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Policy Memorandum No. 3 -FY 1999

TO: Elected Officials, Agency Directors and Personnel
Officers State Agencies

FROM: J. K. Stringer, Jr.
State Personnel Director

DATE: April 16, 1998

**SUBJECT: LEGAL SERVICES CONTRACT POLICIES AND ADMINISTRATIVE
PROCEDURES FOR FISCAL YEAR 1999**

This memorandum provides the policy and administrative procedures for submitting required documentation to implement Fiscal Year 1999 Contract Requests for Legal Services within state service agencies. These policies and procedures have been promulgated pursuant to Sections 25-9-133 and 27-104-105 Mississippi Code of 1972, Annotated, as amended. These provisions shall supersede all conflicting policies and procedures for administration of contracts for legal services published in the Mississippi State Personnel Board Policy and Procedure's Manual, any additional or replacement manuals, and all subsequent changes to the manual, effective close of business June 30, 1998, and shall become an official attachment to the Mississippi State Personnel Board Policy and Procedures Manual for Fiscal Year 1999.

The following guidelines incorporate a single set of procedures which are designed to assist state agencies in compliance with requirements of state law prescribing the process for payment of legal services performed by attorneys and their assistants.

A. Legal Services Contracts - Authority

This policy is promulgated in accordance with Senate Bill 2512 of the 1991 Mississippi Legislative Session and Section 27-104-105. Mississippi Code of 1972, Annotated, as amended.



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1. Senate Bill 2512, General Laws of Mississippi, 1991 states, in part:

SECTION 1. The Department of Finance and Administration shall not process any warrant requested by any state agency for payment of legal services without first determining that the services and contract were approved by the Attorney General and the State Personnel Board. The State Auditor shall test for compliance with this section.

SECTION 2. The State Auditor shall, when conducting agency audits, test to determine whether or not the state institutions of higher learning and any state agency which does not draw warrants on the Treasury have received approval of the Attorney General for any contract for legal services.

SECTION 3. This act shall take effect and be in force from and after its passage. Approved: March 29, 1991 [1991 Miss. Leg. Sess., Chap. No. 473]

2. **Section 27-104-105** of the Mississippi Code of 1972, Annotated, as amended, **Senate Bill 2512** and states as follows:

The Department of Finance and Administration shall not process any warrant requested by any state agency for payment for legal services without first determining that the services and contract were approved by the Attorney General and the State Personnel Board. The State Auditor shall test for compliance with this section.

B. Scope and Application of Policies Regarding Legal Services Contracts

1. These policies will be applied by the State Personnel Board in the enforcement of **Section 27-104-105, Mississippi Code of 1972, Annotated, as amended**. The policies are intended to be consistent with existing law.



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2. These policies apply too personal and professional agreements made between State agencies and persons for legal services to be rendered during Fiscal Year 1999. The term “agreements” means written or oral contracts which involve process of payment for legal services by the Department of Finance and Administration. The term “persons” means attorneys, law firms, and other individuals who would perform legal services such as paralegal professionals.
3. For the timely, effective and efficient implementation of the State Personnel System, the State Personnel Board, in accordance with the authority vested in said Board by Section 25-9-115(d) of the Mississippi Code of 1972, Annotated, as amended, delegates to the State Personnel Director the authority to review and approve or disapprove legal services contracts in an amount not to exceed a total of \$100,000 per contract, including modifications thereto within the fiscal year. Legal services contracts in an amount exceeding a total of \$100,000 per contract, including modifications thereto within the fiscal year, must be presented to the State Personnel Board for approval or disapproval.
4. Legal services contracts entered into by the Mississippi Department of Transportation and approved by the State Attorney General involving eminent domain activities are not affected by these policies.
5. Legal services contracts entered into by the Office of Attorney General and state agencies for special assistant attorneys general are not affected by these policies.

C. Administrative and Processing Procedures Regarding Legal Services Contracts

1. SPAHRS Procedures
 - a. Online SPAHRS agencies
 - (1) Prior to any agency coming online to SPAHRS, representatives from that agency will be trained by Mississippi Management Reporting Systems (MMRS) representatives on the relevant screens, navigational procedures and routing processes. These agency representatives will also receive a SPAHRS manual delineating online contractual request procedures to be used as a guide for all requests made online.



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- (2) All online agencies will print out two (2) copies of all relevant screens from the SPAHRS system and submit these copies, along with the contractual agreement signed by the agency head at the same time the request is transmitted for approval online through SPAHRS. Relevant screenprints can be made by using the Request For Contract Personnel Services Approval report option found under the Miscellaneous Contracts Report Menu within the Contract Segment of SPAHRS.

The hard copy of the relevant screenprints and a copy of the contractual agreement, will be forwarded back to the requesting agency after approval of the request has been granted. **All contractual agreements must be signed by the appropriate state government authorities.** The agencies which are **NOT** also online SAAS users must forward to DFA a hard copy of a screenprint which indicates that SPB has approved the contract.

Online agencies will be able to make payments for contractual services online through SPAHRS once the payroll segment is implemented. Online agencies currently under SAAS will be required to write in necessary Commodity Codes until the Payroll Segment of SPAHRS is fully implemented. A space for the Commodity Codes is provided on the Request For Contract Personnel Services Approval Report. Those SAAS agencies not online with SPAHRS will continue to provide required Commodity Codes on the Form SPB 620-88 (Rev 5/1/97).

- (3) All legal services contracts should be submitted to the Office of the Attorney General for approval prior to submission to the SPB. Printed hard copies will include space for the requesting agency's authorized signature and required signatures from the Attorney General and the State Personnel Director.

(b) Off Line Agencies

- (1) Those agencies not currently online in the SPAHRS system should continue to submit requests for legal services contracts in accordance with this memorandum. Fiscal Year 1999 requests for contracts for legal services submitted to SPB on the SPB Form 620-88 (Rev



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5/1/97) from agencies not online will be entered into SPAHRS once received by SPB staff.

2. IRS Code stipulates that compensation paid to contractual workers is subject to the same Federal employment tax requirements as that of salaried workers. The IRS categorizes contractual personnel as either independent contractors or employees for the purpose of withholding and paying employment taxes. Generally, while independent contractors are responsible for the proper payment of employment taxes for themselves and their employees, the contracting agency is responsible for withholding and paying employment taxes for those contract personnel determined not to be (nor working for) an independent contractor. The State of Mississippi has a more narrow definition of "employee" than that used in the IRS regulation. Mississippi statute states that an "employee" is any person legally occupying a position in state service. In order to prevent potential confusion caused by IRS terminology and Mississippi statutory terminology, contractual personnel determined not to be (nor working for) independent contractors will be referred to as "contract workers." Therefore, contractual personnel who do not meet the definition of independent contractors should be classified as contractual workers and subject to the proper withholding of employment taxes. [Reference, Section 25-9-120, Mississippi Code of 1972, Annotated, as amended].

Agency and institutional heads are responsible for determining what work is being performed by contractual workers and ensuring that proper procedures are followed to comply with the IRS Code. Prior to submission of "Request for Contract Personnel Services Approval" SPB Form 620-88 (Rev 5/1/97), each contractor will be classified using the criteria referenced below. If the contractor fails to qualify for classification as an independent contractor, then the contractor must be treated as a contractual worker. The department or agency should give consideration to the contract type. If the contractor is classified as a contractual worker, the agency is liable for the employer's share of employment taxes. In budgeting for the contract, the department should allow for this additional cost.

Please refer to the Department of Finance and Administration for instructions concerning the accounting codes and proper withholding of federal and state income taxes, Social Security/Medicare matching funds and unemployment insurance taxes. Refer also to IRS Publication 937, Employment Taxes and Information Returns, which stipulates as follows:



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Twenty (20) Factors Used to Determine Employee Status: To determine if an employer-employee relationship exists, the Internal Revenue Service has developed a list of twenty (20) factors as guidelines to determine whether an individual is an employee. The presence of any of the following twenty (20) factors may indicate a possible employer-employee relationship depending on the occupation and the context in which services are performed. Under common-law rules, every individual who performs services subject to the will and control of an employer, as to both what must be done and how it must be done, is an employee. It does not matter that the employer allows the employee discretion and freedom of action, as long as the employer has the legal right to control both the method and the result of the services. If an employer-employee relationship exists, it makes no difference how it is described. It does not matter if the employee is called an employee, a partner, agent or independent contractor. The factors are:

- a. Instructions. An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved.
- b. Training. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
- c. Integration. An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.
- d. Services Rendered Personally. An employee renders services personally. This shows that the employer is interested in the methods as well as the results.
- e. Hiring Assistants. An employee works for an employer who hires, supervises, and pays workers. An independent contractor can hire, supervise, and pay assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.



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- f. Continuing Relationship. An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring, although irregular intervals.
- g. Set Hours of Work. An employee usually has set hours of work established by an employer. An independent contractor generally can set his or her own work hours.
- h. Full Time Required. An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he chooses.
- I. Work Done on Premises. An employee usually works on the premises of an employer, or works on a route or at a location designated by an employer.
- j. Order of Sequence Set. An employee may be required to perform services in order or sequence set by an employer. This shows that the employee is subject to direction and control.
- k. Reports. An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control.
- l. Payments. An employee is paid by the hour, week, or month. An independent contractor is usually paid by the job or on a straight commission.
- m. Expenses. An employee's business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control.
- n. Tools and Materials. An employee is normally furnished significant tools, materials, and other equipment by an employer.
- o. Investment. An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.



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- p. Profit or Loss. An independent contractor can make a profit or suffer a loss.
 - q. Works for More Than One Person or Firm. An independent contractor is generally free to provide his or her services to two or more unrelated persons or firms at the same time.
 - r. Offers Services to General Public. An independent contractor makes his or her services available to the general public.
 - s. Right to Fire. An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.
 - t. Right to Quit. An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.
3. Requests to enter into contracts for legal services, including renewals and modifications, for Fiscal Year 1999 shall be submitted to the Office of the Attorney General prior to submission to the State Personnel Board. The contract proposed to be executed by State agencies and two (2) copies of [State Personnel Board Form 620-88 Pages I - IV (Rev 5/1/97), "Request for Contract Personnel Services Approval"] shall be made a part of the request. Pages III & IV shall be completed outlining the agency justification for legal services and the consequences of disapproval. The proposed contract and SPB Form 620-88 (Rev 5/1/97) should have all authorized agency signatures and contracting attorney signatures. The Office of the Attorney General will forward the contractual documents (the original contract and 620-88) to the State Personnel Director following approval by the Attorney General. The contract will be returned to the Office of the Attorney General after consideration by the State Personnel Director, and the SPB Form 620-88 (Rev 5/1/97) will be returned to the agency requesting to contract for legal services.
4. The requests and documents required in the above section C.3. must be received in the office of the State Personnel Director by May 15, 1998.



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5. Renewals, amendments or modifications of existing legal services contracts that will be effective July 1, 1998 shall be handled in accordance with the above procedural sections C.3. and 4. A copy of the previously approved request and any other relevant supporting documentation, including a contractual agreement shall be attached to the request and submitted by May 15, 1998.
6. Contracts proposed to be entered into at other times during Fiscal Year 1999 shall be subject to procedure C.3. and should normally receive State Personnel Board consideration at a next regularly scheduled Board Meeting. Documents received by the State Personnel Director less than (10) working days prior to a scheduled Board meeting will be considered by the State Personnel Board at a subsequent meeting, in absence of submission and acceptance of evidence which substantiates an emergency.
7. Accordingly, all Fiscal Year 1999 requests for legal services shall contain the minimum following materials:
 - a. The original contract approved by the State Attorney General. The contract should be submitted to the State Attorney General and the State Personnel Board prior to execution by the Agency Head and legal services contractor.
 - b. Identification of the attorneys and other legal professionals by name, address, telephone number and employer identification number who will perform the legal services.
 - c. Justification of need for legal services including a description of the scope of services and a certified listing of funds expended for legal fees and expenses by the State agency for the previous fiscal year (FY 1998). This listing should also contain the information required in section C.7.b above.
8. The agency shall notify the State Personnel Director upon termination of previously approved contracts for legal services or the completion of the performance of services prior to the original terms of the contract (expiration date) in accordance with the following provisions:



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- a. The original and one copy of the approved “Request for Contract Personnel Services Approval” [SPB Form 620-88 (Rev 5/1/97)] shall be submitted to the State Personnel Director specifying the termination of services and effective date.
- b. The State Personnel Director shall acknowledge the termination of services submitted and return the original processed “Request for Contract Personnel Services Approval” [SPB Form 620-88 (Rev 5/1/97)] to the agency.
- c. The Department of Finance and Administration shall be notified to this action.

Should you require assistance or have questions concerning this Policy Memorandum, please contact Bob Fagan, Office of General Counsel, Mississippi State Personnel Board at 359-2704.

Recommendation:

Approval of Policy Memorandum No. 3, effective July 1, 1998. Further, if there are no public comments or substantive changes thirty (30) days after filing with the Secretary of State pursuant to the Administrative Procedures Law, that the proposed policy will be refiled as final action for adoption.