



*Lynn Fitch*  
**ATTORNEY GENERAL**  
OPINIONS AND POLICY

March 3, 2021

Ben H. Stone, Esq.  
Attorney for the Mississippi State Port Authority  
1310 Twenty Fifth Avenue  
Gulfport, Mississippi 39501

Re: Mississippi State Port Authority's Power to Lease and Contract

Dear Mr. Stone:

The Office of the Attorney General has received your request for an official opinion.

### **Background Facts**

According to your request, the Mississippi State Port Authority (the "MSPA") enters into long-term leases that provide lessees designated areas at the Mississippi State Port at Gulfport (the "Port") to conduct business operations. Your request further states that the MSPA is currently in advanced negotiation of a long-term lease and operating agreement that would provide a third-party operator with a lease for the exclusive use and possession of certain portions of the Port designated as the operating area and the exclusive right to provide the operational services to each respective maritime user or shipper at the Port. Your request goes on to provide additional details related to the proposed agreement. We understand that, along with the MSPA, the Mississippi Development Authority ("MDA") will be a signatory to the referenced agreement.

### **Issues Presented**

1. Whether the MSPA has authority to enter into a binding contract granting a third party operator a lease for the exclusive use and possession of certain portions of the Port together with the exclusive right to provide the operational services to each respective maritime tenant and shipper utilizing that portion of the Port subject to the lease?
2. If the MSPA has the authority to enter into the binding contract, would sovereign immunity bar actions against the MSPA brought on a breach of contract theory under such contract?

### **Brief Response**

1. The MSPA—acting jointly with the MDA—may lease certain portions of the Port to a third-party, with such lease providing the lessee exclusive use and possession of the leased area for a period not to exceed ninety-nine years. Further, the MSPA is authorized to enter into all contracts that are “incidental to or necessary for the . . . operation of any ports, harbors, rivers, channels and waterways . . .” Miss. Code Ann. § 59-5-37.
2. The state does not enjoy sovereign immunity for claims of breach of an express contract.

### **Applicable Law and Discussion**

As an initial matter, whether the provisions of a specific long-term lease, operating agreement, and/or contract being negotiated by the MSPA comport with applicable state law requires this office to interpret the contractual language, which we cannot do. MS AG Op., *Matthews* at \*2 (Nov. 1, 2019). Such determination must be made by the MSPA, subject to judicial review. MS AG Op., *Cheney* at \*2 (Nov. 14, 2011). Similarly, this office cannot opine on any potential effect the long-term lease and operating agreement would have on existing leases or contractual agreements to which the MSPA is a party or any other existing rights or obligations.

The MSPA is an agency of the State that performs an essential governmental function “for the benefit of the people of the State of Mississippi.” Miss. Code Ann. §§ 59-5-21, 59-5-7. It is charged with the oversight of the Port. *Miss. State Port Auth. at Gulfport v. S. Indus. Contractors LLC*, 271 So. 3d 742, 754 (Miss. Ct. App. 2018).

The “State Ports and Harbors Law”—the legislation under which the MSPA was formed—declared that it was “the public policy of the state to aid and encourage the promotion, development, improvement, and expansion of the state’s ports, harbors and inland waterways.” Miss. Code Ann. § 59-5-3. The Mississippi Legislature further instructed that the provisions of this Law “shall be construed liberally and broadly” to effectuate its policy and purposes. *Id.* at § 59-5-5(1).

With respect to your first question, in relation to its operation of the Port, the MSPA has the following authority to lease real property and improvements:

The [MDA], acting jointly with the state port authority, is authorized to set aside, or lease all or portions of any lands, roads, docks, sheds, warehouses, elevators, compresses, floating dry docks, graving docks, marine railways, tugboats, or any other necessary or useful improvements constructed or acquired by it to individuals, firms, or corporations, public or private, for port, harbor, commercial or industrial purposes for a period not to exceed ninety-nine years, or to execute a conveyance of sale, except as otherwise limited by law, on such terms and conditions and with such safeguards as would best promote and protect the public interest. Any industrial lease of lands may be executed upon such terms and conditions and for

such monetary rental or other consideration as may be found adequate and approved by the board in orders or resolutions authorizing the same.

Miss. Code Ann. § 59-5-35.<sup>1</sup> Under this broad authority, the MSPA, acting jointly with the MDA,<sup>2</sup> may lease certain portions of the Port to a third party, with such lease providing the lessee exclusive use and possession of the leased area for a period not to exceed ninety-nine years.

In addition to its power to lease property, the MSPA has explicit statutory authority to contract with other parties to carry out its duties. Specifically, the Code provides that the:

State Port Authority, in the performance of its duties, may . . . make all contracts . . . incidental to or necessary for the advancement, promotion, development, establishment, insurance, maintenance, repair, improvement and operation of any ports, harbors, rivers, channels and waterways . . . .

Miss. Code. Ann. § 59-5-37; *Tradigrain, Inc. v. Miss. State Port Auth.*, 701 F.2d 1131, 1133 (5th Cir. 1983) (citing Section 59-5-37 and finding the MSPA has the power to “enter into contracts necessary to its operation”). Accordingly, the MSPA is vested with broad authority to enter into a contract that is “incidental to or necessary for the . . . operation of . . . [the] [P]ort[ ].” Miss. Code. Ann. § 59-5-37.

Turning to your second question, case law in Mississippi provides that the State does not have the protection of sovereign immunity for claims of breach of an express contract.<sup>3</sup> *See, e.g., Cig Contractors, Inc. v. Miss. State Bldg. Comm’n*, 399 So. 2d 1352, 1355 (Miss. 1981) (finding that under a breach of contract claim, “the defense of sovereign immunity is not available”); *Weible v. Univ. of S. Miss.*, 89 So. 3d 51, 63 (Miss. Ct. App. 2011) (“Here, it is undisputed that sovereign immunity does not relieve USM of its obligations under an express contract . . . .”). Our courts have expounded on this principle by stating:

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<sup>1</sup> Additionally, to the extent that the MSPA has not expressly been granted such authority, it may exercise all powers and authority granted to county port authorities or county development commissions under Sections 59-9-15 through 59-9-35. Miss. Code Ann. § 59-5-31.

<sup>2</sup> Section 59-5-11 similarly grants broad power to “lease . . . ports, harbors, waterways, channels, wharves, piers, docks, quays, elevators, tipples, compresses, bulk loading and unloading facilities, warehouses, floating dry docks, graving docks, marine railways, tugboats, ships, vessels, shipyards, shipbuilding facilities, machinery and equipment, dredges and any other facilities required and incidental to the construction, outfitting, drydocking or repair of ships or vessels, and water, air and rail terminals, and roadways and approaches thereto, and other structures and facilities needful for the convenient use of the same in the aid of commerce . . . .”

<sup>3</sup> However, a claim for breach of an implied contractual term is subject to and governed by the Mississippi Tort Claims Act (“MTCA”). *Jones v. Miss. Inst. of Higher Learning*, 264 So. 3d 9, 24 (Miss. Ct. App. 2018) (“Therefore, Jones is correct that the MTCA does not apply to any claim alleging a breach of the express terms of a contract; however, the MTCA does apply to a claim for breach of any implied term of any contract, including the implied covenant of good faith and fair dealing.”); *see also City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 711 (Miss. 2005) (“Miss. Code Ann. § 11-46-3 grants immunity to the state and its political subdivisions for ‘breach of implied term or condition of any warranty or contract.’”). The Attorney General expresses no opinion as to factual circumstances creating either express or implied contractual obligations for purposes of the MTCA.

The general rule is that when the legislature authorizes the State's entry into a contract, the State necessarily waives its immunity from suit for a breach of contract. Where the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations.

*Gulfside Casino P'ship v. Miss. State Port Auth. at Gulfport*, 757 So. 2d 250, 256 (Miss. 2000) (quoting *Cig Contractors, Inc.*, 399 So. 2d at 1355); *Weible*, 89 So. 3d at 63 (same).

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Kyle Williams

Kyle Williams  
Special Assistant Attorney General

OFFICIAL OPINION