



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

## **Memorandum**

To: State Agencies, University Systems, Institutions of Higher Education and Prospective Outside Counsel for any of the aforementioned

From: Office of the Attorney General—Financial Litigation & Charitable Trusts Division

Date: July 3, 2019

Re: Outside Counsel Contract 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 outside legal counsel contracts of state agencies, university systems, and institutions of higher education (individually “agency” and collectively “agencies”). In light of recent changes made to the processes and procedures governing these contracts, the OAG is taking this opportunity to inform agencies of these updates and direct agencies to visit the OAG’s website<sup>1</sup> to access the revised forms and templates. Please note that the guidance in this letter updates and supersedes the previously issued Letter to State Agencies dated December 9, 2016.

### **New Policies and Procedures**

**Request 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 utilize services provided by outside counsel without first receiving authorization and approval from the OAG. If an agency requires legal services from any outside counsel whatsoever, regardless of the source of funds that would be used to pay for such legal services or the party engaging such counsel, it must first electronically submit to the OAG a Request to Retain Outside Counsel (“RtR”) through the link available on the OAG’s website.<sup>2</sup> Any questions regarding the Outside Counsel Contract (“OCC”) process should be sent to the following e-mail address:

**[FLDContracts@oag.texas.gov](mailto:FLDContracts@oag.texas.gov)**

Upon receipt, the OAG will review the RtR 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 electronic documents, the OAG will

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<sup>1</sup> <https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts>

<sup>2</sup> Click on the “Request to Retain Outside Counsel” link available at <https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts>

either process the RtR and OCC documents or notify the agency in writing if its request has been denied or if additional information is required to make a decision.

## **Requests to Retain Outside Counsel**

### *a. Designation of Agency Contact and Responsible Attorney*

Agencies must designate an individual employed by the agency to act as the agency contact and handle all matters and correspondence with the OAG related to the RtR and any resulting contract. To the extent the agency contact is not an attorney, the agency must also designate a responsible attorney, employed by the agency's Office of General Counsel, or otherwise representing the agency, who must be familiar with all aspects of the RtR and maintain familiarization with any resulting OCC throughout the life of the contract to avoid any delay in processing the RtR and maintaining the contract. Agencies must ensure the contact information for the designated agency contact and/or the responsible attorney is updated as necessary throughout the duration of the OCC.

### *b. Requirement for System-Wide Contracts for Universities*

University systems and institutions of higher education may not submit on behalf of the system's or institution's individual member schools separate RtRs involving the same or similar legal services provided by the same outside counsel attorney or outside counsel firm. For example, a system may not submit a RtR for two of its member universities, (x) university and (y) university, for the same or similar legal services to be provided by the same outside counsel or outside counsel firm. Instead, all RtRs submitted by a system must identify the system as the contracting party and include the entire amount of the proposed limitation of liability applicable to both (x) university and (y) university. Legal services to be provided by outside counsel under a system OCC, whether immigration, intellectual property, real estate, etc., must be applicable to all of system's universities to which the services will pertain—in this example, both (x) university and (y) university.

### *c. Start and end dates for Outside Counsel Contracts*

Unless OAG determines that compelling circumstances exist, the requested start date for an OCC must not be earlier than the first day of the calendar month in which the RtR is submitted for OAG review. Also, except for OCCs involving litigation legal services, OCCs should terminate no later than the end of the fiscal biennium for which the contract is requested. The term of contracts for litigation legal services may extend beyond the end of the immediate biennium or until the litigation concludes, as determined by the agency in consultation with OAG.

### *d. Documents that Must Accompany Requests to Retain*

Along with the RtR, an agency must attach: (1) an outside counsel's signed conflict disclosure statement; (2) the agency's affirmation statement that it has reviewed the disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the disclosure

statement; and (3) documentation of the eligibility of the requested lead counsel to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. Any RtRs not accompanied by these documents will be rejected, and agencies may be required to resubmit the RtR along with all required documents. Outside counsel's disclosure statement must be dated no more than thirty (30) calendar days earlier than the date on which the RtR is submitted or the date the OAG receives the statement, whichever occurs later.

*e. Guidance for Scopes of Service in Requests to Retain and Contracts*

In the RtR, the proposed scope of services must be narrowly tailored so as to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while also being broad enough to fulfill the agency's objectives through the representation. Failure to narrowly tailor the scope of services will result in a delay in processing the RtR, and could result in the RtR being rejected—which would require the agency to submit a new RtR. Agencies should carefully draft the scope of services in order to obtain the results it desires from the proposed outside counsel representation. Finally, no single RtR may contain a scope of services that permits legal representation across multiple practice areas, unless each is clearly related to the central subject matter of the representation and so described in the proposed scope of services.

*f. Deviation from the OAG Contract Template*

Although the OAG generally will not approve any deviation from the OCC template, the OAG recognizes that exceptional and compelling circumstances could necessitate such changes in rare cases. As a result, the OAG reserves the right to grant exceptions to this policy if the OAG determines it is in the State's best interest to do so. Because the electronic submission process does not allow for any changes to be made to the OCC template, agencies wishing to deviate from the OAG's OCC template must contact the OAG directly to seek approval for the specified changes.

**Competitive Procurement Process**

Unless good cause exists, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel, regardless of the anticipated maximum liability of the OCC. The RFQ must be published in the Electronic 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. Because 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 certify in its RtR that good cause or a reasonable justification exists for the exemption. Reasonable justifications include emergency situations or situations involving continuing legal services under a previously approved OCC that were not able to be completed within the term of the previous agreement through no fault of either the agency or outside counsel. The OAG is not responsible for determining what amounts to good cause or a reasonable justification. Such determinations

must be made independently by the agency in consultation with agency's internal legal counsel and/or agency leadership.

### **Outside Counsel Disclosure Statement Regarding Conflicts of Interest**

As mentioned above, the outside counsel disclosure statements must be attached to the agency's electronic submission of the RtR and must be dated no earlier than thirty (30) days before the date the RtR is submitted or the OAG receives the statement, whichever occurs later. Outside counsel must sign the statement and attest to its completeness and accuracy. The agency must separately affirm it has reviewed the disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.

As a point of clarification, present policy requires that outside counsel disclose any and all conflicts that the entire firm (including any offices located outside the State of Texas) has to any and all agencies of the State of Texas, not merely the agency that is a party to the OCC. That obligation continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and disclose to the agency and OAG any existing or potential conflicts that arise concerning the agency, OAG, or the State of Texas.

The OAG will not modify, alter, waive, or allow agencies to waive this disclosure requirement absent exceptional and compelling circumstances unique to the specific law firm or representation sought.

### **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 OCC and the OAG's 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 Outside Counsel Contract and 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, which is available on the OAG's website.<sup>3</sup> The completed Request for Voucher Approval, a copy of the subject Invoice(s), and all other information required to be submitted by the administrative rules make up one "Voucher Packet".

An agency should submit one Voucher Packet per billing period per contract. However, one Voucher Packet may include multiple Invoices from the same billing period. Multiple Voucher Packets covering the same time period as other Voucher Packets for the same contract will be rejected as incomplete, and may result in an Invoice not being approved for payment.

Voucher Packets should be sent to the following e-mail address: **OCCInvoice@oag.texas.gov**.

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<sup>3</sup> Click on the "Request for Voucher Approval" link available at <https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts>

Outside counsel must submit Invoice(s) to the agency for review within one calendar month from the end of the relevant billing period covered by the Invoice. Pursuant to Section 402.0212 of the Texas Government Code, the agency must submit Invoices and the corresponding Request for Voucher Approval to the OAG within twenty-five (25) days of the agency's receipt of a correct and complete Invoice from the outside counsel. The 25-day-period begins once the last, timely, correct and complete Invoice for the relevant billing period has been received by the agency. "Correct and complete Invoice" is defined in Texas Administrative Code Rule §57.6(b).

Outside counsel's failure to timely submit each Invoice constitutes a breach of the outside counsel contract. Failure to timely submit a Voucher Packet to OAG for review may result in OAG declining to approve payment of the Invoice(s) included in the Voucher Packet, unless OAG determines that good cause exists for the delay. *No late Voucher Packets or Voucher Packets that include late Invoices will be reviewed by the OAG unless a reasonable justification for the delay has been provided.*

Once the Voucher Packet is received and reviewed by the OAG, the Invoice(s), or a portion thereof, will either be approved or rejected, or the agency will be notified that more information is required. 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 any Invoices under a Voucher Packet are rejected, or if the OAG has questions regarding a Voucher Packet, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with 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 is due each fiscal biennium. Outside counsel may not charge or seek reimbursement from the agency for the fee.

The initial administrative fee is due to the OAG within thirty (30) calendar days of the date the proposed OCC has received final approval by the OAG and returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG's approval may be withdrawn, rendering the OCC void. Any Invoice submitted to the OAG for review as part of a Voucher Packet prior to the receipt of the administrative fee will be deemed ineligible for payment until outside counsel submits the requisite administrative fee to the OAG. For OCCs that cross the State's fiscal biennium, separate administrative fees are due to the OAG on September 1 of each subsequent biennium covered by the term of the contract. *Please note that an administrative fee is not due for each Invoice submitted.*

The OAG has granted a limited exemption from the administrative fee and Invoice review to university systems and institutions of higher education regarding certain legal services that are solely related to the prosecution and management of system or institution intellectual property, which includes patents, trademarks, and copyrights. This limited exemption does not apply to the enforcement of intellectual property rights—including litigation—or corporate legal services relating to the monetization of intellectual property. The OAG may rescind this limited exemption at any time. If the OAG decides to conduct periodic testing of Invoices under an OCC that qualified for this limited exemption, the exemption will be deemed rescinded and the applicable non-refundable administrative fee is immediately due upon notice by the OAG that testing will occur.

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

<b>Limitation of Liability Amount</b>	<b>Administrative Fee</b>
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

**Please note that no administrative fee is due on a contract with a maximum liability of \$0.00.**

If the OCC is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee within thirty (30) calendar days of the date the amendment is approved by the OAG and returned to the agency.

Outside counsel must 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.

### **Obtaining the OAG’s Approval of the Outside Counsel Contract**

As described above, if an agency determines that a change to the OCC template is required in a particular extraordinary instance, the agency must contact the OAG; the electronic submission process does not allow for any changes to be made to the OCC template.

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 the OAG's contract template.

When completing the electronic RtR, 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 limitation of liability amount.
- All amounts paid for expenses under a contract must count toward the limitation of liability specified in that contract, regardless of whether outside counsel was reimbursed for said expenses or whether such expenses were paid by the agency directly.
- Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

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

- In most cases, the contract term should end on or before August 31st of a biennium.
- The start of the contract term may be no earlier than the first day of the month in which the OAG received the RtR.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, at a date beyond the biennium in which the contract is executed. For example, if the contract involves litigation that has an indiscernible duration, it is acceptable to use a date such as “8/31/2030” or “8/31/2040” or similar dates to account for the uncertainty.

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 non-attorney legal work (limited to paralegals, legal assistants, and other timekeepers performing similar legal work) shall not exceed \$225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns. Billing for administrative support is not allowed under Section 5.5 of the OCC.
- “Not to exceed”—Agencies that wish to use hourly rates to identify an entire classification of employees must now use a “not to exceed” rate. For example, such a rate would appear as “Partners’ rates shall not exceed \$300/hr.” If, however, the agency wants to ensure that certain individuals are providing the legal services, naming each individual and their specific hourly rate may be preferred. An example of identifying a particular individual, the individual’s classification, and the individual’s hourly rate would be “Susan Smith, Partner, not to exceed \$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.” In the event a proposed outside counsel contract involves both fixed fee and hourly rates, an agency must draft and upload a new Addendum B that includes language specifically directing when either the fixed fee or hourly rate ranges will be used. For example, under the previous example, a contract involving both fixed fees for H-1B Visa Petitions and hourly rates for other services would state “Preparation of H-1B Visa Petition is \$900. All other services are governed by the identified hourly rates.”

Please note, fixed fees should be treated as set amounts, rather than as not-to-exceed limitations. For any Invoices with amounts deviating from the fees established by the Outside Counsel Contract, the reason(s) for the deviation(s) must be clearly identified on the Invoice itself. Otherwise, the OAG will be unable to approve payment of the Invoice.

If a subcontractor is providing legal services at a fixed fee, a statement must be provided to the OAG certifying that the time spent on the flat fee work was, at minimum, comparable to what would have been spent had the firm been billing at the maximum hourly rate allowed under Addendum B of the Outside Counsel Contract.

Billing Period—The billing period is the interval that determines the frequency outside counsel will submit Invoices to the agency. The agency and outside counsel will determine and specify the billing period in each specific contract. For most contracts, the billing period will likely be monthly - beginning with the first day of the calendar month and ending with the last day of the calendar month. Additionally, as noted above, outside counsel must submit the Invoice(s) to the agency within one calendar month from the end of the relevant billing period covered by the Invoice. Any untimely invoice submissions by Outside counsel will delay processing and may constitute a breach of the contract, which could result in an Invoice being disapproved for payment. Agencies likewise must review Invoices and submit Voucher Packets to the OAG in a timely manner.

Travel— By setting hourly travel rates in a contract, the agency and outside counsel are permitted, but not required, to pay for time spent traveling to or from a place where legal services are to be provided to the agency. Note that an attorney’s travel rate may not exceed half of that attorney’s standard hourly rate under the OCC. OAG does not consider it a best practice for attorneys to provide legal services while traveling; however, if an attorney is providing legal services while traveling, the attorney may charge the standard hourly rate for the time spent providing those legal services.

Additionally, any attorneys or other timekeepers who are traveling for work under the contract must either be named or fall under one of the timekeeper classifications in Addendum B of the contract. This applies even if the firm is typically only providing work under a fixed fee schedule.

Contract Number—The OAG establishes a contract number for each OCC. An agency may establish its own contract number in addition to the OAG’s contract number; however, an agency must note the OAG contract number in all correspondence with 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 requires outside counsel to provide legal services and advice on Texas law, then a Texas-licensed attorney must be utilized and named as lead counsel 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 limited circumstances will the OAG approve an outside counsel 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.

## **Expenses**

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted to the Agency. The following are examples of expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare or premium or preferred benefits related to 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.

Pursuant to Texas Government Code §402.0212, the OAG shall review outside counsel's Invoices only to determine whether the legal services for which the agency is billed were performed within the term of the contract and are within the scope of the legal services authorized by the contract and are therefore eligible for payment. Agencies shall submit to the OAG a statement with each Invoice confirming the agency-approved amounts to be paid to outside counsel for legal services and expenses allowed under the contract and the amount of any expenses allowed under the contract which were paid for directly by the agency or any party other than outside counsel.

Pursuant to Texas Government Code §402.0212, the agency shall also include with any Voucher Packet (and associated Invoices) submitted to OAG for approval, a written certification, as provided by the Request for Voucher Approval, that the legal services for which the agency is billed were performed within the term of the contract, are within the scope of the legal services authorized by the contract and are reasonably necessary to fulfill the purpose of the contract.

## **Amending an Outside Counsel Contract**

Any change to an executed and OAG-approved OCC must be supported by a written amendment. Any amendment to an existing OCC must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment, using the fillable electronic amendment template is available on OAG's website.<sup>4</sup>

Reasons to amend an existing outside counsel contract include increasing the limitation of liability amount or expanding the scope of legal services. If the limitation of liability amount is being increased, the agency should enclose a proper justification (for example, if at least 75% of the

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<sup>4</sup> Click on the "Amendment to Outside Counsel Contract" link available at <https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts>

current limitation of liability has been spent) in its e-mail requesting the increase. The amendment and any supporting documentation should be submitted electronically through the fillable template on the OAG's website.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's Financial Litigation and Charitable Trusts Division. The OAG's website may be updated from time to time with additional information. Please periodically review that resource. 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:

**FLDContracts@oag.texas.gov**

The Request for Voucher Approval:

**OCCInvoice@oag.texas.gov**

Mail may be sent to:

Outside Counsel Contracts  
Office of the Attorney General  
Financial Litigation and Charitable Trusts 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 **Mari Gomez, Outside Counsel Contract Coordinator**, Financial Litigation and Charitable Trusts Division—Telephone Number (512) 475-1849.