MISSISSIPPI LEGISLATURE
REGULAR SESSION 2022
By: Senator(s) Horhn
To: Labor; Economic and Workforce Development

SENATE BILL NO. 2401

AN ACT TO ESTABLISH THE OPPORTUNITIES FOR DIVERSITY IN CONTRACTING PROGRAM (ODC) TO BE ADMINISTERED BY THE MISSISSIPPI DEVELOPMENT AUTHORITY TO IMPROVE THE NUMBER OF SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESS CONCERNS THAT DO BUSINESS WITH THE STATE BY FACILITATING AND IMPROVING ACCESS TO GOVERNMENT CONTRACTS; TO REQUIRE EACH STATE AGENCY TO APPOINT AN ODC COMPLIANCE OFFICER WHO WILL BE RESPONSIBLE FOR MONITORING COMPLIANCE WITH THE ODC PROGRAM AND FOR REPORTING COMPLIANCE OR NONCOMPLIANCE FOR THEIR RESPECTIVE AGENCIES TO THE MDA; TO ESTABLISH THE RESPONSIBILITIES OF ODC COMPLIANCE OFFICERS; TO REQUIRE STATE AGENCIES TO INCLUDE CERTAIN LANGUAGE IN CONTRACTS FOR GOODS AND SERVICES; TO ESTABLISH A PROCESS FOR ISSUING ODC WAIVERS; TO AMEND SECTION 31-7-13, MISSISSIPPI CODE OF 1972, IN CONFORMITY THERETO; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. This act shall be known and may be cited as the "Opportunities for Diversity in Contracting Act."

SECTION 2. The State of Mississippi is committed to improving the number of socially and economically disadvantaged small business concerns that do business with the state by facilitating and improving access to government contracts. Facilitating this access is not only the right thing to do but will foster an environment in which all Mississippi businesses have access to and compete fairly in the procurement process.
SECTION 3. As used in this section:

(a) "ODC business enterprise" means a socially and economically disadvantaged small business concern certified as a participant in the Opportunities for Diversity in Contracting Program by the Mississippi Development Authority under this section.

(b) "MDA" means the Mississippi Development Authority.

(c) "Socially and economically disadvantaged small business concern" means a socially and economically disadvantaged small business concern as defined under the Small Business Act (15 USCA, Section 637(a)), except that the net worth of the business may not be greater than Seven Hundred Fifty Thousand Dollars ($750,000.00).

SECTION 4. (1) The MDA shall establish a business assistance program known as the Opportunities for Diversity in Contracting Program (ODC Program) with the goal of improving the number of socially and economically disadvantaged small business concerns that do business with the state by facilitating and improving access to government contracts. MDA shall adopt rules to administer the program that do all of the following:

(a) Establish procedures by which a sole proprietorship, association, partnership, corporation, limited liability corporation, or joint venture may apply for certification as an ODC business enterprise.
(b) Except as provided in paragraph (n) of this subsection, establish agency procurement goals for contracting with ODC business enterprises in the award of contracts based on the availability of eligible program participants as determined by the MDA.

(i) Goals established under this paragraph shall be based on a percentage level of participation and a percentage of contractor availability.

(ii) Goals established under this paragraph shall be applied at the contract level, relative to an overall dollar goal for each state agency, in accordance with the following certification categories: construction, architecture, and engineering; professional services; goods and services; and information technology services.

(c) Establish a system of certifying ODC business enterprises.

(d) Establish standards to determine when an ODC business enterprise no longer qualifies for ODC business enterprise certification.

(e) Develop a process for evaluating and adjusting goals established by this section to determine what adjustments are necessary to achieve participation goals established by the executive director.

(f) Establish a point system or comparable system to evaluate bid proposals to encourage ODC business enterprises to
participate in the procurement of professional services and
information technology services.

(g) Establish a system to track data and analyze each
certification category established under paragraph (b)(ii) of this
subsection.

(h) Establish a process to mediate complaints and to
review ODC business enterprise certification appeals.

(i) Implement an outreach program to educate potential
participants about the Opportunities for Diversity in Contracting
Program.

(j) Establish a system to assist state agencies in
identifying and utilizing ODC business enterprises in their
contracting processes.

(k) Implement a system of self-reporting by ODC
business enterprises as well as an on-site inspection process to
validate the qualifications of an ODC business enterprise.

(l) Establish a waiver mechanism to waive program goals
or participation requirements for those companies that, despite
their documented best efforts, are unable to contract with
certified ODC business enterprises.

(m) Establish a process for monitoring overall program
compliance in which equal employment opportunity officers
primarily are responsible for monitoring their respective
agencies.
(n) Establish guidelines for institutions of higher learning to allow the institutions of higher learning to establish agency procurement goals for contracting with ODC business enterprises.

(2) Business and personal financial information and trade secrets submitted by Opportunities for Diversity in Contracting Program applicants pursuant to this section shall be exempt from the provisions of the Mississippi Public Records Act of 1983, unless the executive director presents the financial information or trade secrets at a public hearing or public proceeding regarding the applicant's eligibility to participate in the program.

SECTION 5. (1) Each state agency shall appoint an ODC compliance officer who will be responsible for monitoring compliance with the ODC Program and for reporting compliance or noncompliance for their respective agencies to the MDA. The ODC compliance officer shall also be responsible for:

(a) Analyzing spending on goods, services and construction projects for his agency and determining missed opportunities for the inclusion of ODC vendors.

(b) Analyzing the spending of the state agency with ODC vendors, as well as ODC vendor availability by regions of the state so the MDA may determine the appropriate ODC goal for each contract.
(c) Reporting ODC enrollment for all contracts issued by each state agency to the MDA.

(d) Implementing a scorecard system that will be developed by MDA, which tracks each state agency's ODC Program expenditures.

(e) Implementing an outreach and training plan that will be developed by MDA, to ensure compliance with ODC Program requirements.

(f) Attending semiannual training conducted by MDA on ODC Program requirements.

(g) Participating in an annual compliance review conducted by MDA and implementing recommendations made by MDA as a result of the review process.

(2) State agencies shall ensure that all contracts for the purchase of goods and services contain language that:

(a) Prohibits contractors and subcontractors from engaging in discriminatory employment practices.

(b) Certifies that contractors and subcontractors are in compliance with all applicable state and federal law governing fair labor and employment practices.

(c) Encourages contractors and subcontractors to purchase goods and services from certified ODC vendors.

(3) State agencies shall not issue ODC waivers without undertaking the following:
Having all ODC waivers reviewed by the agency's procurement officer, in collaboration with its ODC compliance officer, who will certify that each ODC waiver issued by the agency complies with criteria for granting an ODC waiver.

(b) Submitting quarterly reports to MDA that list each ODC waiver granted by the agency.

(c) Permitting MDA to complete its review of each state agency's quarterly reports and to conduct periodic audits of each state agency's administration of the ODC waiver process.

(4) If MDA determines that a state agency has not properly administered the issuance of ODC waivers, subsequent ODC waivers shall not be issued without the approval of MDA. MDA may release a state agency from the approval process once MDA has determined that an agency has the ability to consistently administer the waiver process.

SECTION 6. The MDA shall file an annual report with the Governor, Lieutenant Governor and Speaker of the House of Representatives regarding describing progress in advancing the ODC Program as well as any initiatives that are implemented to increase the number of certified ODC vendors doing business with the state.

SECTION 7. Section 31-7-13, Mississippi Code of 1972, is amended as follows:

31-7-13. All agencies and governing authorities shall purchase their commodities and printing; contract for garbage
collection or disposal; contract for solid waste collection or
disposal; contract for sewage collection or disposal; contract for
public construction; and contract for rentals as herein provided.

(a) **Bidding procedure for purchases not over $5,000.00.**
Purchases which do not involve an expenditure of more than Five
Thousand Dollars ($5,000.00), exclusive of freight or shipping
charges, may be made without advertising or otherwise requesting
competitive bids. However, nothing contained in this paragraph
(a) shall be construed to prohibit any agency or governing
authority from establishing procedures which require competitive
bids on purchases of Five Thousand Dollars ($5,000.00) or less.

(b) **Bidding procedure for purchases over $5,000.00 but
not over $50,000.00.** Purchases which involve an expenditure of
more than Five Thousand Dollars ($5,000.00) but not more than
Fifty Thousand Dollars ($50,000.00), exclusive of freight and
shipping charges, may be made from the lowest and best bidder
without publishing or posting advertisement for bids, provided at
least two (2) competitive written bids have been obtained. In
determining the lowest and best bidder, a point system or
comparable system established under the Opportunities for
Diversity in Contracting Act shall be utilized. Any state agency
or community/junior college purchasing commodities or procuring
construction pursuant to this paragraph (b) may authorize its
purchasing agent, or his designee, to accept the lowest
competitive written bid under Fifty Thousand Dollars ($50,000.00).
Any governing authority purchasing commodities pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, with regard to governing authorities other than counties, or its purchase clerk, or his designee, with regard to counties, to accept the lowest and best competitive written bid. Such authorization shall be made in writing by the governing authority and shall be maintained on file in the primary office of the agency and recorded in the official minutes of the governing authority, as appropriate. The purchasing agent or the purchase clerk, or his designee, as the case may be, and not the governing authority, shall be liable for any penalties and/or damages as may be imposed by law for any act or omission of the purchasing agent or purchase clerk, or his designee, constituting a violation of law in accepting any bid without approval by the governing authority. The term "competitive written bid" shall mean a bid submitted on a bid form furnished by the buying agency or governing authority and signed by authorized personnel representing the vendor, or a bid submitted on a vendor's letterhead or identifiable bid form and signed by authorized personnel representing the vendor. "Competitive" shall mean that the bids are developed based upon comparable identification of the needs and are developed independently and without knowledge of other bids or prospective bids. Any bid item for construction in excess of Five Thousand Dollars ($5,000.00) shall be broken down by components to provide detail of component description and...
pricing. These details shall be submitted with the written bids and become part of the bid evaluation criteria. Bids may be submitted by facsimile, electronic mail or other generally accepted method of information distribution. Bids submitted by electronic transmission shall not require the signature of the vendor's representative unless required by agencies or governing authorities.

(c) **Bidding procedure for purchases over $50,000.00.**

(i) **Publication requirement.**

1. Purchases which involve an expenditure of more than Fifty Thousand Dollars ($50,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located. **In determining the lowest and best bidder, a point system or comparable system established under the Opportunities for Diversity in Contracting Act shall be utilized.** However, all American Recovery and Reinvestment Act projects in excess of Twenty-five Thousand Dollars ($25,000.00) shall be bid. All references to American Recovery and Reinvestment Act projects in this section shall not apply to programs identified in Division B of the American Recovery and Reinvestment Act.

2. Reverse auctions shall be the primary method for receiving bids during the bidding process. If a
purchasing entity determines that a reverse auction is not in the best interest of the state, then that determination must be approved by the Public Procurement Review Board. The purchasing entity shall submit a detailed explanation of why a reverse auction would not be in the best interest of the state and present an alternative process to be approved by the Public Procurement Review Board. If the Public Procurement Review Board authorizes the purchasing entity to solicit bids with a method other than reverse auction, then the purchasing entity may designate the other methods by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, or bids received by any other method that promotes open competition and has been approved by the Office of Purchasing and Travel. However, reverse auction shall not be used for any public contract for design or construction of public facilities, including buildings, roads and bridges and term contracts as provided in paragraph (n) of this section. The Public Procurement Review Board must approve any contract entered into by alternative process. The provisions of this item 2 shall not apply to the individual state institutions of higher learning.

3. The date as published for the bid opening shall not be less than seven (7) working days after the last published notice; however, if the purchase involves a construction project in which the estimated cost is in excess of Fifty Thousand Dollars ($50,000.00), such bids shall not be opened in less than
fifteen (15) working days after the last notice is published and
the notice for the purchase of such construction shall be
published once each week for two (2) consecutive weeks. However,
all American Recovery and Reinvestment Act projects in excess of
Twenty-five Thousand Dollars ($25,000.00) shall be bid. For any
projects in excess of Twenty-five Thousand Dollars ($25,000.00)
under the American Recovery and Reinvestment Act, publication
shall be made one (1) time and the bid opening for construction
projects shall not be less than ten (10) working days after the
date of the published notice. The notice of intention to let
contracts or purchase equipment shall state the time and place at
which bids shall be received, list the contracts to be made or
types of equipment or supplies to be purchased, and, if all plans
and/or specifications are not published, refer to the plans and/or
specifications on file. If there is no newspaper published in the
county or municipality, then such notice shall be given by posting
same at the courthouse, or for municipalities at the city hall,
and at two (2) other public places in the county or municipality,
and also by publication once each week for two (2) consecutive
weeks in some newspaper having a general circulation in the county
or municipality in the above-provided manner. On the same date
that the notice is submitted to the newspaper for publication, the
agency or governing authority involved shall mail written notice
to, or provide electronic notification to the main office of the
Mississippi Procurement Technical Assistance Program under the
Mississippi Development Authority that contains the same information as that in the published notice. Submissions received by the Mississippi Procurement Technical Assistance Program for projects funded by the American Recovery and Reinvestment Act shall be displayed on a separate and unique Internet web page accessible to the public and maintained by the Mississippi Development Authority for the Mississippi Procurement Technical Assistance Program. Those American Recovery and Reinvestment Act related submissions shall be publicly posted within twenty-four (24) hours of receipt by the Mississippi Development Authority and the bid opening shall not occur until the submission has been posted for ten (10) consecutive days. The Department of Finance and Administration shall maintain information regarding contracts and other expenditures from the American Recovery and Reinvestment Act, on a unique Internet web page accessible to the public. The Department of Finance and Administration shall promulgate rules regarding format, content and deadlines, unless otherwise specified by law, of the posting of award notices, contract execution and subsequent amendments, links to the contract documents, expenditures against the awarded contracts and general expenditures of funds from the American Recovery and Reinvestment Act. Within one (1) working day of the contract award, the agency or governing authority shall post to the designated web page maintained by the Department of Finance and Administration, notice of the award, including the award recipient, the contract amount,
and a brief summary of the contract in accordance with rules promulgated by the department. Within one (1) working day of the contract execution, the agency or governing authority shall post to the designated web page maintained by the Department of Finance and Administration a summary of the executed contract and make a copy of the appropriately redacted contract documents available for linking to the designated web page in accordance with the rules promulgated by the department. The information provided by the agency or governing authority shall be posted to the web page for the duration of the American Recovery and Reinvestment Act funding or until the project is completed, whichever is longer.

(ii) **Bidding process amendment procedure.** If all plans and/or specifications are published in the notification, then the plans and/or specifications may not be amended. If all plans and/or specifications are not published in the notification, then amendments to the plans/specifications, bid opening date, bid opening time and place may be made, provided that the agency or governing authority maintains a list of all prospective bidders who are known to have received a copy of the bid documents and all such prospective bidders are sent copies of all amendments. This notification of amendments may be made via mail, facsimile, electronic mail or other generally accepted method of information distribution. No addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening
to a date not less than five (5) working days after the date of
the addendum.

(iii) **Filing requirement.** In all cases involving
governing authorities, before the notice shall be published or
posted, the plans or specifications for the construction or
equipment being sought shall be filed with the clerk of the board
of the governing authority. In addition to these requirements, a
bid file shall be established which shall indicate those vendors
to whom such solicitations and specifications were issued, and
such file shall also contain such information as is pertinent to
the bid.

(iv) **Specification restrictions.**

1. Specifications pertinent to such bidding
shall be written so as not to exclude comparable equipment of
domestic manufacture. However, if valid justification is
presented, the Department of Finance and Administration or the
board of a governing authority may approve a request for specific
equipment necessary to perform a specific job. Further, such
justification, when placed on the minutes of the board of a
governing authority, may serve as authority for that governing
authority to write specifications to require a specific item of
equipment needed to perform a specific job. In addition to these
requirements, from and after July 1, 1990, vendors of relocatable
classrooms and the specifications for the purchase of such
relocatable classrooms published by local school boards shall meet
all pertinent regulations of the State Board of Education,
including prior approval of such bid by the State Department of
Education.

2. Specifications for construction projects
may include an allowance for commodities, equipment, furniture,
construction materials or systems in which prospective bidders are
instructed to include in their bids specified amounts for such
items so long as the allowance items are acquired by the vendor in
a commercially reasonable manner and approved by the
agency/governing authority. Such acquisitions shall not be made
to circumvent the public purchasing laws.

(v) **Electronic bids.** Agencies and governing
authorities shall provide a secure electronic interactive system
for the submittal of bids requiring competitive bidding that shall
be an additional bidding option for those bidders who choose to
submit their bids electronically. The Department of Finance and
Administration shall provide, by regulation, the standards that
agencies must follow when receiving electronic bids. Agencies and
governing authorities shall make the appropriate provisions
necessary to accept electronic bids from those bidders who choose
to submit their bids electronically for all purchases requiring
competitive bidding under this section. Any special condition or
requirement for the electronic bid submission shall be specified
in the advertisement for bids required by this section. Agencies
or governing authorities that are currently without available high
speed Internet access shall be exempt from the requirement of this subparagraph (v) until such time that high speed Internet access becomes available. Any county having a population of less than twenty thousand (20,000) shall be exempt from the provisions of this subparagraph (v). Any municipality having a population of less than ten thousand (10,000) shall be exempt from the provisions of this subparagraph (v). The provisions of this subparagraph (v) shall not require any bidder to submit bids electronically. When construction bids are submitted electronically, the requirement for including a certificate of responsibility, or a statement that the bid enclosed does not exceed Fifty Thousand Dollars ($50,000.00), on the exterior of the bid envelope as indicated in Section 31-3-21(1) and (2) shall be deemed in compliance with by including same as an attachment with the electronic bid submittal.

(d) **Lowest and best bid decision procedure.**

(i) **Decision procedure.** Purchases may be made from the lowest and best bidder. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually
submitted, it shall place on its minutes detailed calculations and
narrative summary showing that the accepted bid was determined to
be the lowest and best bid, including the dollar amount of the
accepted bid and the dollar amount of the lowest bid. No agency
or governing authority shall accept a bid based on items not
included in the specifications.

(ii) Decision procedure for Certified Purchasing Offices. In addition to the decision procedure set forth in
subparagraph (i) of this paragraph (d), Certified Purchasing
Offices may also use the following procedure: Purchases may be
made from the bidder offering the best value. In determining the
best value bid, freight and shipping charges shall be included.
Life-cycle costing, total cost bids, warranties, guaranteed
buy-back provisions, documented previous experience, training
costs and other relevant provisions, including, but not limited
to, a bidder having a local office and inventory located within
the jurisdiction of the governing authority, may be included in
the best value calculation. This provision shall authorize
Certified Purchasing Offices to utilize a Request For Proposals
(RFP) process when purchasing commodities. All best value
procedures for state agencies must be in compliance with
regulations established by the Department of Finance and
Administration. No agency or governing authority shall accept a
bid based on items or criteria not included in the specifications.
(iii) Decision procedure for Mississippi Landmarks. In addition to the decision procedure set forth in subparagraph (i) of this paragraph (d), where purchase involves renovation, restoration, or both, of the State Capitol Building or any other historical building designated for at least five (5) years as a Mississippi Landmark by the Board of Trustees of the Department of Archives and History under the authority of Sections 39-7-7 and 39-7-11, the agency or governing authority may use the following procedure: Purchases may be made from the lowest and best prequalified bidder. Prequalification of bidders shall be determined not less than fifteen (15) working days before the first published notice of bid opening. Prequalification criteria shall be limited to bidder's knowledge and experience in historical restoration, preservation and renovation. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid and prequalification procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the
dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications.

(iv) **Construction project negotiations authority.** If the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

(e) **Lease-purchase authorization.** For the purposes of this section, the term "equipment" shall mean equipment, furniture and, if applicable, associated software and other applicable direct costs associated with the acquisition. Any lease-purchase of equipment which an agency is not required to lease-purchase under the master lease-purchase program pursuant to Section 31-7-10 and any lease-purchase of equipment which a governing authority elects to lease-purchase may be acquired by a lease-purchase agreement under this paragraph (e). Lease-purchase financing may also be obtained from the vendor or from a third-party source after having solicited and obtained at least two (2) written competitive bids, as defined in paragraph (b) of this section, for such financing without advertising for such bids. Solicitation for the bids for financing may occur before or after acceptance of bids for the purchase of such equipment or, where no such bids for purchase are required, at any time before
the purchase thereof. No such lease-purchase agreement shall be for an annual rate of interest which is greater than the overall maximum interest rate to maturity on general obligation indebtedness permitted under Section 75-17-101, and the term of such lease-purchase agreement shall not exceed the useful life of equipment covered thereby as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines. Any lease-purchase agreement entered into pursuant to this paragraph (e) may contain any of the terms and conditions which a master lease-purchase agreement may contain under the provisions of Section 31-7-10(5), and shall contain an annual allocation dependency clause substantially similar to that set forth in Section 31-7-10(8). Each agency or governing authority entering into a lease-purchase transaction pursuant to this paragraph (e) shall maintain with respect to each such lease-purchase transaction the same information as required to be maintained by the Department of Finance and Administration pursuant to Section 31-7-10(13). However, nothing contained in this section shall be construed to permit agencies to acquire items of equipment with a total acquisition cost in the aggregate of less than Ten Thousand
Dollars ($10,000.00) by a single lease-purchase transaction. All equipment, and the purchase thereof by any lessor, acquired by lease-purchase under this paragraph and all lease-purchase payments with respect thereto shall be exempt from all Mississippi sales, use and ad valorem taxes. Interest paid on any lease-purchase agreement under this section shall be exempt from State of Mississippi income taxation.

(f) **Alternate bid authorization.** When necessary to ensure ready availability of commodities for public works and the timely completion of public projects, no more than two (2) alternate bids may be accepted by a governing authority for commodities. No purchases may be made through use of such alternate bids procedure unless the lowest and best bidder cannot deliver the commodities contained in his bid. In that event, purchases of such commodities may be made from one (1) of the bidders whose bid was accepted as an alternate.

(g) **Construction contract change authorization.** In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the necessity of further public bids; provided that such change shall be made in a commercially
reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract without the necessity of prior approval of the agency or governing authority when any such change or modification is less than one percent (1%) of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

(h) *Petroleum purchase alternative.* In addition to other methods of purchasing authorized in this chapter, when any agency or governing authority shall have a need for gas, diesel fuel, oils and/or other petroleum products in excess of the amount set forth in paragraph (a) of this section, such agency or governing authority may purchase the commodity after having solicited and obtained at least two (2) competitive written bids, as defined in paragraph (b) of this section. If two (2) competitive written bids are not obtained, the entity shall comply with the procedures set forth in paragraph (c) of this section. In the event any agency or governing authority shall have advertised for bids for the purchase of gas, diesel fuel, oils and other petroleum products and coal and no acceptable bids can be obtained, such agency or governing authority is authorized and
directed to enter into any negotiations necessary to secure the lowest and best contract available for the purchase of such commodities.

(i) **Road construction petroleum products price adjustment clause authorization.** Any agency or governing authority authorized to enter into contracts for the construction, maintenance, surfacing or repair of highways, roads or streets, may include in its bid proposal and contract documents a price adjustment clause with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract or in the production or manufacture of materials for use in such performance. Such industry-wide index shall be established and published monthly by the Mississippi Department of Transportation with a copy thereof to be mailed, upon request, to the clerks of the governing authority of each municipality and the clerks of each board of supervisors throughout the state. The price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment. The bid proposals or document contract shall contain the basis and methods of adjusting unit prices for the change in the cost of such petroleum products.

(j) **State agency emergency purchase procedure.** If the governing board or the executive head, or his designees, of any
agency of the state shall determine that an emergency exists in
regard to the purchase of any commodities or repair contracts, so
that the delay incident to giving opportunity for competitive
bidding would be detrimental to the interests of the state, then
the head of such agency, or his designees, shall file with the
Department of Finance and Administration (i) a statement
explaining the conditions and circumstances of the emergency,
which shall include a detailed description of the events leading
up to the situation and the negative impact to the entity if the
purchase is made following the statutory requirements set forth in
paragraph (a), (b) or (c) of this section, and (ii) a certified
copy of the appropriate minutes of the board of such agency
requesting the emergency purchase, if applicable. Upon receipt of
the statement and applicable board certification, the State Fiscal
Officer, or his designees, may, in writing, authorize the purchase
or repair without having to comply with competitive bidding
requirements.

If the governing board or the executive head, or his
designees, of any agency determines that an emergency exists in
regard to the purchase of any commodities or repair contracts, so
that the delay incident to giving opportunity for competitive
bidding would threaten the health or safety of any person, or the
preservation or protection of property, then the provisions in
this section for competitive bidding shall not apply, and any
officer or agent of the agency having general or specific

S. B. No. 2401
22/SS26/R300
PAGE 25 (rdd\tb)
authority for making the purchase or repair contract shall approve the bill presented for payment, and he shall certify in writing from whom the purchase was made, or with whom the repair contract was made.

Total purchases made under this paragraph (j) shall only be for the purpose of meeting needs created by the emergency situation. Following the emergency purchase, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the nature of the emergency shall be filed with the Department of Finance and Administration. Any contract awarded pursuant to this paragraph (j) shall not exceed a term of one (1) year.

Purchases under the grant program established under Section 37-68-7 in response to COVID-19 and the directive that school districts create a distance learning plan and fulfill technology needs expeditiously shall be deemed an emergency purchase for purposes of this paragraph (j).

(k) **Governing authority emergency purchase procedure.**

If the governing authority, or the governing authority acting through its designee, shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interest of the governing authority, then the provisions herein for competitive bidding shall not apply and any officer or agent of such governing
authority having general or special authority therefor in making such purchase or repair shall approve the bill presented therefor, and he shall certify in writing thereon from whom such purchase was made, or with whom such a repair contract was made. At the board meeting next following the emergency purchase or repair contract, documentation of the purchase or repair contract, including a description of the commodity purchased, the price thereof and the nature of the emergency shall be presented to the board and shall be placed on the minutes of the board of such governing authority. Purchases under the grant program established under Section 37-68-7 in response to COVID-19 and the directive that school districts create a distance learning plan and fulfill technology needs expeditiously shall be deemed an emergency purchase for purposes of this paragraph (k).

(l) Hospital purchase, lease-purchase and lease authorization.

(i) The commissioners or board of trustees of any public hospital may contract with such lowest and best bidder for the purchase or lease-purchase of any commodity under a contract of purchase or lease-purchase agreement whose obligatory payment terms do not exceed five (5) years.

(ii) In addition to the authority granted in subparagraph (i) of this paragraph (l), the commissioners or board of trustees is authorized to enter into contracts for the lease of equipment or services, or both, which it considers necessary for
the proper care of patients if, in its opinion, it is not financially feasible to purchase the necessary equipment or services. Any such contract for the lease of equipment or services executed by the commissioners or board shall not exceed a maximum of five (5) years' duration and shall include a cancellation clause based on unavailability of funds. If such cancellation clause is exercised, there shall be no further liability on the part of the lessee. Any such contract for the lease of equipment or services executed on behalf of the commissioners or board that complies with the provisions of this subparagraph (ii) shall be excepted from the bid requirements set forth in this section.

(m) **Exceptions from bidding requirements.** Excepted from bid requirements are:

(i) Purchasing agreements approved by department.

Purchasing agreements, contracts and maximum price regulations executed or approved by the Department of Finance and Administration.

(ii) Outside equipment repairs. Repairs to equipment, when such repairs are made by repair facilities in the private sector; however, engines, transmissions, rear axles and/or other such components shall not be included in this exemption when replaced as a complete unit instead of being repaired and the need for such total component replacement is known before disassembly of the component; however, invoices identifying the equipment,
specific repairs made, parts identified by number and name,
supplies used in such repairs, and the number of hours of labor
and costs therefore shall be required for the payment for such
repairs.

(iii) **In-house equipment repairs.** Purchases of
parts for repairs to equipment, when such repairs are made by
personnel of the agency or governing authority; however, entire
assemblies, such as engines or transmissions, shall not be
included in this exemption when the entire assembly is being
replaced instead of being repaired.

(iv) **Raw gravel or dirt.** Raw unprocessed deposits
of gravel or fill dirt which are to be removed and transported by
the purchaser.

(v) **Governmental equipment auctions.** Motor
vehicles or other equipment purchased from a federal agency or
authority, another governing authority or state agency of the
State of Mississippi, or any governing authority or state agency
of another state at a public auction held for the purpose of
disposing of such vehicles or other equipment. Any purchase by a
governing authority under the exemption authorized by this
subparagraph (v) shall require advance authorization spread upon
the minutes of the governing authority to include the listing of
the item or items authorized to be purchased and the maximum bid
authorized to be paid for each item or items.
(vi) **Intergovernmental sales and transfers.**

Purchases, sales, transfers or trades by governing authorities or state agencies when such purchases, sales, transfers or trades are made by a private treaty agreement or through means of negotiation, from any federal agency or authority, another governing authority or state agency of the State of Mississippi, or any state agency or governing authority of another state. Nothing in this section shall permit such purchases through public auction except as provided for in subparagraph (v) of this paragraph (m). It is the intent of this section to allow governmental entities to dispose of and/or purchase commodities from other governmental entities at a price that is agreed to by both parties. This shall allow for purchases and/or sales at prices which may be determined to be below the market value if the selling entity determines that the sale at below market value is in the best interest of the taxpayers of the state. Governing authorities shall place the terms of the agreement and any justification on the minutes, and state agencies shall obtain approval from the Department of Finance and Administration, prior to releasing or taking possession of the commodities.

(vii) **Perishable supplies or food.** Perishable supplies or food purchased for use in connection with hospitals, the school lunch programs, homemaking programs and for the feeding of county or municipal prisoners.
(viii) **Single-source items.** Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration. Following the purchase, the executive head of the state agency, or his designees, shall file with the Department of Finance and Administration, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the source from whom it was purchased.

(ix) **Waste disposal facility construction contracts.** Construction of incinerators and other facilities for disposal of solid wastes in which products either generated therein, such as steam, or recovered therefrom, such as materials for recycling, are to be sold or otherwise disposed of; however, in constructing such facilities, a governing authority or agency shall publicly issue requests for proposals, advertised for in the
same manner as provided herein for seeking bids for public
construction projects, concerning the design, construction,
ownership, operation and/or maintenance of such facilities,
wherein such requests for proposals when issued shall contain
terms and conditions relating to price, financial responsibility,
technology, environmental compatibility, legal responsibilities
and such other matters as are determined by the governing
authority or agency to be appropriate for inclusion; and after
responses to the request for proposals have been duly received,
the governing authority or agency may select the most qualified
proposal or proposals on the basis of price, technology and other
relevant factors and from such proposals, but not limited to the
terms thereof, negotiate and enter contracts with one or more of
the persons or firms submitting proposals.

(x) **Hospital group purchase contracts.** Supplies,
commodities and equipment purchased by hospitals through group
purchase programs pursuant to Section 31-7-38.

(xi) **Information technology products.** Purchases
of information technology products made by governing authorities
under the provisions of purchase schedules, or contracts executed
or approved by the Mississippi Department of Information
Technology Services and designated for use by governing
authorities.

(xii) **Energy efficiency services and equipment.**
Energy efficiency services and equipment acquired by school
districts, community and junior colleges, institutions of higher learning and state agencies or other applicable governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14.

(xiii) **Municipal electrical utility system fuel.** Purchases of coal and/or natural gas by municipally owned electric power generating systems that have the capacity to use both coal and natural gas for the generation of electric power.

(xiv) **Library books and other reference materials.** Purchases by libraries or for libraries of books and periodicals; processed film, videocassette tapes, filmstrips and slides; recorded audiotapes, cassettes and diskettes; and any such items as would be used for teaching, research or other information distribution; however, equipment such as projectors, recorders, audio or video equipment, and monitor televisions are not exempt under this subparagraph.

(xv) **Unmarked vehicles.** Purchases of unmarked vehicles when such purchases are made in accordance with purchasing regulations adopted by the Department of Finance and Administration pursuant to Section 31-7-9(2).

(xvi) **Election ballots.** Purchases of ballots printed pursuant to Section 23-15-351.

(xvii) **Multichannel interactive video systems.** From and after July 1, 1990, contracts by Mississippi Authority for Educational Television with any private educational
institution or private nonprofit organization whose purposes are educational in regard to the construction, purchase, lease or lease-purchase of facilities and equipment and the employment of personnel for providing multichannel interactive video systems (ITSF) in the school districts of this state.

(xviii) **Purchases of prison industry products by the Department of Corrections, regional correctional facilities or privately owned prisons.** Purchases made by the Mississippi Department of Corrections, regional correctional facilities or privately owned prisons involving any item that is manufactured, processed, grown or produced from the state's prison industries.

(xix) **Undercover operations equipment.** Purchases of surveillance equipment or any other high-tech equipment to be used by law enforcement agents in undercover operations, provided that any such purchase shall be in compliance with regulations established by the Department of Finance and Administration.

(xx) **Junior college books for rent.** Purchases by community or junior colleges of textbooks which are obtained for the purpose of renting such books to students as part of a book service system.

(xx) **Certain school district purchases.**

Purchases of commodities made by school districts from vendors with which any levying authority of the school district, as defined in Section 37-57-1, has contracted through competitive bidding procedures for purchases of the same commodities.
(xxii) Garbage, solid waste and sewage contracts. Contracts for garbage collection or disposal, contracts for solid waste collection or disposal and contracts for sewage collection or disposal.

(xxiii) Municipal water tank maintenance contracts. Professional maintenance program contracts for the repair or maintenance of municipal water tanks, which provide professional services needed to maintain municipal water storage tanks for a fixed annual fee for a duration of two (2) or more years.

(xxiv) Purchases of Mississippi Industries for the Blind products. Purchases made by state agencies or governing authorities involving any item that is manufactured, processed or produced by the Mississippi Industries for the Blind.

(xxv) Purchases of state-adopted textbooks. Purchases of state-adopted textbooks by public school districts.

(xxvi) Certain purchases under the Mississippi Major Economic Impact Act. Contracts entered into pursuant to the provisions of Section 57-75-9(2), (3) and (4).

(xxvii) Used heavy or specialized machinery or equipment for installation of soil and water conservation practices purchased at auction. Used heavy or specialized machinery or equipment used for the installation and implementation of soil and water conservation practices or measures purchased subject to the restrictions provided in
Sections 69-27-331 through 69-27-341. Any purchase by the State Soil and Water Conservation Commission under the exemption authorized by this subparagraph shall require advance authorization spread upon the minutes of the commission to include the listing of the item or items authorized to be purchased and the maximum bid authorized to be paid for each item or items.

   (xxviii) **Hospital lease of equipment or services.** Leases by hospitals of equipment or services if the leases are in compliance with paragraph (l)(ii).

   (xxix) **Purchases made pursuant to qualified cooperative purchasing agreements.** Purchases made by certified purchasing offices of state agencies or governing authorities under cooperative purchasing agreements previously approved by the Office of Purchasing and Travel and established by or for any municipality, county, parish or state government or the federal government, provided that the notification to potential contractors includes a clause that sets forth the availability of the cooperative purchasing agreement to other governmental entities. Such purchases shall only be made if the use of the cooperative purchasing agreements is determined to be in the best interest of the governmental entity.

   (xxx) **School yearbooks.** Purchases of school yearbooks by state agencies or governing authorities; provided, however, that state agencies and governing authorities shall use for these purchases the RFP process as set forth in the
Mississippi Procurement Manual adopted by the Office of Purchasing and Travel.

(xxxi) Design-build method of contracting and certain other contracts. Contracts entered into under the provisions of Section 31-7-13.1, 37-101-44 or 65-1-85.

(xxxii) Toll roads and bridge construction projects. Contracts entered into under the provisions of Section 65-43-1 or 65-43-3.

(xxxiii) Certain purchases under Section 57-1-221. Contracts entered into pursuant to the provisions of Section 57-1-221.

(xxxiv) Certain transfers made pursuant to the provisions of Section 57-105-1(7). Transfers of public property or facilities under Section 57-105-1(7) and construction related to such public property or facilities.

(xxxv) Certain purchases or transfers entered into with local electrical power associations. Contracts or agreements entered into under the provisions of Section 55-3-33.

(xxxvi) Certain purchases by an academic medical center or health sciences school. Purchases by an academic medical center or health sciences school, as defined in Section 37-115-50, of commodities that are used for clinical purposes and
1. intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment or prevention of disease, and 2. medical devices, biological, drugs and
radiation-emitting devices as defined by the United States Food
and Drug Administration.

(xxxvii) Certain purchases made under the Alyce G. Clarke Mississippi Lottery Law. Contracts made by the Mississippi Lottery Corporation pursuant to the Alyce G. Clarke Mississippi Lottery Law.

(n) Term contract authorization. All contracts for the purchase of:

(i) All contracts for the purchase of commodities, equipment and public construction (including, but not limited to, repair and maintenance), may be let for periods of not more than sixty (60) months in advance, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of office. Term contracts for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering the contract.

(ii) Bid proposals and contracts may include price adjustment clauses with relation to the cost to the contractor based upon a nationally published industry-wide or nationally published and recognized cost index. The cost index used in a price adjustment clause shall be determined by the Department of Finance and Administration for the state agencies and by the governing board for governing authorities. The bid proposal and
contract documents utilizing a price adjustment clause shall contain the basis and method of adjusting unit prices for the change in the cost of such commodities, equipment and public construction.

(o) **Purchase law violation prohibition and vendor penalty.** No contract or purchase as herein authorized shall be made for the purpose of circumventing the provisions of this section requiring competitive bids, nor shall it be lawful for any person or concern to submit individual invoices for amounts within those authorized for a contract or purchase where the actual value of the contract or commodity purchased exceeds the authorized amount and the invoices therefor are split so as to appear to be authorized as purchases for which competitive bids are not required. Submission of such invoices shall constitute a misdemeanor punishable by a fine of not less than Five Hundred Dollars ($500.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment for thirty (30) days in the county jail, or both such fine and imprisonment. In addition, the claim or claims submitted shall be forfeited.

(p) **Electrical utility petroleum-based equipment purchase procedure.** When in response to a proper advertisement therefor, no bid firm as to price is submitted to an electric utility for power transformers, distribution transformers, power breakers, reclosers or other articles containing a petroleum
product, the electric utility may accept the lowest and best bid therefor although the price is not firm.

(q) **Fuel management system bidding procedure.** Any governing authority or agency of the state shall, before contracting for the services and products of a fuel management or fuel access system, enter into negotiations with not fewer than two (2) sellers of fuel management or fuel access systems for competitive written bids to provide the services and products for the systems. In the event that the governing authority or agency cannot locate two (2) sellers of such systems or cannot obtain bids from two (2) sellers of such systems, it shall show proof that it made a diligent, good-faith effort to locate and negotiate with two (2) sellers of such systems. Such proof shall include, but not be limited to, publications of a request for proposals and letters soliciting negotiations and bids. For purposes of this paragraph (q), a fuel management or fuel access system is an automated system of acquiring fuel for vehicles as well as management reports detailing fuel use by vehicles and drivers, and the term "competitive written bid" shall have the meaning as defined in paragraph (b) of this section. Governing authorities and agencies shall be exempt from this process when contracting for the services and products of fuel management or fuel access systems under the terms of a state contract established by the Office of Purchasing and Travel.
(r) **Solid waste contract proposal procedure.** Before entering into any contract for garbage collection or disposal, contract for solid waste collection or disposal or contract for sewage collection or disposal, which involves an expenditure of more than Fifty Thousand Dollars ($50,000.00), a governing authority or agency shall issue publicly a request for proposals concerning the specifications for such services which shall be advertised for in the same manner as provided in this section for seeking bids for purchases which involve an expenditure of more than the amount provided in paragraph (c) of this section. Any request for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph (r) shall be duly included in the advertisement to elicit proposals. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter into contracts with one or more of the persons or firms submitting proposals. If the governing authority or agency deems none of the proposals to be qualified or otherwise acceptable, the request for proposals
process may be reinitiated. Notwithstanding any other provisions of this paragraph, where a county with at least thirty-five thousand (35,000) nor more than forty thousand (40,000) population, according to the 1990 federal decennial census, owns or operates a solid waste landfill, the governing authorities of any other county or municipality may contract with the governing authorities of the county owning or operating the landfill, pursuant to a resolution duly adopted and spread upon the minutes of each governing authority involved, for garbage or solid waste collection or disposal services through contract negotiations.

(s) Minority set-aside authorization. Notwithstanding any provision of this section to the contrary, any agency or governing authority, by order placed on its minutes, may, in its discretion, set aside not more than twenty percent (20%) of its anticipated annual expenditures for the purchase of commodities from minority businesses; however, all such set-aside purchases shall comply with all purchasing regulations promulgated by the Department of Finance and Administration and shall be subject to bid requirements under this section. Set-aside purchases for which competitive bids are required shall be made from the lowest and best minority business bidder. For the purposes of this paragraph, the term "minority business" means a business which is owned by a majority of persons who are United States citizens or permanent resident aliens (as defined by the Immigration and Naturalization Service) of the United States, and who are Asian,
Black, Hispanic or Native American, according to the following definitions:

(i) "Asian" means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

(ii) "Black" means persons having origins in any black racial group of Africa.

(iii) "Hispanic" means persons of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race.

(iv) "Native American" means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

(t) **Construction punch list restriction.** The architect, engineer or other representative designated by the agency or governing authority that is contracting for public construction or renovation may prepare and submit to the contractor only one (1) preliminary punch list of items that do not meet the contract requirements at the time of substantial completion and one (1) final list immediately before final completion and final payment.

(u) **Procurement of construction services by state institutions of higher learning.** Contracts for privately financed construction of auxiliary facilities on the campus of a state institution of higher learning may be awarded by the Board of
Trustees of State Institutions of Higher Learning to the lowest and best bidder, where sealed bids are solicited, or to the offeror whose proposal is determined to represent the best value to the citizens of the State of Mississippi, where requests for proposals are solicited.

(v) **Insurability of bidders for public construction or other public contracts.** In any solicitation for bids to perform public construction or other public contracts to which this section applies, including, but not limited to, contracts for repair and maintenance, for which the contract will require insurance coverage in an amount of not less than One Million Dollars ($1,000,000.00), bidders shall be permitted to either submit proof of current insurance coverage in the specified amount or demonstrate ability to obtain the required coverage amount of insurance if the contract is awarded to the bidder. Proof of insurance coverage shall be submitted within five (5) business days from bid acceptance.

(w) **Purchase authorization clarification.** Nothing in this section shall be construed as authorizing any purchase not authorized by law.

**SECTION 8.** This act shall take effect and be in force from and after July 1, 2022.