jersey Sports and Exposition Authority*, the New Jersey Supreme Court was confronted with the issue of whether a contract for the installation and servicing of a totalisator system, a complex computer network for use at the Meadowlands racetrack, constituted a "professional service" subject to public bidding requirements. 427 A.2d 55 (N.J. 1981). There was no dispute that the computer equipment involved was highly sophisticated, requiring constant supervision and specially trained operators. As a result, the court concluded that "the contract in question involved the inextricable integration of a sophisticated computer system and services of such a technical and scientific nature as to constitute 'professional services' within the statutory exception to the requirement of public bidding. . ." *Autotote Limited*, 427 A.2d at 59.

[I]t is clear that the term "professional services" is no longer limited to the traditional professions such as law and medicine If the law is to keep pace with scientific developments in business and commerce, it must adapt statutory provisions, such as the one in question, to the realities of the day.

Autotote Limited, 427 A.2d at 59 (emphasis added).

The rationale of *Autotote Limited* has been approved by the Third and Tenth Circuit Courts of Appeal. *Curtis Ambulance of Florida, Inc. v. Board of County Commissioners of the County of Shawnee, Kansas*, 811 F.2d 1371 (10th Cir. 1987); *General Engineering Corp. v. Virgin Islands Water and Power Authority*, 805 F.2d 88 (3rd Cir. 1986).

In *Curtis Ambulance*, a low, but unsuccessful bidder for an ambulance service contract sued the county which awarded the contract claiming a violation of its civil rights under 42 U.S.C. s1983, breach of contract, and a violation of the Kansas open meeting law. 811 F.2d 1371 (10th Cir. 1987). Resolution of whether the county had in fact violated its own purchasing regulations turned on whether the ambulance services in question constituted "professional services" so as to exempt those services from the bidding requirements.

Recognizing that *Autotote Limited, supra*, "has been called 'a leading case in the field'," the Tenth Circuit agreed that the term "professional services" today encompasses more than traditionally recognized professions. *Curtis Ambulance*, 811 F.2d 1371, 1380, n. 6 (10th Cir. 1987). The ambulance service awarded the contract was required to employ emergency personnel qualified as emergency medical technicians or mobile intensive care technicians. Accordingly, the court found the occupations possessed the necessary specialized medical training sufficient to place them in the category "professional services." *Curtis Ambulance*, 811 F.2d at 1379.

In *General Engineering*, the court found, as was true in *Autotote Limited*, that "[r]eliability is so important to the success of operations . . . that selection of the . . . system . . . could not have been subjected to the even limited uncertainties of public bidding." *General Engineering*, 805 F.2d at 95 quoting *Autotote Limited*, 427 A.2d at 61.

In another decision dealing with a contract for the design, construction and operation of a solid waste recycling facility, the Wisconsin Supreme Court, said:

Statutory bidding provisions must be read in the light of the reason for their enactment, lest they be applied where they were not intended to operate and thus deny the authorities the ability to deal with problems in a sensible, practical way.

Waste Management, Inc. v. Wisconsin Solid Waste Recycling Authority, 267 N.W.2d 659, 663-64 (Wis. 1978).

The *Waste Management* court went on to recognize as an established judicial principle that service contracts requiring scientific knowledge and professional skill for their performance are "outside the scope of competitive bidding statutes." 267 N.W.2d at 663. In many circumstances it is impossible or impractical to draw specifications for bidding purposes where special knowledge or skill is involved because often the objective is not the lowest cost but the value and skill of

the person or entity providing the service. See *General Engineering Corp. v. Virgin Islands Water and Power Authority*, 805 F.2d 88, 95 (3rd Cir. 1986); accord: *Attlin Construction, Inc., v. Muncie Community Schools*, 413 N.E.2d 281, 286 (Ind.App. 1980).

In *Attlin Construction, supra*, the court, in dealing with a contract for construction management services, noted the general rule that contracts for professional services are not subject to public bidding laws. The court further pointed out that public bidding laws are applicable to public works contracts only when performance may be measured by objective standards, that is, may be performed according to specifications because presumably the legislature intended cost to be the decisive factor in awarding such contracts. 413 N.E.2d at 287.

However, with public contracts calling for professional and/or personal services requiring aesthetic, business or technical judgment, and/or professional or scientific skills and experiences, it is assumed that the legislature could not have intended the lowest price to be the ultimate determining factor as the performance of the contract can not be evaluated objectively. Because the nature of personal and/or professional service contracts makes it unlikely that bids would provide any advantage to the public body in awarding the contract, advertising for such bids would be undesirable, impossible or impractical.

Attlin Construction, 413 N.E.2d at 287.

It seems generally acknowledged that there are no bidding requirements for services, particularly professional services, in Mississippi. However, the Attorney General does routinely recommend that eventhough competitive bidding is not required, the county or municipality or other non-State entity, should establish some competitive procedures, such as requests for proposals or requests for qualifications, and circulate announcements of the work offered widely to encourage a range of proposals and to avoid the kinds of problems the new sole source rules in §25-9-120 were designed to combat.

III. Local Government Professional Services Procurement Requirements

Without repeating all of the commentary from the last section, we note that where a specific statute requires a public entity to advertise for bids or use some other means of competitive procurement, that statute controls over the general statutes relating to personal services, and the requirements of the specific statute must be followed.

In *State ex rel. Hood v. Madison County*, 873 So. 2d 85 (Miss. 2004), the Mississippi Supreme Court found that *Miss. Code Ann.* §27-35-101 required a county to advertise for bids for reappraisal services and had to be read together with *Miss. Code Ann.* §27-35-165 and *Miss. Code Ann.* §

19-3-69. The Court found that Madison County did not have the authority to enter into a contract for appraisal services with an appraiser without advertising for bids. The county was required to comply with the advertising-for-bids provisions of *Miss. Code Ann. § 27-35-101* for its reappraisal work. *State ex rel. Hood v. Madison County*, 873 So. 2d 85 (Miss. 2004).

The key point here is that just characterizing services as purely professional or structuring a contract such that it would be services only, will not avoid the requirements of a particular statute. You must look past whether or not the services are normally provided by an engineer or can be provided by an engineering firm. It is the substance of what is being done that controls, and it is not always an easy question to answer. You must investigate for any specific statutory requirements which would require competitive procurement before pursuing, or at least taken, employment offered on a non-competitive basis. Legal advice may well be required.

To repeat:

Remember that a contractor with the State is charged with knowledge of the law and its requirements and has an affirmative duty to see that they are complied with. Relying upon an agency's practices or representations may not be enough to protect you. It may prohibit you from getting paid.

The recent Mississippi Supreme Court opinion in *Wellness, Inc. v. Pearl River County Hospital*, No. 2014-CA-01696-SCT (MS. Supreme Court, November 19, 2015) illustrates the problem and the risk. The particulars of Wellness' contract were not properly or adequately spread upon the Hospital board's minutes. In disallowing payment of Wellness, the Court stated,

Wellness had a clear and well-established duty to ensure that sufficient terms of its contract with the hospital were spread upon the Board's minutes. Its failure to fulfill its own duty does not entitle it to an exception from the enforcement of a well-established policy that allows members of the tax-paying public to consult a Board's minutes to "see what was actually done." *Lee County*, 174 So. at 77. "[T]he importance of the public policy involved will be the overriding factor in such disputes even when the rule may work an apparent injustice." *Butler*, 659 So. 2d at 582.

Contractors who deal with a public entity are charged with notice of the extent and limitations of the authority of the public body and with notice of the way the public body must do things. A contractor who fails to ensure that both the authority and mechanism for his/her employment or that which he/she oversees in anyway is at serious risk of both the inability to get paid for its work as well as the possible creation of liability over and above its fees for its errors.

It should also be noted that Miss. Code Ann., §31-7-57 (1972, as amended), holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of law. See also PSCRB Rule 3-101.03. In certain circumstances, criminal penalties may arise. *E.g., Miss. Code Ann. §31-7-55* (2016)

No professional wants to "get sideways" with a client, much less a governmental client, over matters which diligence and awareness could avoid. Engineers should be aware of the existence of the Personal Services Contracts Review Board, its rules, regulations and governing statute and keep them in mind whenever working for a State agency, whether as to the engineer's own contract or those it may be assisting in obtaining or administering. It is always much easier and much less expensive to spend a little additional time and effort on the front end rather than to try to fix a problem later.

IV. Opinions of the Attorney General

Part of the Attorney General's job is to give written legal opinions to public officials concerning prospective action, its requirements and its lawfulness. *Miss. Code Ann., §7-5-25.*

When any . . . person authorized by this section to require such written opinion of the Attorney General shall have done so and shall have **stated all the facts to govern such opinion**, and the Attorney General has prepared and delivered a legal opinion with reference thereto, **there shall be no liability, civil or criminal, accruing to or against any such officer . . . who, in good faith, follows the direction of such opinion** and acts in accordance therewith *unless* a court of competent jurisdiction, after a full hearing, **shall judicially declare that such opinion is manifestly wrong and without any substantial support.** However, if a court of competent jurisdiction makes such a judicial declaration about a written opinion of the Attorney General that applies to acts or omissions of any licensee to which Section 63-19-57, 75-67-137 or 75-67-245 applies, and the licensee has acted in conformity with that written opinion, the liability of the licensee shall be governed by Section 63-19-57, 75-67-137 or 75-67-245, as the case may be. **No opinion shall be given or considered if the opinion is given after suit is filed or prosecution begun.**⁹

⁹ An attorney general's opinion, itself infected with unconstitutional state action in attempting to support the action of a school board in establishing a racially segregated private school, cannot be relied on to justify an unconstitutional action, despite statutory language exonerating persons acting in good faith in accordance therewith. *United States v. Tunica County Sch. Dist.* 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd*, 440 F.2d 377 (5th Cir. 1971).

Section 7-5-23 also requires the Attorney General to keep an opinion-book, “in which he shall record or cause to be recorded each and every opinion given by him, or by his assistants, in pursuance of law.” Each of his opinions shall be prefaced with a clear and concise statement of the facts upon which it is predicated. The "opinion-book" shall be kept well indexed, both as to subject matters and parties.

It is important to note that an AG Opinion is directed to a single person on a single set of facts. The party(s) to whom the Opinion is directed are the only ones who may take advantage of the shield of that Opinion. While the Attorney General’s Opinions are useful for gaging what the law may be and how consistently the state has pursued a single interpretation, Attorney General Opinions are not law and are not necessarily correct. Not all of the considerations necessary for a full understanding of the circumstances may have been in front of the Attorney General at the time. He might have simply been wrong or made a mistake. Remember, being in compliance with previous attorney general opinions to other people provides you NO PROTECTION, other than to perhaps establish that you acted in good faith in trying to find the correct course of action.

APPENDIX A

Agencies under PSCRB Purview

Agency Name	MAGIC Business Area	SAAS Agency Number (Legacy)
Arts Commission	1865	865
Athletic Commission	1843	843
Auctioneer Commission	1820	820
Board of Animal Health	1405	428
Board of Architecture	1848	848
Board of Barber Examiners	1840	840
Board of Cosmetology	1822	822
Board of Dental Examiners	1824	824
Board of Examiners for Social Workers	1859	859
Board of Funeral Service	1833	833
Board of Medical Licensure	1829	829
Board of Nursing	1838	838
Board of Nursing Home Administrators	1821	821
Board of Pharmac y	1846	846
Board of Physical Therapy	1828	828
Board of Public Accountanc y	1845	845
Board of Registered Professional Engineers and Land Surveyors	1841	841
Board of Registered Professional Geologists	1858	858
Boswell Regional Center	3382	382
Central Mississippi Residential Center	3389	389
Department of Agriculture and Commerce	1401	401
Department of Archives and History	1475	475

Department of Banking and Consumer Finance	1511	511
Department of Corrections	1551	551
Department of Education	1201	201
Department of Employment Security	1671	671
Department of Environmental Quality	1470	470
Department of Finance and Administration	1130	130
Department of Health	1301	301
Department of Human Services	1651	651
Department of Information Technology Services	1601	601
Department of Marine Resources	1450	450
Department of Mental Health	3371	371
Department of Public Safety	1711	711
Department of Rehabilitation Services	1635	235
Department of Revenue	1181	181
Department of Wildlife, Fisheries, and Parks	1464	464
Division of Medicaid	1628	328
East Mississippi State Hospital	3372	372
Ellisville State School	3373	373
Fair Commission	1403	431
Forestry Commission	1451	451
Grand Gulf Military Monument Commission	1472	472
Hudspeth Regional Center	3386	386
Insurance Department	1501	501
Mississippi Adolescent Center	3392	392
Mississippi Authority for Educational Television	1247	247
Mississippi Development Authority	1411	411
Mississippi Emergency Management Agency	1741	721

Mississippi Gaming Commission	1850	185
Mississippi Librar y Commission	1245	245
Mississippi Public Utilities Staff	1812	812
Mississippi Real Estate Appraiser Licensure and Certification Board	1836	836
Mississippi Specialized Treatment Facility	3393	393
Mississippi State Board of Contractors	1834	834
Mississippi State Hospital	3374	374
Mississippi State Personnel Board	1614	614
Motor Vehicle Commission	1839	839
North Mississippi Regional Center	3385	385
North Mississippi State Hospital	3384	384
Office of the Attorne y General	1071	071
Office of the Secretar y of State	1111	111
Office of the State Auditor	1155	155
Office of the State Treasurer	1171	171
Oil and Gas Board	1491	491
Pat Harrison Waterwa y District	9950	950
Pearl River Basin Development District	9955	955
Pearl River Valle y Water Supply District	9970	970
Public Employees Retirement System	1531	531
Public Service Commission	1811	811
Real Estate Commission	1832	832
Soil and Water Conservation Commission	1486	486
South Mississippi Regional Center	3387	387
South Mississippi State Hospital	3391	391

Tombigbee River Valley Water Management District	9980	980
Veterans Affairs Board	1731	731
Veterans' Home Purchase Board	1734	734
Workers Compensation Commission	1521	521