

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

December 18, 2015

Mike Espy, Esq.
Madison County Board Attorney
P.O. Box 608
Canton, MS 39046

Re: Request for official opinion

Dear Mr. Espy:

Attorney General Hood is in receipt of your request for an official opinion and it has been assigned to me for research and reply.

Background and Questions Presented

Your letter states:

On July 22, 2011, the Attorney General's Office rendered an opinion to the then Madison County counsel (2011 WL 3627254-Hamer), regarding whether three invoices submitted by the county engineer could be paid, or whether the invoices in question were barred from payment by Madison County, based on passage of the three (3) year statute of limitations.

The invoices in question at that time were dated: February 28, 2006; January 10, 2008; and October 18, 2010. Your office opined that two of the invoices (2006 and 2008 – as previously noted) were barred, but that one (2010) was not barred and could be legally paid. The three invoices represented under-billings by the Madison County Engineer that were discovered pursuant to a county Performance Audit, conducted by the Mississippi State Auditor, for year 2010-2011.

My question at this time references these same three invoices, all of which remain unpaid. The invoices appear to have been re-dated to reflect the following dates and invoice amounts due: April 20, 2011 in the amount of \$19,089.68; April 20, 2011 in the amount of \$66,930.87; and May 10, 2011 in the amount of \$135,295.07.

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I have recently received affirmation from the Mississippi Auditor's Office that these invoices indeed resulted from its previous 2010-2011 audit, and represent under-billings by the county engineer. It is undisputed that these invoices were never paid. It is also undisputed that the engineering services reflected on the invoices were performed.

Based on the July 22, 2011 AG Opinion (2011 WL 3627254-Hamer), it appears that all three of these invoices are now time barred by the three year statute of limitations and cannot be legally paid by Madison County. However, my concern involves whether new contracts and invoices can be created based upon the original unpaid debts for work previously performed.

My specific question: Could Madison County legally pay these aforesaid invoices at the present time if it amended the original contract and/or created a new contract premised upon the original debts, if now time barred. In other words, can the unpaid invoices serve as consideration for a new promise or contract with the Madison County Board of Supervisors allowing it to pay the previous invoices for work certified to have been performed by the Madison County Engineer.

Response

When permissible under the facts, a county or municipality has a duty to assert the statute of limitations as a defense in refusing to pay a claim. In *Trowbridge v. Schmidt*, 83 Miss. 475 (1903), the Mississippi Supreme Court stated:

It is indisputable that a municipal board cannot lawfully give away public money. It is certain, also, that a former liability extinguished by the bar of the statute of limitations is no debt. It follows that paying it is giving away public money, and this is ultra vires, and the treasurer may refuse to pay it. . . . It is the plain duty of a county or municipal board to plead the statute of limitations when it can, under the facts. Such boards are the people's trustees.

(See also MS AG Ops., *Seales* (February 17, 2004) and *Kierschten* (March 19, 1980) (citing *Trowbridge*) and 54 C.J.S. Section 52.

This office has stated:

Section 15-1-51 of the Mississippi Code generally provides that statutes of limitation do not run against the State, political subdivisions and municipalities; however, statutes of limitation do run in favor of the State, counties, and municipalities. This office has previously opined that a board

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of supervisors has the duty to assert applicable statute of limitations defenses. We opined that the assertion of such a defense is not discretionary and may not be waived. MS AG Op., *Dobbins* (Nov. 14, 2003).

As mentioned in your request, this office previously responded to the county's question regarding lawful payment of these invoices and stated that the 2006 and 2008 debts were barred by the three year general statute of limitation found in Miss. Code Ann. Section 15-1-49. See MS AG Op., *Hamer* (July 22, 2011). Based upon the facts presented, payment of all three invoices is now barred by the statute of limitations.

Please let us know if this office can be of further assistance.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

OFFICIAL By:  OFFICIAL
Elizabeth S. Bolin
Special Assistant Attorney General