



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

MEMORANDUM

TO: State Agencies, University Systems, and Institutions of Higher Education

FROM: Office of the Attorney General – General Counsel Division

DATE: June 2014

RE: Updates - Outside Counsel Rules and Templates

Pursuant to Subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General (“OAG”) has adopted administrative rules related to the retention and contracting of outside legal counsel by state agencies, university systems, and institutions of higher education (collectively “agencies”). Effective June 5, 2014, the OAG has amended those administrative rules regarding the requirements for outside counsel to submit a disclosure statement related to conflicts of interest to the agency as well as for the agency to submit to the OAG information related to the disclosure statement when the outside counsel contract is submitted to the OAG for approval.

Therefore, the OAG is taking this opportunity to revise some of its processes, procedures, forms, and templates related to the retention and contracting of outside counsel. The purpose of this memorandum is to inform you of these updates and to suggest you visit the OAG’s website at www.texasattorneygeneral.gov to access the revised forms and templates. Because of these changes, we ask that you review this memorandum carefully. We also ask that you share this memorandum with your current and potential outside counsel so that they can perform a review as well.

Retention to Retain Outside Legal Counsel. The Attorney General serves as the state’s legal counsel, therefore the OAG serves as legal counsel to all agencies. Agencies may not retain or select outside counsel without first receiving authorization and approval from the OAG to do so. If an agency requires legal services from outside counsel, it must first submit to the OAG a completed Request to Retain Outside Counsel form. The request form and any supporting documentation should be sent to the following e-mail address: general.counsel@texasattorneygeneral.gov.

Upon receipt, the OAG will review the Request to Retain to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the request, the OAG will notify the agency in writing that its Request to Retain has either been approved or denied, or that additional information is required to make a decision. Please remember that an approval to retain outside counsel does not constitute approval of an outside counsel contract.

Competitive Procurement Process. Unless an exemption is granted by the OAG, an agency is required to publish a Request for Qualifications (“RFQ”) before selecting outside counsel. The RFQ must be published in the Texas State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency’s discretion. Please note that the RFQ may be published before or after the Request to Retain Outside Counsel has been submitted

to the OAG. Since the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must provide the OAG with a reasonable justification in writing for the exemption in its Request to Retain Outside Counsel. Agencies must follow the RFQ process requirements regardless of the anticipated maximum liability of a contract unless a specific exemption is granted by the OAG.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest. Effective June 5, 2014, Sections 57.4 and 57.5 of the OAG's administrative rules were amended to provide a formalized process for the disclosure of potential conflicts of interest by selected outside counsel.

New rule §57.4(d) and (e) provides as follows:

(d) Conflict of Interest.

(1) After selecting the Outside Counsel, the Agency shall require the law firm to submit a written disclosure statement identifying every matter in which the firm represents, or has represented, within the past calendar year, any entity or individual in any litigation matter in which the entity or individual is directly adverse to the State of Texas or any of its boards, agencies, commissions, universities, or elected or appointed state agency officials in connection with their official job duties and responsibilities. "Litigation" means the matter has been filed in the public record in either state or federal court.

(2) If a disclosure statement is submitted, it must include a short description of the nature of the matter and the relief requested or obtained in each matter and any identifying cause or case number.

(e) The Agency shall determine given the disclosure statement whether to continue with its choice of Outside Counsel.

New rule §57.5 provides as follows:

(e) Agency shall submit to the OAG the disclosure statement previously submitted by the selected Outside Counsel to the Agency. If the Agency is satisfied in its choice of Outside Counsel selected, the Agency shall submit to the OAG an affirmative statement that it is satisfied in its choice of selected Outside Counsel notwithstanding the information contained in the disclosure statement.

Therefore, before proceeding to entering into a contract with the selected outside counsel, the agency should obtain the required disclosure from the outside counsel and be prepared to submit that and the agency's affirmative statement to the OAG when the agency forwards the outside counsel contract to the OAG for the OAG's approval.

Obtaining the OAG's Approval of the Outside Counsel Contract. The OAG's approval of the Request to Retain is not the OAG's approval of the resulting Outside Counsel Contract. After obtaining authorization to retain outside counsel and completion of the RFQ process (unless exempted), an agency may enter into a contract with its selected outside counsel. However, that outside counsel contract ("OCC") must be approved by the OAG in order to be valid and enforceable. The OAG's standard Outside Counsel Contract template is posted on the OAG's website which must be used by the agency and outside counsel. If an agency determines that a change to the contract template is required in a particular instance, the agency must request, in writing, and receive permission from the OAG to make the change before the modified contract is used. Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with our contract template.

The agency and the outside counsel will complete and sign the outside counsel contract before submitting the contract to the OAG for review. The OAG only requires one signed copy of the OCC to be submitted. The outside counsel contract and any supporting documentation should be sent to the following e-mail address: general.counsel@texasattorneygeneral.gov. After reviewing the OCC, the OAG will either approve it and return it to the agency or notify the agency that the contract has been rejected.

When completing the outside counsel contract, please be mindful of the following:

Total Liability to Outside Counsel - The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the contract cap amount.

Contract Term - The start date and end date of the contract term.

- It is preferred that contract term end on or before August 31st of a biennium.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, upon "the conclusion of the litigation."

Addendum B to the Contract:

Timekeeper Rates – Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed \$525/hour, while hourly rates for paralegals shall not exceed \$225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns.
- Rate Range - A rate range for each timekeeper classification can be used instead of specifically identifying each timekeeper by name and hourly rate. A rate range provides more flexibility during the term of the contract than specifically identifying each timekeeper. An example of rate range would be "Partners are \$250/hr to \$300/hr."

However, if the agency wants to ensure that certain timekeepers are providing the legal services, naming each timekeeper and their individual rates may be preferred. An example of specifically identifying a timekeeper would be "Susan Smith, Partner, \$250/hr."

Fixed Fee or Fee Schedule for Projects or Matters - Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be

appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is \$900."

Billing Period – The billing period is the interval specified in the contract which determines the frequency Outside Counsel will submit invoices to the agency. The agency and outside counsel will determine the billing period for a particular contract. For most contracts, the billing period will likely be monthly.

Travel Rate – In Addendum B of the OCC template, the agency and outside counsel are permitted, but not required, to pay for travel time by setting travel rates. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC of the OCC. If travel rates are not set in an OCC, outside counsel may not charge or seek reimbursement for time spent traveling on agency matters. If an attorney is providing legal services while traveling, however, the attorney may charge the standard hourly rate.

Contract Number - The OAG establishes a contract number for each outside counsel contract. Agencies may establish their own contract number in addition to the OAG's Contract Number; however, agencies must note the OAG contract number in all submissions to the OAG.

Texas Law License – An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC will require Outside Counsel to provide legal services and advice on Texas law, then a Texas licensed attorney must be utilized and named in Addendum B of the OCC. A law firm with no Texas licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in very special circumstances will the OAG approve an outside counsel law firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice only.

Expenses. If an outside counsel bills for allowable expenses, copies of actual receipts must be submitted. The following is a list of some of the expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Invoices for Legal Services and Expenses. Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the outside counsel contract and administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel invoice in accordance with the administrative rules, it must seek approval from the OAG to pay the invoice.

When an agency determines that an invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval form, as posted on the OAG's website. The completed Request for Voucher Approval form, a copy of the invoice at issue, and all other information required to be submitted by the administrative rules should be sent to the following e-mail address: **OCCInvoice@texasattorneygeneral.gov**. Note that an agency should submit one Request for Voucher Approval form per billing period per contract, but one request form may be used for multiple invoices from the same billing period.

The agency must submit the Request for Voucher Approval form and other required information to the OAG within 10 business days of the agency's receipt of a correct and complete invoice from the outside counsel.

Once the Request for Voucher Approval form and other information are received and reviewed by the OAG, the invoice(s), or a portion thereof, will either be approved or rejected. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If an invoice is rejected, or if the OAG has questions regarding an invoice, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with the outside counsel.

Administrative Fee. Pursuant to Subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of invoices. The fee is non-refundable and outside counsel may not charge or seek reimbursement from the agency for the fee.

The administrative fee is due to the OAG on the date that the outside counsel submits to the agency its first invoice after the adoption date of the administrative rules. Any invoice submitted to the OAG for review after the effective date of the administrative rules will be deemed ineligible for payment until the outside counsel submits the requisite administrative fee to the OAG. For outside counsel contracts that cross the state's fiscal biennium(s), separate administrative fees are due to the OAG for every fiscal biennium covered under the term of the contract. *Please note that an administrative fee is not due for each invoice submitted.*

The OAG has granted an limited exemption from to the administrative fee and invoice review to university systems and institutions of higher education regarding certain outside counsel that provide legal services under an OAG approved outside counsel contract that is solely related to the filing, management, and/or enforcement of system or institution patents, trademarks, and/or copyrights. More information on the limited exemption is found on the OAG's website.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	Administrative Fee
Less than \$2,000.00, but more than \$0.00	\$100.00
Equal to or greater than \$2,000.00 but less than \$10,000.00	\$200.00
Equal to or greater than \$10,000.00 but less than \$50,000.00	\$500.00
Equal to or greater than \$50,000.00 but less than \$150,000.00	\$1,000.00
Equal to or greater than \$150,000.00 but less than \$1,000,000.00	\$1,500.00
Equal to or greater than \$1,000,000.00	\$2,000.00

If the outside counsel contract is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, the outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee.

Outside counsel will submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Amending an Outside Counsel Contract. Any change to the outside counsel contract must be supported by an amendment. Any amendment to an existing outside counsel contract must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment that is signed by the agency and outside counsel. Two amendment templates that may be used are posted on the OAG's website.

Reasons to amend an existing outside counsel contract include increasing the contract cap amount or expanding the scope of legal services. The amendment and any supporting documentation should be sent to the following e-mail address: general.counsel@texasattorneygeneral.gov.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's General Counsel Division. The OAG's website may be updated from time to time with additional information, please consider periodically reviewing that resources. Thank you for your attention to these important matters.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

general.counsel@texasattorneygeneral.gov

The Request for Voucher Approval:

OCCInvoice@texasattorneygeneral.gov

Mail may be sent to:

Outside Counsel Contracts
Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **James Burkhart, Outside Counsel Contract Coordinator, General Counsel Division** – Telephone Number (512) 475-4291.