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STATE OF ALABAMA

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Via e-mail: dannygarrett44@gmail.com

The Honorable Danny Garrett
Alabama House of Representatives
11 South Union Street
Montgomery, AL 36130

Dear Representative Garrett:

This letter responds to your request for information about Governor Fob James' Executive Order No. 1 (renumbered as Executive Order No. 439) as it pertains to contracting for lobbying services. I am also happy to provide an overview of the workflow for the approval of contracts for professional services in general.

First, Governor Ivey maintains that Executive Order No. 439 is still in effect, and she will continue to enforce it. In relevant part, the order prohibits state agencies from contracting with any person or entity "*for the purpose of promoting or opposing the introduction or enactment of legislation before the Legislature, or a legislative committee or the members thereof, or promoting or opposing executive approval of legislation.*" Exec. Order No. 439 (Jan. 18, 1995) (emphasis added). Thus, closely tracking the statutory definition of *lobbying*, the executive order operates against the *activity* of lobbying rather than the status or profession of the contractor performing the activity. See Ala. Code § 36-25-1(20). In accordance with the executive order, Governor Ivey will disapprove agency contracts for *lobbying* services with anyone.

We are mindful, of course, that consistent with First Amendment principles, the Alabama Code does not deem all contact with legislators to be *lobbying*. For example, *lobbying* "does not include providing *public* testimony before a legislative body or regulatory body or any committee thereof." Ala. Code § 36-25-1(20) (emphasis added). And of course, the executive order's prohibition on *lobbying* contracts would not encompass *non-lobbying* services — that is, services that do not involve "promoting or opposing" legislation — such as the services of attorneys or other persons in tracking or monitoring legislation, coordinating the internal activities or schedules of agency staff,

or “drafting bills or in advising clients and in rendering opinions as to the construction and effect of proposed or pending legislation, executive action, or rules or regulations, *where those professional services are not otherwise connected with legislative, executive, or regulatory action.*” Ala. Code § 36-25-1(21)(b) (emphasis added). However, even while the executive order permits such non-lobbying services, it also suggests that executive agencies should, whenever possible, “utilize the extensive expertise and experience [of] career State employees . . . in the development of budget and policy matters to be brought before the Alabama Legislature.” To that end, Governor Ivey’s office applies a higher degree of scrutiny to any outside contracts for services relating to legislative activity. For example, Governor Ivey may require an agency head to submit written justification for the contract, such as a shortage of full-time, in-house staff capable of performing the required services. In short, Governor Ivey intends to enforce not only the substance of the executive order, but also the spirit.

You also asked about the workflow for the approval of professional services contracts that come before the Legislative Contract Review Oversight Committee (“Contract Review Committee”). I am pleased to provide the following high-level overview of that process.

First, it is important to note that the Governor’s approval of professional services contracts is not required by statute; rather, it is required by the state’s Fiscal Policy and Procedures Manual (FPPM), which embodies the administrative rules of the Comptroller. *See* FPPM Ch. 5-2(C). Consequently, the Governor’s approval is not necessarily required for the contracts of agencies who are not subject to the FPPM, such as “checkbook” agencies – agencies who have statutory or other legal authority to conduct their financial transactions exclusively outside of the state treasury and thus outside of the Comptroller’s rules in the FPPM. Such contracts typically bypass the Governor’s Office.

For agencies that are subject to both the FPPM and the oversight of the Contract Review Committee, the process works as follows:

STEP 1. SOLICITATION

Agency contracting for professional services typically begins with a solicitation by the contracting agency (unless the agency is exempt from the statutes governing the procurement of professional services). *See* Ala. Code. § 41-16-72 and -78. That solicitation may take any number of forms prescribed by statute. For example, for

architectural and engineering services, the agency issues a “request for qualifications.” *See* Ala. Code § 41-16-72(3). For the services of outside attorneys to represent the state in litigation, the agency submits “a request for legal assistance” to the Attorney General, who then appoints outside counsel as a deputy attorney general to handle the case. *See* Ala. Code § 41-16-72(1)(a). The Attorney General’s Office forwards the appointment to the Governor’s Office for approval of the attorney’s hourly rate. *See id.* For the medical services of physicians, the contracting agency must solicit the services from a list of qualified physicians maintained by the Alabama Medical Licensure Commission. *See* Ala. Code § 41-16-72(2). For all other professional service providers other than those specifically named in the statute, the agency issues a “request for proposals.” Ala. Code § 41-16-72(4).

STEP 2. EVALUATION, SELECTION, AND CONTRACT EXECUTION

Generally, after the contracting agency receives responses from interested professional service providers, it proceeds to evaluate the proposals and select a provider. The standards for selection are set out in the applicable Code section. In some cases, such as for attorneys, the contract fee may be negotiated. *See, e.g.,* Ala. Code § 41-16-72(1)(a). *But see* Exec. Order No. 620, as amended (Aug. 10, 2010) (previously numbered as Riley Exec. Order No. 51) (capping hourly rates for attorneys at \$195.00 per hour except under “extraordinary circumstances”). After selecting the provider, the agency prepares the contract, which is then executed by the provider and the agency head.

STEP 3. SUBMISSION TO CONTRACT REVIEW COMMITTEE

After the parties execute the contract, but before the Governor’s approval, the contract is submitted to the Contract Review Committee, unless it is an emergency contract exempt from the Committee’s review under the provisions section 29-2-41.1.

Emergency contracts are submitted directly to the Governor’s Office for approval. But if the agency head’s emergency declaration is for an “emergency adversely affecting the economic welfare of the state” – for example, for immediate legal representation to protect the State from an imminent default judgment – the contract must be limited to 60 days. *See id.* All other emergency contracts “may be let to the extent necessary to meet the emergency without review by the committee.” *Id.*

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STEP 4. GOVERNOR'S REVIEW AND APPROVAL

As you know, the Contract Review Committee may hold a contract for up to 45 days. *See Ala. Code § 29-2-41.* Once the contract is released by the Committee, it comes to the Governor's Legal Office for review and approval. The information gleaned from agencies during the legislative contract review process aids the Governor's Office in making this decision. The Governor's Legal Office reviews professional services contracts for legal compliance using the Governor's Additional Contract Questions form supplied by the agency head. If the contract is disapproved, the process ends, and the contract is void. If the Governor approves the contract, it is returned to the agency, who then notifies the contractor to begin work.

CONCLUSION

Obviously, this is not a comprehensive overview of the process, procedures, and laws governing the procurement of professional services. However, I hope that you find it helpful as you continue the work of overseeing the efficient and lawful expenditure of taxpayers' dollars. Governor Ivey wishes to convey her sincere appreciation for the important role you and your colleagues play in this important process. If I can answer any other questions or provide additional information, please do not hesitate to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan M. Taylor". The signature is fluid and cursive, with a large initial "B" and a stylized "T" at the end.

Bryan M. Taylor
General Counsel