

**Joint Legislative Committee on Performance
Evaluation and Expenditure Review (PEER)**

Report to
the Mississippi Legislature



**State Government Purchasing: A Review of
State Agencies' Implementation of Recent
Statutory Changes and Other Selected Issues**

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms, with one Senator and one Representative appointed from each of the U. S. Congressional Districts and three at-large members appointed from each house. Committee officers are elected by the membership, with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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The Mississippi Legislature

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December 15, 2015

Honorable Phil Bryant, Governor
Honorable Tate Reeves, Lieutenant Governor
Honorable Philip Gunn, Speaker of the House
Members of the Mississippi State Legislature

On December 15, 2015, the PEER Committee authorized release of the report entitled **State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues.**

A handwritten signature in cursive script that reads "Becky Currie".

Representative Becky Currie, Chair

This report does not recommend increased funding or additional staff.

Table of Contents

Letter of Transmittali

Executive Summary vii

Introduction 1

 Authority 1

 Problem Statement 1

 Scope and Purpose 2

 Scope Limitations 3

 Method 3

Background 5

 Why are oversight and accountability important in
 state government purchasing? 5

 Who oversees state agencies’ purchasing and what are their responsibilities? 6

 What are the training and certification needs
 related to state government purchasing? 9

2015 Amendments to Procurement Laws and Regulations and
Their Potential Effects on the Procurement Environment 10

 What changes were made to state procurement laws in the 2015 session? 10

 What has been the response of the control agencies to the new legislation? 14

 What are the potential effects of the changes on the procurement
 environment of state agencies? 16

Training and Certification Requirements Established
by State Law and DFA Regulations 20

 What is the statutorily required training for purchasing officials? 20

 What are the additional statutory requirements
 for a Certified Purchasing Office? 23

The Uses and Status of Net-of-Fee Contracts in State Government 26

 What are net-of-fee contracts and what are the concerns
 regarding such contracts? 26

 For what purposes do state agencies use net-of-fee contracts? 27

Recommendations 30

Table of Contents (continued)

Appendix A: Indictments Related to MDOC Purchasing 33

Appendix B: Task Force on Contracting and Procurement in the Mississippi
Department of Corrections..... 34

Agency Responses 37

List of Exhibits

- 1. Statutory Authority and Oversight Responsibilities of the Purchasing Control Agencies..... 7

- 2. Contracts Approved in Accordance with the Thirty-Day Requirement of H. B. 825, 2015 Regular Session 18

State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues

Executive Summary

Introduction

In response to perceived and actual malfeasance and mismanagement at state agencies regarding purchasing, in recent years the Legislature has made statutory changes designed to yield improvements in the transparency, accountability, and oversight of state government purchasing. PEER received a legislative inquiry regarding whether these statutory changes have resulted in the desired improvements.

PEER sought to determine in this review:

- whether the state's primary control agencies for purchasing (i.e., the Department of Finance and Administration, the Department of Information Technology Services, and the Personal Service Contract Review Board) have implemented relevant 2015 legislation (specifically, Senate Bill 2400 and House Bill 825, 2015 Regular Session) in a manner that will likely result in improved oversight, transparency, and accountability; and,
- whether the training and certification requirements for certified purchasing agents and certified purchasing offices, enacted by the Legislature in 2013,⁶ are achieving the desired results.

Additionally, in response to one of the recommendations of the Governor's Task Force on Contracting and Procurement in the Mississippi Department of Corrections that was specifically directed to PEER, the Committee reviewed statutes regarding "net-of-fee" contracts.

This report will serve as a description of the purchasing and procurement regulatory environment at the beginning of the biennium for which the PEER Committee will be required by H.B. 825, 2015 Regular Session, to produce a study.

⁶In August 2014, the Commissioner of the Mississippi Department of Corrections (MDOC) was indicted on forty-nine counts of conspiracy, bribery, fraud, and money laundering in relation to transactions that had occurred between him and a private contractor doing business with MDOC. In February 2015, the commissioner pleaded guilty to money laundering conspiracy and filing a false tax return. See Appendix A, page 33 of this report, for more details.

⁷See H. B. 502, 2013 Regular Session.

Background

Since FY 2010, state agencies have spent over \$1 billion on purchases of goods and services. Proper stewardship of public funds requires that the agency making such purchases and the state as a whole make efforts to ensure that public money is being wisely used.

Oversight of purchasing decisions ensures that the state receives the best value for its purchase, that agencies comply with the required laws and regulations of the state, and that public funds are used in the most cost-beneficial way for the state to accomplish its mission. Within the public sector, procurement is increasingly being seen as an important component in delivering value to government and ultimately, service delivery to the taxpayers. The need for accountability is further reinforced by the amount of money that state government purchasing represents within a given fiscal year, especially the amount represented by contracts.

The three state control agencies for purchasing--the Department of Finance and Administration, the Department of Information Technology Services, and the Personal Service Contract Review Board--are the ones chiefly charged with administration and oversight of purchasing of state agencies.

2015 Amendments to Procurement Laws and Regulations and Their Potential Effects on the Procurement Environment

In 2015, the Mississippi Legislature acted to address several areas that it believed created risk to the integrity, transparency, and accountability of the procurement process.

What changes were made to state procurement laws in the 2015 session?

During the 2015 Regular Session of the Legislature, two pieces of legislation, S. B. 2400 and H. B. 825, were passed to address and alleviate concerns regarding accountability and transparency within the state's procurement system. Additionally, changes were made to the membership and jurisdiction of the Personal Service Contract Review Board. While now implemented in the three control agencies, the legislation's true impact on the number and dollar amounts of emergency and sole-source contracts awarded and reviewed cannot yet be determined.

What has been the response of the control agencies to the new legislation?

The departments of Finance and Administration and Information Technology Services have adopted rules in conformity with the changes in laws in 2015. The Personal Service Contract Review Board is in the process of adopting rules to give effect to the changes in law.

What are the potential effects of the changes on the procurement environment of state agencies?

While increased accountability and transparency are expected for emergency and sole-source contracts under the revised laws and regulations, the control agencies also expect that the new laws will impact the timeliness of procurements and require better planning by state agencies to ensure that procurement laws are followed and ultimately approved. Because these changes have been in force and effect for less than a year, it is premature at this point to project their impact on agency budgets and workload.

Training and Certification Requirements Established by State Law and DFA Regulations

Successful implementation of the recent purchasing reform efforts enacted by the Legislature will depend on trained and competent purchasing officials within the various state agencies. The Legislature has mandated the establishment of certification and training requirements to assist state agency employees in carrying out their purchasing duties.

As required by state law, the Office of Purchasing, Travel and Fleet Management has created a procurement training and certification school to instruct purchasing officials regarding the state's laws and regulations. However, OPTFM cannot definitively determine the number of employees who are subject to receive purchasing training or what percentage of purchasing officials within the state are already certified.

Agencies that complete the statutory requirements to be a Certified Purchasing Office are allowed to make purchasing decisions based on best value (rather than lowest and best price) and are allowed to participate in cooperative purchasing agreements. As of September 1, 2015, five state entities had been designated by OPTFM as certified purchasing offices.

The Uses and Status of Net-of Fee Contracts in State Government

"Net-of-fee" contracts do not involve the expenditure of appropriated funds, but do involve commitments on the part of state government for the use of some government benefit--e.g., space or access to a market.

Under a net-of-fee contract, a vendor makes an agreement to conduct activities that will result in the vendor being paid. Such contracts are generally not subject to state procurement laws and, without regulation, could be let in a manner that is not transparent or competitive. Such contracts became a subject of concern following indictments associated with the Mississippi Department of Corrections' use of net-of-fee contracts for the delivery of commissary services.

Some state agencies use net-of-fee contracts as a means of offering food and vending services to staff, customers, and inmates. Despite the fact that public funds generally are not used to compensate contractors with net-of-fee contracts, state agencies have an interest in seeing that their staff, clients, and inmates receive quality services from their contractors.

Recommendations

To address the procurement issues identified by PEER in this report, the Legislature should enact the following legislation:

- Amend MISS. CODE ANN. Sections 31-7-3 and 25-9-120 (1972) to require the Department of Finance and Administration, Personal Service Contract Review Board, and Department of Information Technology Services to compile the following information regarding the implementation of Senate Bill 2400, 2015 Regular Session, and House Bill 825, 2015 Regular Session:
 - additional costs associated with the development and monitoring of compliance with rules and regulations adopted subsequent to the passage of the legislation;
 - changes in control agencies (i. e., DFA, PSCRB, and ITS) and state agencies' workloads subsequent to the passage of the legislation, specifically identifying any impediments to service, oversight, or transparency;
 - frequency and value of contracts using alternate means of procurement, such as sole-source or emergency contracts; and,
 - conflicts among rules and regulations adopted by the control agencies subsequent to the passage of the legislation.

This information should be collected for fiscal years 2016 and 2017 and reported to the Executive Director of the PEER Committee and the chairs of the Senate and House committees on Accountability, Efficiency and Transparency by September 30, 2017.

- Amend MISS. CODE ANN. Section 31-7-9 (1972) to require the Department of Finance and Administration to survey annually all state agencies as defined in MISS. CODE ANN. Section 25-9-107 (d) (1972) to determine the names and position titles of employees directly or indirectly responsible for procurement actions within the agencies. Once identified, DFA should maintain a list of such employees and update it periodically. Such employees should be required to enroll in the Mississippi Purchasing Certification Program as established in MISS. CODE ANN. Section 31-7-9 (3) (1972) and complete the program within twenty-four months of the effective date of this amendment or, for persons employed subsequent to the effective date of this amendment, within twenty-four months of employment.
- Amend MISS. CODE ANN. Section 31-7-1 and 31-7-9 (1972) to require the Department of Finance and Administration to promulgate rules and regulations regarding the procurement of net-of-fee contracts by state agencies. Such contracts should be submitted to DFA regardless of the amount to be remitted to the state agency--i. e., \$0 threshold. Such rules and regulations should exempt contracts specifically within the purview of the federal Randolph-Sheppard Act.

Also, the Legislature should amend MISS. CODE ANN. Section 37-101-15 (1972) to require the Board of Trustees of Institutions of Higher Learning to adopt a policy that requires state institutions of higher learning to obtain the approval of the board prior to entering into net-of-fee contracts. Such contracts should be submitted to the board regardless of the amount to be remitted to the state institutions of higher learning--i. e., \$0 threshold. Such board policy should exempt contracts specifically within the purview of the federal Randolph-Sheppard Act.

For More Information or Clarification, Contact:

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State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues

Introduction

Authority

The PEER Committee reviewed state agencies' purchasing practices pursuant to the authority granted in MISS. CODE ANN. Section 5-3-57 (1972). PEER acted in accordance with MISS. CODE ANN. Section 5-3-51 et seq.

Problem Statement

In response to perceived and actual malfeasance and mismanagement at state agencies regarding purchasing,¹ in recent years the Legislature has made statutory changes designed to yield improvements in the transparency, accountability, and oversight of state government purchasing. PEER received a legislative inquiry regarding whether these statutory changes have resulted in the desired improvements.

An outgrowth of the recent indictments related to the Department of Corrections' purchasing was the Governor's Task Force on Contracting and Procurement in the Mississippi Department of Corrections, created by Executive Order of Governor Phil Bryant in November 2014. One of the recommendations of the task force's June 16, 2015, report was that the PEER Committee review several issues, including:

Any statutes that exempt agency contracts, such as the "net of fee" contracts, from oversight by any contract review agency.

¹In August 2014, the Commissioner of the Mississippi Department of Corrections (MDOC) was indicted on forty-nine counts of conspiracy, bribery, fraud, and money laundering in relation to transactions that had occurred between him and a private contractor doing business with MDOC. In February 2015, the commissioner pleaded guilty to money laundering conspiracy and filing a false tax return. See Appendix A, page 33 of this report, for more details.

The “net-of-fee” contract² was the type of contract MDOC used for its commissary services and was one of the contracts involved in the indictments related to MDOC purchasing.

Scope and Purpose

The overall purpose of this review of state government purchasing was to determine whether Mississippi has the provisions in place to protect public funds from misuse while providing for the needs of state agencies in a timely and cost-effective manner.

Given the concerns of the Legislature that gave rise to recent statutory changes and the public’s perception of the problems with procurement in state government, PEER sought to determine in this review:

- whether the state’s primary control agencies for purchasing (i. e., the Department of Finance and Administration, the Department of Information Technology Services, and the Personal Service Contract Review Board) have implemented relevant 2015 legislation (specifically, Senate Bill 2400 and House Bill 825, 2015 Regular Session) in a manner that will likely result in improved oversight, transparency, and accountability; and,
- whether the training and certification requirements for certified purchasing agents and certified purchasing offices, enacted by the Legislature in 2013,³ are achieving the desired results.

Additionally, in response to one of the recommendations of the Governor’s Task Force specifically directed to PEER, the Committee reviewed statutes regarding “net-of-fee” contracts.

H. B. 825, 2015 Regular Session, also mandated the PEER Committee to engage in ongoing oversight of the procurement processes of the state, as follows:

The Joint Committee on Performance Evaluation and Expenditure Review (PEER) shall evaluate on a biennial basis the procurement process utilized by all state agencies, including, but not limited to, the contract review, reporting and recordkeeping requirements in Section 25-9-120, and the bid requirements in Section 31-7-13. Upon completion of its evaluation, the PEER Committee shall submit a report to the Legislature with recommendations for improving the procurement process. The Department of Finance and Administration and the

²The Personal Service Contract Review Board (PSCRB) 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). Net-of-fee contracts do not come under PSCRB purview since they do not involve expenditures of state funds.

³See H. B. 502, 2013 Regular Session.

Personal Service Contract Review Board shall cooperate with the PEER Committee to carry out the provisions of this section.

This report will serve as a description of the purchasing and procurement regulatory environment at the beginning of the biennium for which the PEER Committee will be required to produce a study.

Scope Limitations

PEER's review was limited to the implementation of the laws cited above (and related rules and regulations) governing the purchase of commodities⁴ and services, excluding construction, of state agencies.

PEER did not review the purchasing practices of institutions of higher learning or local governing authorities, such as schools, community colleges, county governments, or municipalities.

Method

In conducting fieldwork, PEER:

- reviewed:
 - the Department of Finance and Administration's *Mississippi Procurement Manual*, as of July 2015;
 - the Department of Finance and Administration's Certified Mississippi Purchasing Agent Program and Certified Purchasing Office documents as of July 2015;
 - the Department of Information Technology Services' *Procurement Handbook* as of July 2015;
 - the Personal Service Contract Review Board's *Rules and Regulations* (January 16, 2015);
 - applicable state laws; and,
 - the American Bar Association's *2000 Model Procurement Code for State and Local Governments*;

⁴MISS. CODE ANN. § 31-7-1 (e) (1972) defines *commodities* to include goods, merchandise, furniture, equipment, automotive equipment, and other personal property purchased by the agencies of the state and governing authorities, but not commodities purchased for resale or raw materials converted into products for resale. The term *commodities* does not include computer-related equipment. CODE § 31-7-1 (e) (i) defines *equipment* to include automobiles, trucks, tractors, office appliances, and other equipment. CODE § 31-7-1 (e) (ii) defines *furniture* to include desks, chairs, tables, seats, filing cabinets, bookcases, and other items of similar nature, as well as dormitory furniture, appliances, carpets, and other personal property generally referred to as home, office, or school furniture.

- interviewed staff of appropriate state agencies;
- researched literature on other states' contracting policies and procedures; and,
- reviewed applicable information disseminated by national state purchasing officers' organizations.

Background

Since FY 2010, state agencies have spent over \$1 billion on purchases of goods and services. Proper stewardship of public funds requires that the agency making such purchases and the state as a whole make efforts to ensure that public money is being wisely used.

This chapter addresses the following questions:

- Why are oversight and accountability important in state government purchasing?
- Who oversees state agencies' purchasing and what are their responsibilities?
- What are the training and certification needs related to state government purchasing?

Why are oversight and accountability important in state government purchasing?

Oversight of purchasing decisions ensures that the state receives the best value for its purchase, that agencies comply with the required laws and regulations of the state, and that public funds are used in the most cost-beneficial way for the state to accomplish its mission. Within the public sector, procurement is increasingly being seen as an important component in delivering value to government and ultimately, service delivery to the taxpayers. The need for accountability is further reinforced by the amount of money that state government purchasing represents within a given fiscal year, especially the amount represented by contracts.

Oversight of purchasing decisions made by agencies is a vital responsibility. Oversight should begin at the level of the purchasing agency, continue to the control agency tasked with monitoring purchases, and ultimately be exercised by the Legislature during the appropriations process. These are all key points in the decision chain that require the input and actions to administer the purchasing function in an effective, efficient, and a trustworthy manner.

Systems in place at each of the three levels of oversight should contribute to the overall goal of ensuring that public funds are used in the most cost-beneficial way for the state to accomplish its mission. These systems should include internal audit and control systems that monitor at-risk areas for misuse or abuse and are capable of recommending actions that could be taken for correction.

Ideally, oversight systems should be able to address and ensure:

- that there are adequate independent control and audit mechanisms and institutions to oversee the procurement function;
- that there are clearly defined internal control mechanisms for individual agencies;
- that there exists a proper balance between timely and efficient decisionmaking and adequate risk management; and,
- that specific and periodic risk assessments and controls be tailored to the particular purchasing environment.⁵

Accountability in public procurement essentially means to be responsible for purchasing decisions, to have an obligation to report purchasing actions to the appropriate control agency, and to answer for those decisions and actions, facing penalty or correction, if necessary.

Who oversees state agencies' purchasing and what are their responsibilities?

The three state control agencies for purchasing--the Department of Finance and Administration, the Department of Information Technology Services, and the Personal Service Contract Review Board--are the ones chiefly charged with administration and oversight of purchasing by state agencies.

The MISSISSIPPI CODE governs state agencies' processes for procurement of goods and services. The CODE delegates responsibility to the following state agencies to create rules and regulations regarding contracting within their jurisdictions:

- the Department of Finance and Administration (within that department, the Office of Purchasing, Travel, and Fleet Management and the Public Procurement Review Board);
- the Department of Information Technology Services; and,
- the Personal Service Contract Review Board.

State law provides authority to these agencies to promulgate rules and regulations regarding contracting for goods and services. State agencies must operate within the bounds of these rules and regulations and are responsible for maintaining appropriate paperwork and/or computer records to document their compliance with such. Exhibit 1, page 7, provides the statutory authority and lists the oversight responsibilities of each of these three agencies.

⁵*Integrity in Public Procurement: Good Practice From A to Z*, Organization for Economic Co-operation and Development (OECD), 2007.

Exhibit 1: Statutory Authority and Oversight Responsibilities of the Purchasing Control Agencies

Agency	Statutory Authority	Oversight Responsibilities
Department of Finance and Administration: Office of Purchasing, Travel, and Fleet Management	MISS. CODE ANN. Section 25-1-77 and 31-7-9 (1972)	<ul style="list-style-type: none"> • Governs the procurement of commodities, which include goods, merchandise, furniture, equipment, automotive equipment, and other personal property purchased by the agencies of the state and governing authorities, but not commodities purchased for resale or raw materials converted into products for resale • Promulgates and maintains the <i>Mississippi Procurement Manual</i> and its regulations that govern commodity purchases in the state • Approves purchases in excess of \$50,000 made by state agencies • Approves state contracts for commodities at an agreed-upon price or discount (i. e., statewide contracts).
Department of Finance and Administration: Public Procurement Review Board*	MISS. CODE ANN. Section 27-104-7 (1972)	<ul style="list-style-type: none"> • Approves OPTFM regulations governing the purchase or lease of commodities and equipment by state agencies • Reviews and rules on any purchase that exceeds \$500,000 for commodities, goods, merchandise, furniture, equipment, automotive, or other personal property • Hears protests of solicitations or awards of contracts

*Excludes certain powers and duties related to master leases, construction, and disposal of property.

<p>Department of Information Technology Services</p>	<p>MISS. CODE ANN. Section 25-53-5 (1972)</p>	<ul style="list-style-type: none"> • Governs the procurement and acquisition of information technology systems, including computer or telecommunications equipment, electronic word processing and office systems, or services utilized in connection with phases of computer software and consulting services and insurance on all state-owned computer equipment • Develops and maintains the <i>Mississippi Department of Information Technology Services Procurement Handbook</i> and its regulations, which govern information technology purchases in the state • Conducts information technology procurements for purchases in excess of \$50,000 made by state agencies • Conducts procurements to award and purchase for the Express Products List, which includes vendors who agree to sell certain products at a not-to-exceed price
<p>Personal Service Contract Review Board</p>	<p>MISS. CODE ANN. Section 25-9-120 (1972)</p>	<ul style="list-style-type: none"> • Governs the procurement of personal and professional services contracts • Develops and maintains the <i>Personal Service Contract Review Board Rules and Regulations</i> and its regulations, which govern personal and professional contracts in the state • Approves personal and professional contracts in excess of \$75,000 made by state agencies, except those services exempt by statute • Maintains a pre-approved vendor list that includes providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board

SOURCE: PEER analysis of MISS. CODE ANN.

What are the training and certification needs related to state government purchasing?

Having trained and certified purchasing agents in state agencies helps to reduce error, waste, and abuse in the purchasing of goods or services. Also, by having a training and certification system in place, the state can expect improvements in gaining the best value for money on state purchases, ultimately resulting in more effective use of public funds.

The need to have a trained and certified purchasing staff within each agency's purchasing department is paramount to an effective and efficient purchasing program. By having knowledgeable staff in charge of purchasing decisions, the state gains two main advantages:

- A certified and trained purchasing official alleviates the problem of contracts having to be reissued because of flaws in the original contract or purchase order. A purchasing official who is well versed in the laws and regulations of the state helps to ensure that purchases and contracts are issued correctly on the first attempt. This allows the agency to acquire the good or service within the desired time frame.
- Having well-trained and certified purchasing staff in state agencies should result in direct savings for the state. A purchasing staff that can easily navigate the purchasing laws and regulations of the state should be able to gain more advantageous purchases and contracts for goods or services. Ultimately, this will result in the state gaining the most value for each dollar it expends.

2015 Amendments to Procurement Laws and Regulations and Their Potential Effects on the Procurement Environment

During 2014, charges of procurement-related corruption within the Mississippi Department of Corrections caused many to consider changes to laws to ensure that such abuses are stopped. Several agencies legally charged with the oversight of state procurement laws, as well as a special task force appointed by the Governor, reviewed procurement laws and policies with an eye toward strengthening oversight. In 2015, the Mississippi Legislature acted to address several areas that it believed created risk to the integrity, transparency, and accountability of the procurement process.

This chapter addresses the following questions:

- What changes were made to state procurement laws in the 2015 session?
- What has been the response of the control agencies to the new legislation?
- What are the potential effects of the changes on the procurement environment of state agencies?

In 2015, the Legislature passed two bills designed to address concerns regarding accountability and transparency within the state's procurement system.

What changes were made to state procurement laws in the 2015 session?

During the 2015 Regular Session of the Legislature, two pieces of legislation, Senate Bill 2400 and House Bill 825, were passed to address and alleviate concerns regarding accountability and transparency within the state's procurement system. Additionally, changes were made to the membership and jurisdiction of the Personal Service Contract Review Board. While now implemented in the three control agencies discussed at page 6, the legislation's true impact on the number and dollar amounts of emergency and sole-source contracts awarded and reviewed cannot yet be determined.

During the 2015 Regular Session, the Legislature passed two important pieces of legislation related to the state's procurement laws:

- Senate Bill 2400, which amended MISS. CODE ANN. §31-7-13 (j) (1972), changed commodity purchasing standards relative to emergency and sole-source procurements; and,

- House Bill 825, which amended MISS. CODE ANN. §25-9-120 (1972), changed the composition, jurisdiction, and duties of the Personal Service Contract Review Board.

How did Senate Bill 2400 change procurement laws?

Senate Bill 2400, 2015 Regular Session, changed the procedures for state agencies' emergency procurement of commodities and repair services.

According to DFA, S. B. 2400 was envisioned as a method of improving accountability for state agencies' emergency procurements.

Prior to the adoption of S. B. 2400, state agencies could procure commodities under emergencies when their governing boards found that an emergency existed as defined by CODE Section 31-7-1 and could document the need for the purchase. The agency would make a purchase and then give notice to DFA that it had made the purchase and set out the need that had given rise to the emergency purchase, as well as a description of what was purchased.

S. B. 2400 amended CODE Section 31-7-13 to allow the agency to set out its emergency need and refer a request to DFA for approval that the department may approve. After the passage of S. B. 2400, the only time an agency may purchase under an emergency without first seeking and obtaining DFA's prior approval is when it can demonstrate that a condition creating the emergency threatens the life or health of persons or the protection and preservation of property. Such purchases may be made without prior approval.

In all emergency procurements, the agency must provide documentation to DFA of the procurement made, its price, and the nature of the emergency. Emergency procurements must only be used to meet emergency needs.

Another amendment to MISS. CODE ANN. Section 31-7-13 (1972) dealt with sole-source procurement of commodities. Historically, both state agencies and local governing authorities could make non-competitive procurements from a single source when there was only one source offering the commodity for sale. For agencies, pre-approval from DFA was required. S.B. 2400 amendments provided that an agency director or the director's designee must file with DFA a description of what was purchased, its purchase price, and the source from which the commodity was purchased.

How did House Bill 825 change procurement laws?

House Bill 825, 2015 Regular Session, amended several sections of the CODE, with the greatest impact being on the composition, jurisdiction, and duties of the Personal Service Contract Review Board.

The Personal Service Contract Review Board, created by MISS. CODE ANN. Section 25-9-120 (1972), is the state's oversight body for state agency personal service contracting. The board has authority to set regulations for such procurements and has the duty to pre-approve contracts of a value in excess of \$75,000, except those services exempt by statute.

Composition of the PSCRB Changed

Since its inception, the Personal Service Contract Review Board has been composed of the State Personnel Director, the Executive Director of DFA, and the executive directors of the Department of Corrections; Wildlife, Fisheries and Parks; and Environmental Quality. These directors, except for the State Personnel Director, could also designate an employee to perform their functions.

The presence of executive directors who could influence decisions over the approval of their own contracts raised concerns, giving rise to the need for a major change in the membership of the board. H. B. 825 provided for a board comprised of two gubernatorial appointees, two appointees of the Lieutenant Governor, and the State Personnel Director. The Executive Director of DFA serves as an ex-officio voting member. The Senate must confirm appointees of the Governor and Lieutenant Governor and those persons must possess five years' experience in general business, health care, or finance for an organization, corporation, or other private or public entity.

Procurement Threshold for Personal Services Lowered

H. B. 825 made a significant change in the jurisdiction of the PSCRB by lowering the amount of contracts to be pre-approved from \$100,000 to \$75,000. Such a change places a greater number of high-value contracts under the board's jurisdiction for pre-approval.

Some Professions Removed from List of Exemptions

MISS. CODE ANN. Section 25-9-120 (3) (a) (1972) has always included a list of professions or occupations for which contracts

were exempt from board regulation. H. B. 825 removed several of these professions from the list of exempt services. Beginning with the July 1, 2015, effective date of the bill, contracts for physicians, dentists, and veterinarians now must be procured in accordance with the board's regulations.

H. B. 825 does contain a provision that would allow the board to exempt professionals from having to bid if the board seeking their services can show that federal law or provisions of professional ethics would bar persons from bidding or if the agency can show that the use of bidding would in some way be counterproductive for a particular procurement. H. B. 825 also added a new exemption for certain Public Employees' Retirement System contracts from PSCRB purview.

Regulation of Sole-Source Service Contracts

As in the case of S. B. 2400, sole-source procurements were a subject for amendment by H. B. 825 in the area of service contracting.

Agencies wishing to make sole-source procurement must now demonstrate that they have used the state procurement portal website established by MISS. CODE ANN. Sections 25-53-151 and 27-104-165 (1972) to solicit vendors for at least fourteen days⁶. Following that, they must be able to show the Personal Service Contract Review Board that they need the particular service and that this service is only available through one vendor. The agency must also show that the amount expended for the service is reasonable and that the agency made efforts to get the best price for the service.

Alternate vendors that, through the use of the state portal, discover that an agency is contemplating sole-source procurement may notify the board and the agency of the availability of their comparable service. If the agency determines that this service meets the requirements of the agency, the agency must abandon its proposed use of sole-source procurement and proceed competitively. If the agency believes that the alternative service is not comparable to the one it requires, it may petition to the PSCRB for sole-source procurement authority, with the agency bearing the burden of proving that the sole-source procurement is necessary. For a sole-source procurement to continue, the board must vote affirmatively to allow such. To finalize the sole-source procurement, the agency must provide the board with information regarding the pricing of the service, the need for the sole source, information showing that the vendor is the sole practicable source

⁶H. B. 825 also added that an agency may obtain a binding, valid court order that mandates that a particular source or provider be used for the required service. A copy of the court order must be submitted to the PSCRB.

to meet the needs of the agency, and all efforts made to negotiate the best price for the agency.

Changes in Procedures

Contracts submitted for the PSCRB's approval must be submitted no later than thirty days prior to the next scheduled board meeting or as prescribed by the PSCRB. The board has thirty days to review and either approve or deny such contracts. Failure to act in the thirty-day period results in a presumptive approval of the contract. Denials of any proposed contract approval must be in writing and must set out the basis for the denial.

Additionally, the bill requires that the board:

- provide any changes to the rules and regulations related to personal and professional services proposed by the PSCRB to the chairs of the Accountability, Efficiency and Transparency committees of the Senate and House of Representatives at least fifteen days prior to the board's vote; and,
- prepare and submit quarterly reports to the House and Senate committees on Accountability, Efficiency and Transparency detailing the sole-source contracts presented to the board, the reasons for the approval or rejection of such contracts, and that the agency requesting such a sole-source contract is prepared to brief and explain the sole-source contract to either committee by December 15 of each year upon request of the committee.

What has been the response of the control agencies to the new legislation?

The departments of Finance and Administration and Information Technology Services have adopted rules in conformity with the changes in laws in 2015. The Personal Service Contract Review Board is in the process of adopting rules to give effect to the changes in law.

What changes in regulations has DFA made in response to the 2015 legislative changes?

DFA has revised its regulations regarding emergency and sole-source procurements in response to the 2015 legislative changes.

With regard to S.B. 2400, DFA has amended Procurement Rule 3.110 to recognize the two types of emergencies (those that require DFA approval prior to procurement and those affecting life, health, and property that can be made without prior approval). The rule sets out all documentation required that must be submitted to DFA under both types of emergency situations.

Procurement Rule 3.109.02 addresses sole-source procurements of commodities. These procurement regulations actually track

the language placed in H.B. 825's provisions dealing with the Personal Service Contract Review Board, but create a comprehensive set of processes that agencies must follow before obtaining a commodity from a sole-source provider.

Sole-source purchases must now be listed for fourteen days on the portal website or in a newspaper. Additionally, a justification letter stating the reason why this is a sole-source purchase must accompany the purchase packet, as well as a final invoice stating the final cost of the item. There has also been a dispute mechanism added so that vendors may protest the award of a sole-source product that they believe is not a true sole-source item. Such disputes may be taken to the Public Procurement Review Board. In instances wherein DFA believes that the commodity is not available solely through one source, the agency likewise may appeal the decision to the Public Procurement Review Board.

What changes in regulations has ITS made in response to the 2015 legislative changes?

ITS revised its regulations regarding emergency and sole-source procurements to help ensure consistency across state government.

ITS has amended Rule 207.6: 013-060 Procurement Types: Emergency Purchases. The rule as amended tracks the new procurement definitions of emergency found in CODE Section 31-7-13 and recognizes that emergencies that could impact the life and health of others or property would trigger agency authority to procure without prior approval from ITS. All other emergencies would not give rise to authority to buy items whose purchase is overseen by ITS without prior approval.

Rule 207.2: 013-030 governs sole-source procurement. This rule contains many features of the sole-source commodities rule adopted by DFA. PEER notes that with regard to advertising, the ITS rule requires advertising only after ITS examines the request for sole-source procurement and concurs with the agency's sole-source determinations; otherwise, ITS conducts a competitive procurement on behalf of the agency. The rule tracks the amendments to the Personal Service Contract Review Board authority (CODE Section 25-9-120) by requiring posting of intent to make sole-source procurements on the state portal. This gives other vendors who might have an identical or comparable product to make their case and possibly require ITS to competitively solicit the information technology hardware, software, or service.

What changes in regulations has PSCRB made in response to the 2015 legislative changes?

The board is in the process of considering new rules adopted to comply with H. B. 825.

The reconstituted board became effective July 1, 2015. By September 2015, all new members had been appointed.

According to the board's staff, the PSCRB began discussions in its November 2015 meeting regarding the new rules and plans to vote on the proposed changes at the December 2015 meeting. Assuming that the board finds these proposed rules acceptable, the board will submit these rules to the Secretary of State for mandatory review under the Administrative Procedures Act. According to the board's staff, it has been applying the new provisions of H. B. 825 to decisions regarding services procurement.

What are the potential effects of the changes on the procurement environment of state agencies?

While increased accountability and transparency are expected for emergency and sole-source contracts under the revised laws and regulations, the control agencies also expect that the new laws will impact the timeliness of procurements and require better planning by state agencies to ensure that procurement laws are followed and ultimately approved. Because these changes have been in force and effect for less than a year, it is premature at this point to project their impact on agency budgets and workload.

What has been the impact on agencies' use of sole-source and emergency contracts?

The new laws and regulations establish more demanding standards for emergency and sole-source procurements. As to the cost and timeliness of procurement processing, it is too soon to draw conclusions about the impact these factors might have on the control agencies and on agencies procuring commodities and services.

Potentially, the number of sole-source contracts could diminish under the new, more demanding standards. Whether agencies will continue to try to make sole-source procurements remains to be seen. Since the provisions of S. B. 2400 just became effective in July 2015, any efforts to make a reasonable assessment regarding impact might be premature at this time.

Some DFA staff believe that the use of sole-source contracts will be diminished as a result of the changes to laws and regulations. Prior to the alterations of July 2015, sole-source contracts were not typical purchase avenues for agencies, except for certain agencies such as the Department of Transportation and the large universities. PEER notes that the law governing sole-source procurement now requires advertising, vendor contests, and appeals before the Public Procurement Review Board, which all could add time to the procurement process.

Because these new rules could cause the expenditure of additional time and resources associated with sole-source procurements, it is difficult at this early date to judge the fiscal impact of this rule on procurement activities. It would appear that because new

regulations expand the time horizon for sole-source procurement, agencies would be required to engage in more planning when contemplating using this type of procurement. Obviously, increased planning time would translate into the expenditure of more resources.

What has been the impact on transparency of commodities and information technology procurement?

The changes in laws and regulations will increase transparency by requiring documentation and reporting of sole-source and emergency contracts.

The requirement of posting on a portal and giving potential vendors an opportunity to compete or argue that they can compete to sell a commodity adds to transparency in the procurement process. The passage of time will help determine whether potential vendors will avail themselves of this opportunity.

Are there potential ill effects of the changes in procurement laws and regulations?

DFA has opined that more restrictive requirements of sole-source contracts could cause agencies to prepare and implement more restrictive product specifications in an attempt to procure products from an agency-preferred vendor.

Recently, DFA has noticed the use of restrictive bids becoming more popular by those agencies that once relied on sole-source contracts.

DFA notes that the restrictive and specific language lifted straight from vendor specifications of products the agency would like to have is now being used as the basis for bid specifications. Such use could obviously curtail competitiveness in the process and could result in an invitation for bids (IFB) becoming a substitute for sole-source procurement.

The Personal Service Contract Review Board is currently attempting, as time and workload allow, to provide courtesy reviews of invitations for bids and requests for proposals. However, the PSCRB staff stated that courtesy reviews are unlikely to continue due to the effects of H. B. 825 on PSCRB's workload. Also, PSCRB anticipates that an increased number of contracts will be approved as a result of the new thirty-day requirement of H. B. 825; in November 2015, four such contracts were approved in accordance with statute without the benefit of PSCRB review.

Working with its five funded positions, the PSCRB now has added responsibilities. These include managing a more demanding procurement process for sole-source and emergency contracts, handling contracts of a lower value because of the lowering of the board's jurisdictional amount to \$75,000, and working quickly to avoid the provision of law that mandates that the board must

complete its analysis of contracts within thirty days or the contract will become effective by operation of law.

SPB's Deputy Director has noted that one noteworthy impact seen to date is that the PSCRB staff are less likely to provide "courtesy review" of agencies' proposed IFBs and RFPs. These reviews were provided to assist agencies in ensuring that their procurement process was in proper order before actual submission of a contract for board review. Because of the new demands of the changed laws, this service is unlikely to continue.

The Deputy Director also noted that there is concern that the thirty-day rule cited above will cause an increase in the number of contracts that become effective without the board's review as a result of the thirty-day requirement in H. B. 825. In November 2015, four such contracts were approved in accordance with statute without the benefit of PSCRB review. (See Exhibit 2, below.) PEER notes that the Deputy Director says that the agency has only enough funding to fill five of the nine positions allocated to the board.

Exhibit 2: Contracts Approved in Accordance with the Thirty-Day Requirement of H. B. 825, 2015 Regular Session

Date Submitted	Agency	Contractor	Contract Value	Type
10/19/2015	Division of Medicaid	eQHealth	\$1,390,129.00	New Contract
10/19/2015	Division of Medicaid	eQHealth	(1,095,302.00)	Modification
10/19/2015	Division of Medicaid	Medical Transportation Management, Inc.	*	Modification
10/19/2015	Division of Medicaid	Med-Solutions, Inc.	**	Modification

*Redacted pursuant to a protective order entered into by Hinds County Chancery Court on December 27, 2013.

** Redacted pursuant to a protective order entered into by Hinds County Chancery Court on February 21, 2013.

SOURCE: PSCRB records.

The State Personnel Board's staff, in particular, is worried that the demands of the changes to purchasing procedure made in the 2015 legislative session will give rise to more emergency purchases under the "best interest" category of emergency purchases.

The Department of Corrections inmate food contract case was supplied as an example of some of the things that could happen in the future because of the new laws/regulations. PSCRB staff was unable to complete its courtesy review of the contract prior to its being submitted to the board. When flaws were found during the initial contracting process, the contract was withdrawn by the agency prior to consideration by the PSCRB. The Department of Corrections did not have time to amend and re-file the contract as

an RFP and thus had to re-enter the contract as an emergency contract to meet the needs of the prison population.

Training and Certification Requirements Established by State Law and DFA Regulations

Successful implementation of the recent purchasing reform efforts enacted by the Legislature will depend on trained and competent purchasing officials within the various state agencies. The Legislature has mandated the establishment of certification and training requirements to assist state agency employees in carrying out their purchasing duties.

This chapter addresses the following questions:

- What is the statutorily required training for purchasing officials?
- What are the additional statutory requirements for a Certified Purchasing Office?

As required by state law, the Office of Purchasing, Travel and Fleet Management has created a procurement training and certification school to instruct purchasing officials regarding the state's laws and regulations. However, OPTFM cannot definitively determine the number of employees who are subject to receive purchasing training or what percentage of purchasing officials within the state are already certified.

Agencies that complete the statutory requirements to be a Certified Purchasing Office are allowed to make purchasing decisions based on best value (rather than lowest and best price) and are allowed to participate in cooperative purchasing agreements. As of September 1, 2015, five state entities had been designated by OPTFM as certified purchasing offices.

What is the statutorily required training for purchasing officials?

As required by state law, the Office of Purchasing, Travel and Fleet Management has created a procurement training and certification school to instruct purchasing officials regarding the state's laws and regulations. However, because of the varying job titles of state agency employees who have purchasing duties, OPTFM cannot definitively determine the number of employees in state agencies who are subject to receive purchasing training or what percentage of purchasing officials within the state are already certified.

During its 2013 Regular Session, the Legislature enacted House Bill 502, which required OPTFM to adopt regulations governing the certification process for certified purchasing offices, including the "Mississippi Purchasing Certification Program, which shall be required of all purchasing officials at state agencies." (This portion of House Bill 502 is now codified as MISS. CODE ANN. Section 31-7-9 [3] [1972].) In accordance with CODE Section 31-7-9 (3), OPTFM established the Mississippi Purchasing Certification Program to ensure that state purchasing and contract

management personnel are trained in state purchasing laws and regulations. The goal of the program is to offer public purchasing courses and certification testing specifically designed for public procurement in Mississippi.

What is the Mississippi Purchasing Certification Program?

The Mississippi Purchasing Certification Program provides training on state purchasing laws and regulations in a classroom setting. At the end of the training program, participants must demonstrate competency in the program's content by scoring 70% or higher in order to receive certification for five years.

The Mississippi Purchasing Certification Program provides two levels of certification--e. g., Certified Mississippi Purchasing Agent and Certified Mississippi Procurement Manager. Program content for the purchasing agent certification consists of thirteen classroom sessions and enables participants to understand state purchasing laws and regulations, identify steps in the procurement process, develop specifications and competitive bids, and understand the procurement oversight responsibilities of the control agencies. At the conclusion of the thirteen sessions, participants must sit for a 100-question written examination and score 70% or higher to pass the examination and be certified for five years.

Approximately six months after the July 1, 2013, effective date of House Bill 502, OPTFM offered certified purchasing agent sessions in early 2014, with the first participants being certified as of March 6, 2014. According to documentation provided by OPTFM, approximately 150 employees, primarily from state agencies, had been certified as of October 1, 2015.

As of October 1, 2015, the OPTFM had not developed the course content for the procurement manager certification program, reportedly due to staff turnover issues and implementation problems associated with the state's migration to a new accounting system--i. e., MAGIC.

Who is required to receive training and who has received training?

Because of the varying job titles of state agency employees who have purchasing duties, OPTFM cannot definitively determine the number of employees in state agencies who are subject to receive purchasing training or what percentage of purchasing officials within the state are already certified.

As stated on page 20, MISS. CODE ANN. Section 31-7-9 (1972) states that the Mississippi Purchasing Certification Program shall be required of all purchasing officials at state agencies. However, the section does not provide a definition for "purchasing officials." In the absence of such a definition, PEER determined that other sections of state law, as well as DFA interpretations, shed light on which state agency employees should be considered as purchasing officials, as follows:

- MISS. CODE ANN. Section 31-7-1 (c) (1972) defines purchasing agent as "any administrator, superintendent, purchase clerk or

other chief officer so designated having general or special authority to negotiate for and make private contract for or purchase for any governing authority or agency.”

- DFA’s *Mississippi Procurement Manual* states that a purchasing agent is a person who has authority to issue purchase orders, issue invitations to bid, receive and accept bids, and negotiate contract clauses.
- OPTFM’s certified purchasing agent application form describes a purchasing position as one in which the incumbent spends the majority of work time making final decisions on procurement methods, contract and purchase order terms and conditions, source, and price.

OPTFM staff state that they primarily accept certified purchasing agent applications from state agency employees who have the terms “purchase” or “contract analyst”--i. e., terms that denote purchasing responsibilities--in their position title. OPTFM accepts other employees into the program only if the employee’s supervisor provides a “working position description” to substantiate the employee’s purchasing responsibilities.

Because of the varying job titles of state agency employees who have purchasing duties, OPTFM cannot definitively determine the number of employees in state agencies who are subject to receive purchasing training or what percentage of purchasing officials within the state are already certified, as required by state law. In an effort to make such a determination, PEER compiled a list of state agency employees as of July 1, 2015, who had the term “purchase” or “contract analyst” in his or her position title. PEER then compared those employees’ names to the Certified Mississippi Purchasing Agent list maintained by OPTFM. Of the sixty-five state employees with a position title indicating that they had purchasing responsibilities, only twenty-two employees (34%) had received the certified purchase agent designation. The remaining forty-three employees (66%) had not yet enrolled in the purchasing agent certification program as required by state law.

PEER also determined the position titles of state agency employees already listed by OPTFM as being certified purchasing agents as of July 1, 2015. While some employees had position titles that included the terms “purchasing” or “contract analyst,” other employees had position titles that included the following:

- accountant/auditor;
- attorney;
- projects/staff officer;
- department chief;
- bureau/branch/division/deputy/office director; and,
- business system analyst.

While all of these employees apparently have job responsibilities involving purchasing functions, those responsibilities are not intuitive simply from the position titles. Although OPTFM has the

statutory responsibility to ensure that all state agency purchase officials become certified, because of confusion resulting from position titles not containing purchasing-related terms, OPTFM does not know the total “universe” of state agency employees with purchasing responsibilities to know when all such employees have been certified and whether compliance with state law has been achieved. OPTFM staff told PEER that the Certified Mississippi Purchasing Agent training would always be available; however, as the need/demand for the class declines, the offerings of the CMPA training would be reduced, probably to quarterly offerings. Once this happens, the OPTFM will then begin working to create the advanced class.

New Mexico’s state purchasing department administers an annual online registration system for all state employees engaged in purchasing. The system allows for a listing of purchasing officials and their certification status.

What are the additional statutory requirements for a Certified Purchasing Office?

Agencies that complete the statutory requirements to be a Certified Purchasing Office are allowed to make purchasing decisions based on best value (rather than lowest and best price) and are allowed to participate in cooperative purchasing agreements.

What is a Certified Purchasing Office?

A state agency can be a certified purchasing office if fifty percent or more of its purchasing officials hold certification from a nationally recognized certification school and one hundred percent of those officials hold certification from the Mississippi Purchasing Certification Program. Agencies that have a certified purchasing office designation are able to make purchasing decisions based on best value rather than lowest and best price (as is required for non-certified agencies) and are allowed to participate in cooperative purchasing agreements.

MISS. CODE ANN. Section 31-7-1 (i) (1972) defines a certified purchasing office as:

. . .any purchasing office in which fifty percent (50%) or more of the purchasing agents hold a certification from the Universal Public Purchasing Certification Council or other nationally recognized purchasing certification, and in which, in the case of a state agency purchasing office, in addition to the national certification, one hundred percent (100%) of the purchasing officials hold a certification from the State of Mississippi’s Basic or Advanced Purchasing Certification Program.

The incentives for state agencies to attain Certified Purchasing Office status are as follows:

- According to MISS. CODE ANN. Section 31-7-13 (d) (ii) (1972), certified purchasing offices may make procurement decisions based on best value rather than lowest and best price (as is

required for non-certified agencies) and may utilize a request for proposals process when purchasing commodities.

- Certified purchasing offices are eligible to purchase from cooperative purchasing agreements that qualify under MISS. CODE ANN. Section 31-7-13 (m) (xxix) (1972), provided that the notification to potential contractors includes a clause that sets forth the availability of the contract to other governmental entities and if the use of such contract is determined to be in the best interest of the government entity.

These provisions provide entities that choose to be designated as certified purchasing offices with a degree of flexibility to consider value rather than price and possibly more advantageous prices offered through cooperatives.

What is the process for becoming a Certified Purchasing Office?

Agencies may gain certified purchasing office designation by applying to OPTFM, providing details on the training level of the staff, and demonstrating that the office has met the fifty percent national certification and one hundred percent state certification requirements.

According to the *Mississippi Procurement Manual*, an entity may apply to become a certified purchasing office by completing an application self-reporting purchasing agents for the entity and attaching documentation showing their proof of national certification, including the issuance and expiration dates of their certificates. OPTFM verifies that 50% or more of the purchasing agents are certified by a qualified national entity and that 100% hold a certification from the state training program.

After review and verification of the submitted documentation, OPTFM issues a certificate to the entity valid for a twelve-month period. OPTFM does not provide notice to renew the certification, which is the responsibility of the certified purchasing office to submit a new application not more than four months and not less than one month prior to the expiration date of certification.

How many state agencies have received Certified Purchasing Office designation?

As of September 1, 2015, five state entities had been designated by OPTFM as certified purchasing offices.

As of September 1, 2015, the following state agencies had been designated by OPTFM as certified purchasing offices: central office of the Community College Board, central office of the Board of Trustees of Institutions of Higher Learning, Department of Archives and History, Department of Rehabilitation Services, and Department of Transportation.

PEER reviewed the certified purchasing office applications of the five state entities and concluded that four of the five complied with the statutory requirement to be designated as such-i. e., 100% of their purchasing agents hold state certification and 50%

of their purchasing agents hold national certification. However, none of the Department of Rehabilitation Services' purchasing staff are certified purchasing agents.

OPTFM staff explained that they "grandfathered" in the Department of Rehabilitation Services as a Certified Purchasing Office because the department became such before the Legislature enacted the requirement that all purchasing agents attain state certification. PEER notes that there is no provision in state law or the *Mississippi Procurement Manual* for exempting state agencies wishing to become a certified purchasing office from state or national certification requirements. Therefore, the OPTFM should consider requiring the Department of Rehabilitation Services' purchasing staff to meet the same requirements for certification that other agencies must meet in order to be considered a Certified Purchasing Office.

As part of the 2014 Governor's Task Force on Procurement and Contracting, MDOC is required to become a certified purchasing office by March 31, 2016.

As stated in Appendix B, page 34, in November 2014, Governor Phil Bryant appointed a Task Force on Contracting and Procurement in the Mississippi Department of Corrections (MDOC). The task force was convened to examine the conditions at MDOC that had allowed abuse of the department's purchasing system. Following the release of the task force's final report in June 2015, Governor Bryant issued Executive Order 1361, in which he noted that the task force determined that "additional training for purchasing agents within the Mississippi Department of Corrections is needed." In addition, Governor Bryant ordered:

No later than March 31, 2016, the Mississippi Department of Corrections shall satisfy the requirements to be recognized as a Certified Purchasing Office by the Department of Finance and Administration.

According to MDOC staff, the department has partially satisfied the requirements for a Certified Purchasing Office because all of its purchasing agents are state certified. The department's purchasing director and deputy director are presently working toward national certification, but have not achieved that status yet. Depending on the schedule for sitting for the national examination, the department hopes to meet the Governor's March 31 deadline to become a Certified Purchasing Office, pending DFA's verification of MDOC's training credentials and approval of MDOC's application.

The Uses and Status of Net-of-Fee Contracts in State Government

“Net-of-fee” contracts became a subject of considerable interest following recent revelations of wrongdoing by the former Commissioner of Corrections (see Appendix A, page 33). Issues arose involving the former commissioner’s selection of contractors for commissaries at the state’s penal institutions. In its final report to the Governor, the Task Force on Contracting and Procurement in the Mississippi Department of Corrections recommended that PEER examine any state agency contracts lacking oversight by a contract review agency, specifically “net-of-fee” contracts.

This chapter addresses the following questions:

- What are net-of-fee contracts and what are the concerns regarding such contracts?
- For what purposes do state agencies use net-of-fee contracts?

Net-of-fee contracts do not involve the expenditure of appropriated funds, but do involve commitments on the part of state government for the use of some government benefit—e. g., space or access to a market. Such contracts are generally not subject to state procurement laws and, without regulation, could be let in a manner that is not transparent or competitive.

What are net-of-fee contracts and what are the concerns regarding such contracts?

Under a net-of-fee contract, a vendor makes an agreement to conduct activities that will result in the vendor being paid. The state does not commit general funds or other appropriated funds to pay the vendor. Such contracts became a subject of concern following indictments associated with the Mississippi Department of Corrections’ use of net-of-fee contracts for the delivery of commissary services.

The Personal Service Contract Review Board (PSCRB) defines a net-of-fee contract as one in which there is no expenditure of state funds from any funding source (state, federal, or other). PSCRB further states that net-of-fee contracts do not come under PSCRB purview, as they do not involve expenditures of state funds, and that an agency should maintain for its file a written determination that a contract is net-of-fee.

Net-of-fee contracts have traditionally had little to no regulation in Mississippi state government. Under such a contract, a vendor makes an agreement with a state agency to conduct activities that will result in the vendor being paid. The state does not commit general funds or other appropriated funds to pay the vendor. The state agency may receive an amount from the vendor to compensate for the agency’s permitting use of its facility or access

to clients. An example of a net-of-fee contract would be a food services contract of the Mississippi Fair Commission, under which the state receives money from the vendor for allowing it to set up operations at the fairgrounds or other properties under the commission's jurisdiction.

Recently adopted legislation now places the Department of Corrections' commissary vendor selection under a competitive bid requirement (see Section 2, H. B. 400, Regular Session 2015, codified as MISS. CODE ANN. Section 47-5-109.1 [1972]). This legislation implemented recommendations PEER made in Report #551, *The Department of Corrections' Management of Commissary Services and the Inmate Welfare Fund* (June 14, 2011).

For what purposes do state agencies use net-of-fee contracts?

Some state agencies use net-of-fee contracts as a means of offering food and vending services to staff, customers, and inmates. Despite the fact that public funds generally are not used to compensate contractors with net-of-fee contracts, state agencies have an interest in seeing that their staff, clients, and inmates receive quality services from their contractors.

Since the PSCRB definition uses the term "agency" as the responsible party regarding written determinations of net-of-fee contracts, PEER limited the scope of its review of these contracts to exclude all state entities that fall outside of the definition of a state "agency," such as local governing authorities. (See MISS. CODE ANN. § 31-7-1 [1972].)

Because of a scarcity of information on the volume of such contracts in state government, PEER researched what types of state agency contracts might fall under the net-of-fee definition. PEER examined relevant statutes in the MISSISSIPPI CODE and definitions similar to net-of-fee contracts enacted by other states. PEER also contacted the fifteen largest agencies and boards, in terms of general fund budgets, and inquired into each agency's policy regarding net-of-fee contracts. The agencies and boards PEER contacted were:

- Medicaid;
- Department of Education;
- Department of Human Services;
- Department of Finance and Administration;
- Department of Transportation;
- Institutions of Higher Learning;
- Department of Revenue;
- Department of Mental Health;
- Mississippi Development Authority;
- Department of Corrections;

- Department of Health;
- Community College Board;
- Department of Public Safety;⁷
- Mississippi Emergency Management Agency; and,
- Department of Environmental Quality.

PEER asked each of the above-listed entities to provide information regarding the number of active net-of-fee contracts within their respective agencies, the procurement process for these contracts, and what oversight applied to these contracts. The responses varied, with most entities indicating that they did not engage in net-of-fee contracts, and those entities that did reported minimal oversight policies (e. g., inner-agency approval by board or agency heads with no secondary check).

Subsequent to PEER's review of the agencies set out above, the Committee learned that the Mississippi Fair Commission also uses net-of-fee contracts for food vending at the fairgrounds.

From research with the above state agencies, PEER learned:

- Neither the PSCRB nor the Department of Finance and Administration have general oversight authority for these contracts.
- MISS. CODE ANN. § 43-3-93 (1972), which codifies the federal Randolph-Sheppard Vending Stand Act (herein referred to as the Randolph-Sheppard statute), narrows the scope of net-of-fee contracts to those which fall outside of the purview of contracts made pursuant to the Vocational Rehabilitation of the Blind. The Randolph-Sheppard statute requires that legally blind persons be given preference in regard to the operation of vending facilities on state property. The Vocational Rehabilitation of the Blind has oversight authority for these vending facilities through weekly or monthly random inspections. Additional oversight is conducted by agency heads that report any problems to the Director of Vocational Rehabilitation of the Blind. Federal regulations giving guidance on the administration of the Randolph-Sheppard Act in state facilities can be found at 34 CFR Section 395 et. seq. Exceptions to the priority given under such programs for the blind include facilities at buildings or land controlled by schools, the Mississippi State Fair, or any of the colleges and universities, as well as food services provided by hospitals, or residential institutions as a direct service to patients, inmates, trainees or institutionalized persons.
- Other states have either a broad definition of these types of contracts similar to what is referred to as net-of-fee by the PSCRB or they treated these contracts as leases of state property (as does Texas) or subjected these contracts to secondary oversight through a central procurement office (as does Tennessee).

⁷The Department of Public Safety did not respond to PEER's inquiry.

PEER notes that the limited oversight regarding net-of-fee contracts outside of the purview of the Vocational Rehabilitation of the Blind is easily attributable to the fact that Mississippi's agencies have no funds invested in these contracts. Agencies who pick a net-of-fee contractor are taking a share of the contractor's earnings in return for the contractor receiving the right to do business with agency's students, patrons, or persons in the agency's custody.

While by definition public funds are not expended on net-of-fee contracts, the close link between state agencies and contractors gives the state considerable interest in the quality of services provided by a vendor. Further, in cases such as the Department of Corrections' commissaries, persons under state custody and control rely on the contractor the agency selects for valuable services and products at a reasonable price.

The competitive process may be used as a means of selecting the best equipped contractor to render services to persons who should reasonably expect the state to have a hand in ensuring that quality service is being provided through these contracts. Generally, a request for proposals (RFP) process could set pricing and quality standards that could help ensure that the ultimate consumers are well served by the contractor. The process could also be used to generate some additional revenue to the state agency through competition, since such agencies should receive benefit from allowing contractors to use their facilities.

Recommendations

To address the procurement issues identified by PEER in this report, the Legislature should enact the following legislation:

- Amend MISS. CODE ANN. Sections 31-7-3 and 25-9-120 (1972) to require the Department of Finance and Administration, Personal Service Contract Review Board, and Department of Information Technology Services to compile the following information regarding the implementation of Senate Bill 2400, 2015 Regular Session, and House Bill 825, 2015 Regular Session:
 - additional costs associated with the development and monitoring of compliance with rules and regulations adopted subsequent to the passage of the legislation;
 - changes in control agencies (i. e., DFA, PSCRB, and ITS) and state agencies' workloads subsequent to the passage of the legislation, specifically identifying any impediments to service, oversight, or transparency;
 - frequency and value of contracts using alternate means of procurement, such as sole-source or emergency contracts; and,
 - conflicts among rules and regulations adopted by the control agencies subsequent to the passage of the legislation.

This information should be collected for fiscal years 2016 and 2017 and reported to the Executive Director of the PEER Committee and the chairs of the Senate and House committees on Accountability, Efficiency and Transparency by September 30, 2017.

- Amend MISS. CODE ANN. Section 31-7-9 (1972) to require the Department of Finance and Administration to survey annually all state agencies as defined in MISS. CODE ANN. Section 25-9-107 (d) (1972) to determine the names and position titles of employees directly or indirectly responsible for procurement actions within the agencies. Once identified, DFA should maintain a list of such employees and update it periodically. Such employees should be required to enroll in the Mississippi Purchasing Certification Program as established in MISS. CODE ANN. Section 31-7-9 (3) (1972) and complete the program within twenty-four months of the effective date of this amendment or, for persons employed subsequent to the effective date of this amendment, within twenty-four months of employment.
- Amend MISS. CODE ANN. Section 31-7-1 and 31-7-9 (1972) to require the Department of Finance and Administration to

promulgate rules and regulations regarding the procurement of net-of-fee contracts by state agencies. Such contracts should be submitted to DFA regardless of the amount to be remitted to the state agency--i. e., \$0 threshold. Such rules and regulations should exempt contracts specifically within the purview of the federal Randolph-Sheppard Act.

Also, the Legislature should amend MISS. CODE ANN. Section 37-101-15 (1972) to require the Board of Trustees of Institutions of Higher Learning to adopt a policy that requires state institutions of higher learning to obtain the approval of the board prior to entering into net-of-fee contracts. Such contracts should be submitted to the board regardless of the amount to be remitted to the state institutions of higher learning--i. e., \$0 threshold. Such board policy should exempt contracts specifically within the purview of the federal Randolph-Sheppard Act.

Appendix A: Indictments Related to MDOC Purchasing

On August 5, 2014, the United States District Court for the Southern District of Mississippi filed an indictment against the Commissioner of the Mississippi Department of Corrections alleging forty-nine counts of conspiracy, bribery, wire fraud, and money laundering for his involvement and participation in a kickback arrangement regarding prison contracts with a local businessman.

According to the indictment, from 2007 through March 2014, the former commissioner received bribes or kickbacks from a private businessman in exchange for awarding MDOC contracts, leases, or work to companies owned by the businessman, or to companies for which the businessman was a paid consultant. The indictments alleged that the former commissioner accomplished this, in part, by directing MDOC contracts to the businessman's firms by use of recommendations of no-bid or sole-source contracts to the State Personnel Board (i. e., the state's control agency for contracts involving personal and professional services).

In all, more than one million dollars in direct money and mortgage payments were made to the former commissioner or his mortgage lenders from November 2, 2007, until March 25, 2014.

In February 2015 the former commissioner pled guilty to the charges of money laundering conspiracy and filing a false tax return. The sentencing and ultimate resolution of the case are pending.

SOURCE: *United States v. Christopher B. Epps and Cecil McCrory*, Grand Jury Indictment, United States District Court for the Southern District of Mississippi filed August 5, 2015; Gates, Jimmie E., "Former MDOC Commissioner Chris Epps' Sentencing Delayed." *Clarion Ledger*, June 8, 2015.

Appendix B: Task Force on Contracting and Procurement in the Mississippi Department of Corrections

In response to the allegations raised in the indictment of former MDOC Commissioner Christopher Epps, Governor Phil Bryant empaneled a special task force in November 2014 to examine the condition of contracting procedures at MDOC. This was in response to Executive Order 1346 issued on November 7, 2014, and Governor Phil Bryant's Directive Letter of November 14, 2014.

This task force was convened to examine the conditions at MDOC that had allowed for the abuse of the purchasing system to occur and to make recommendations to the state on what measures might be taken to prevent such abuses from happening in the future. Officially called the Task Force on Contracting and Procurement in the Mississippi Department of Corrections, this task force consisted of Co-Chairmen Andy Taggart and Robert Gibbs, Bill Crawford, Constance Slaughter-Harvey, and Mike Moore.

From December 2014 until March 2015, the task force met and held public hearings regarding contract and procurement issues that face the state. Staff members of agencies, public officials, prospective vendors, and the public at large contributed to the hearings in the form of testimonials and expert opinions on efforts that might be taken to provide enhanced safeguards for taxpayer money and restoring confidence in the operations of state government.

On December 31, 2014, the task force presented its initial recommendations to the Governor. Subsequent to these recommendations, the Legislature amended state purchasing law with the passage of H. B. 825, H. B. 400, and S. B. 2400 during the 2015 Regular Session. The task force continued its mission of data gathering and suggested alterations to law and regulations until June 2015.

In its final report issued to the Governor on June 16, 2015, the task force offered several recommendations that the state could adopt to increase accountability of the state purchasing system and restore public confidence in the procurement process. These include:

- Require contractual warranties and representations from each vendor entering a personal or professional service contract with a state agency that no consultant has been or is to be retained by the vendor in connection with securing of the contract or the provision of goods or services under the contract, or, if a consultant has been retained by the vendor,

fully identifying by name, services provided and fee paid to and received by each consultant retained by the vendor.

- Require contractual warranties and representations from each vendor entering into a personal or professional service contract with a state agency, identifying by name and address each principal of the vendor owning or controlling a greater than 5% interest in the vendor's business.
- Require all businesses desiring to enter into personal or professional service contracts with the state to register as vendors with the Secretary of State.
- Require MDOC to become a Certified Purchasing Office as described in law and regulation.
- PSCRB should review its existing procurement rules and develop recommendations for improvement.
- Alter the language of H. B. 825 in regard to voting and quorum requirements to allow for a true majority in voting.
- Alter language adopted in H. B. 825 to extend the automatic approval of a personal or professional contract from thirty days to forty-five days if no board action is taken.
- Add and fund positions needed by PSCRB to properly review contracts submitted to the agency.
- Eliminate all statutory exemptions from the bid process for MDOC contracts totaling \$75,000 or more or that competitive bid processes be used even when not statutorily required.
- Give authority to PSCRB or another agency to review and approve "net-of-fee" contracts.
- Require that the analysis for the award of personal and professional service contracts be posted online at the time each executed contract is posted online.
- Require state agencies to post their workplace notices describing the State's Auditor's fraud hotline and website.
- Require an appropriate state agency to conduct financial status reviews of state agency heads at least every four years, with potential problems being reported to the Attorney General for investigation.

SOURCE: *Task Force on Contracting and Procurement in the Mississippi Department of Corrections: Final Report to Governor Phil Bryant In Fulfillment of the Charge of Executive Order 1346 of November 7, 2014,*

and Governor Phil Bryant's Directive Letter of November 14, 2014, June 26, 2015.

Agency Responses



STATE OF MISSISSIPPI
GOVERNOR PHIL BRYANT

DEPARTMENT OF FINANCE AND ADMINISTRATION
KEVIN J. UPCHURCH
EXECUTIVE DIRECTOR



November 23, 2015

James A. Barber, Executive Director
PEER Committee
501 North West Street
Woolfolk Building, 3rd Floor
Jackson, Mississippi 39201

Dear Mr. Barber:

Thank you for the opportunity to review the draft PEER Report entitled *State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues*. As you know, the Department of Finance and Administration (DFA) is committed to fostering an environment of excellence in state procurement. To that end, DFA has worked diligently to develop and implement the procurement certification program first authorized by the Legislature in 2013. In the two years since its inception, the program has aided state procurement professionals in navigating the many changes brought on by the implementation of the State's new enterprise accounting system, MAGIC, and the statutory changes made to sole-source and emergency purchases as well as personal and professional services contracts.

DFA is committed to working hand in hand with the other oversight agencies to ensure accountability, efficiency, and effectiveness in state procurement. We look forward to discussing the recommendations in the report with our sister agencies and stand ready to implement any changes we can make to enhance the integrity of state procurement, including gathering data related to the recent changes and continuing the growth of our certification program. We wish to thank the PEER Committee and its invaluable staff for their professionalism in preparing this report.

Sincerely,

A handwritten signature in black ink that reads "Kevin J. Upchurch".

Kevin J. Upchurch



MISSISSIPPI STATE PERSONNEL BOARD

DEANNE MOSLEY
EXECUTIVE DIRECTOR

December 4, 2015

Mr. James A. Barber
Executive Director
Joint Committee on Performance Evaluation
and Expenditure Review
Post Office Box 1204
Jackson, Mississippi 39215-1204

Dear Mr. Barber:

Thank you for the opportunity to review the draft PEER report entitled *State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues*. We appreciate the opportunity to share the initial results of the implementation of House Bill 825 (2015 Regular Session) with the PEER Committee and staff.

As anticipated and discussed during the 2015 Regular Session, implementation of the new and additional responsibilities assigned by House Bill 825 without funding to the Personal Service Contract Review Board has impacted PSCRB's ability to review procurements and contracts. Our Fiscal Year 2017 budget request renews our request for funding to address the unintended consequences of House Bill 825. However, we remain committed to maximizing our current resources to fulfill our new and additional statutory responsibilities.

Thank you and your staff for your efforts and professionalism throughout this review process. If we can be of any assistance to you and the Committee, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Deanne Mosley".

Deanne Mosley
Executive Director

The Department of Information Technology Services chose not to submit a written response to this report.

PEER Committee Staff

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