

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

May 17, 2019

Steve Hutton, Executive Director
Mississippi State Fair Commission
Post Office Box 892
Jackson, Mississippi 39205-0892

Re: Applicability of Senate Bill 3046, Regular Session 2019 to the Fair Commission
Concession Contract

Dear Mr. Hutton:

Attorney General Jim Hood has received your request for an official opinion of this office and assigned it to me for research and reply.

Background

Your letter indicates that the Fair Commission concession contract expired on March 31, 2019. Your letter also notes that the new Trade Mart will be completed within the next nine months. The Fair Commission is proposing to enter into a new contract for concessions for the next eight to nine months, and thereafter to enter into a long term concession contract of eight to nine years in conjunction with the opening of the new Trade Mart. You note that the longer period of time is necessary, because a recipient of the contract would in all likelihood need to install expensive equipment that would require a longer time period for recoupment of the associated investment.

You note that the Fair Commission believes that these proposed contracts are not required to go through formal bidding requirements required under Section 31-7-13 or to comply with Public Procurement Review Board ("PPRB") regulations. The Fair Commission's beliefs are based on the fact that the contract is a "net-of-fee" contract that involves no expenditure of state funds. Under the proposed contracts, the Fair Commission would not pay for anything, and, instead, the vendor would pay the Fair Commission for the right to sell concessions on the premises. Pursuant to PPRB regulations, Section 3-101.05 "net-of-fee contracts . . . do not come under PPRB purview . . ." 12 Code Miss. R. Pt. 9, R. 3-101.05. Your letter also notes that the proposed contracts do not involve the Fair Commission purchasing any goods or commodities that would trigger the application of Section 31-7-13.

Steve Hutton, Executive Director
May 17, 2019
Page 2

Your letter notes that the Fair Commission's appropriation bill has language which could be read to require that the proposed contracts comply with additional statutory requirements not otherwise applicable. Section 3 of Senate Bill 3046, Regular Session 2019 ("S.B. 3046") states:

SECTION 3. No operation, maintenance or service contracts, agreements or obligations for commodities, concessions, or catering services, shall be entered into or renewed by this agency for a period of more than three (3) years **nor unless** said contracts, agreements or obligations have been made in accordance with Sections 31-7-11, 31-7-13, 31-7-55 and 31-7-57, Mississippi Code of 1972.

(Emphasis added).

Issues Presented

On these facts, you ask the following questions:

1. Does Section 3 of S.B. 3046 have any application at all to our concessions contract, since the concessions contract is a net-of-fee contract?
2. Is the three year cap on the term of our concessions contract as set forth in Section 3 of S.B. 3046 enforceable?
3. Is the requirement in Section 3 of S.B. 3046 requiring solicitation of bids in accordance with *Miss. Code Ann.*, Sections 31-7-11, 13 enforceable, in view of the fact that these code provisions deal with the purchase of commodities and certain specific services, but not including concessions?
4. Is it not true that our concessions contract is net-of-fee, thereby giving us the right to enter into a concessions contract, either short or long term, without advertising for bids?
5. If we do decide to advertise for bids for a long term contract, is it not true that we can conduct a straight-forward RFP, advertise in the newspaper and choose the highest and best bid, without being required to follow the meticulous and onerous steps outlined in *Miss. Code Ann.*, Sections 31-7-401, *et seq.*?

Legal Analysis and Discussion

As an initial matter, consideration must be given to language that could be considered substantive provisions of law. Section 69 of the Mississippi Constitution provides:

General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative, and judicial departments of the government; to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject. **Legislation shall not be engrafted on the appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid.**

Miss. Const. Section 69 (emphasis added). Section 3 of S.B. 3046 provides that “concession” contracts may not be entered or renewed “for a period of more than three (3) years nor unless said contracts, agreements or obligations have been made in accordance with Sections 31-7-11, 31-7-13, 31-7-55 and 31-7-57, Mississippi Code of 1972.” Stated differently, the appropriation bill purports to require the Commission’s “concession” contracts to be for 3 years or less and to be made in accordance with the listed code sections.

The above language of Section 3 of S.B. 3046, according to our research, has been incorporated into Fair Commission appropriations since as early as 1992. It is perhaps possible that the procurement laws as they existed in 1992 may have been written in such a manner that the language use in Section 3 was more applicable. Given the current status of procurement laws, incorporation of Section 3 into existing law is a challenge. The statutes referenced in Section 3 appear to have no applicability to a “net-of-fee” service contract. Section 31-7-11 relates to agencies providing “information relative to its purchase of commodities” to the Department of Finance and Administration (“DFA”) as well as DFA’s regulatory authority over agency purchases. Section 31-7-13 is familiar as the bidding requirement statute, but it only applies to “commodities and printing; contract for garbage collection or disposal; contract for solid waste collection or disposal; contract for sewage collection or disposal; contract for public construction; and contract for rentals . . .” Miss. Code Ann. Section 31-7-13. Sections 31-7-55 and 31-7-57 are penalty and liability provisions relating to violations of procurement laws, and neither add any substantive procurement requirements.

As noted earlier, Section 69 of the Constitution prohibits an appropriation bill from engrafting substantive legislation beyond the amount, purposes and conditions of expenditures. With regard to interpreting statutes where constitutional concerns exist, the courts have stated:

The constitutionality of a statute is presumed, and it should be interpreted in a manner to avoid constitutional defect if that is possible without doing violence to the language. *Estate of Smiley*, 530 So.2d 18, 22–23 (Miss. 1988). When there are two constructions that could be put on a statute, one permitting the statute to be found consistent with constitutional requirements and the other not, then the constitutional interpretation is to be chosen. This has been described as a “duty to adopt a construction of the statutes which would purge the legislative purpose of

Steve Hutton, Executive Director
May 17, 2019
Page 4

any constitutional invalidity....” *Cole v. Nat’l Life Ins. Co.*, 549 So.2d 1301, 1305 (Miss.1989) (quoting *Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 749 (1947)).

Tolbert v. Southgate Timber Co., 943 So.2d 90, 97 (Miss. Ct. App. 2006). Accordingly, we do not interpret Section 3 of S.B. 3046 to alter or modify the current general law requirements for agencies to procure services. The PPRB has defined a “net-of-fee” contract as one “in which there is no expenditure of state funds from any funding source (state, federal or other).” 12 Code Miss. R. Pt. 9, R. 3-101.01. Moreover, PPRB, by regulation, has stated:

Net-of-fee contracts do not involve expenditures of state funds; they do not come under PPRB purview. An agency should maintain for its file a written determination that a contract is net-of-fee.

12 Code Miss. R. Pt. 9, R. 3-101.05. Under existing law, “net-of-fee” contracts for services do not come within the bidding requirements of Section 31-7-13 nor are such contracts governed by PPRB regulations. So long as such contracts are otherwise in compliance with state law, Section 3 of S.B. 3046 does not add any additional requirements or restrictions on the entry of such contracts.

Your letter also raises the applicability of Sections 31-7-401 through 31-7-423 regarding “Best Practices for Soliciting Requests for Proposals or Requests for Qualifications.” However, discussing the applicability of these sections, Section 31-7-401 states:

Any agency that is required to receive approval by the Public Procurement Review Board before entering into a personal or professional services contract as provided in subsection (2)(g) of Section 27-104-7 shall implement the best practices specified in Sections 31-7-401 through 31-7-423.

Miss. Code Ann. Section 31-7-401 (2010); *See also*, 12 Code Miss. R. Pt. 9, R. 3-203 (“Any agency that is required to receive approval by the Public Procurement Review Board before entering into a personal or professional services contract shall implement the best practices specified in this section.”). However, as demonstrated by PPRB’s regulations, “net-of-fee” contracts “do not come under PPRB purview.” Thus, assuming the proposed contracts are true “net-of-fee” contracts, neither Sections 31-7-401 through 31-7-423 nor PPRB regulation Section 3-203 would apply.

Thus, in response to your questions number 1 and 2, we are of the opinion that Section 3 of S.B. 3046 does not alter the existing general laws on procurement. Assuming the proposed contracts referenced in your letter are, in fact, “net-of-fee” contracts, S.B. 3046 does not add bidding requirements or otherwise make PPRB regulations applicable. Assuming that the contracts are otherwise in accordance with applicable law, S.B. 3046 does not limit such contracts to a three (3) year period.

Steve Hutton, Executive Director
May 17, 2019
Page 5

In response to your question number 3, we are of the opinion that S.B. 3046 does not change applicable general procurement laws to make bidding requirements applicable to "net-of-fee" contracts for services.

In response to your question number 4, we have not reviewed and interpreted the as of yet unwritten agreements to determine whether they are "net-of-fee" contracts. Moreover, we do not by official opinion opine as to the interpretation and meaning of contractual documents. Whether the document is a "net-of-fee" is a matter that must be determined by the Fair Commission in consultation with assigned legal counsel.

In response to your question number 5, it is the opinion of this office that the provisions of Sections 31-7-401, *et. seq.*, do not apply to "net-of-fee" contracts for the procurement of services.

If this office can be of further assistance, do not hesitate to contact us.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

OFFICIAL By: OPINION


Ricky G. Luke
Special Assistant Attorney General