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ATTORNEY GENERAL OF TEXAS

August 2, 2021

The Honorable Terry Canales
Chair, House Committee on Transportation
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0378

Re: Whether amendments to a contingent fee contract for legal services entered into before September 1, 2019, must comply with chapter 2254 of the Government Code (RQ-0397-KP)

Dear Representative Canales:

You ask whether amendments to a contingent fee contract for legal services originally entered into before September 1, 2019, must comply with certain provisions in chapter 2254 of the Government Code.¹

In 2019, the Legislature enacted oversight provisions that apply to contingent fee legal contracts entered into on or after September 1, 2019.

Chapter 2254 governs state and local contracts for professional and consulting services. *See generally* TEX. GOV'T CODE §§ 2254.001–.154. Subchapter C, about which you ask, governs contingent fee contracts for legal services. *See generally id.* §§ 2254.101–.110. As a result of changes² to subchapter C made in 2019 during the Eighty-sixth legislative session, political subdivisions entering into contingent fee legal service contracts must, among other things, adhere to a specified method for calculating contingent fees, including a cap on fees, and must comply with certain approval requirements. *See id.* §§ 2254.106 (establishing fee structure), 2254.1036 (requiring prior justification to the public by the governmental body, as well as written findings documenting the justification), 2254.1038 (requiring Attorney General approval of the contract). A contract made in violation of subchapter C “is void as against public policy.” *Id.* § 2254.110. These requirements apply “only to a contract entered into on or after the effective date” of the bill

¹*See* Letter from Honorable Terry Canales, Chair, House Transp. Comm., to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (Feb. 1, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0397KP.pdf> (“Request Letter”).

²*See* Act of May 24, 2019, 86th Leg., R.S., ch. 857, §§ 2, 4, 2019 Tex. Sess. Law Serv. 2320, 2320–2322 (“House Bill 2826”).

that enacted the changes, which is September 1, 2019. House Bill 2826 § 10; *see also id.* § 11 (“This Act takes effect September 1, 2019.”).

In 2021, the Legislature broadened the scope of contingency fee agreements to which oversight applies.

Since the time of your request, the Eighty-seventh Legislature in 2021 amended the definition of a contingent fee contract to “include[] an amendment to a contract for legal services . . . if the amendment: (A) changes the scope of representation; or (B) may result in: (i) the filing of an action; or (ii) the amending of a petition in an existing action.”³ This change was made effective “immediately . . . [upon] a vote of two-thirds of all the members elected to each house,” which occurred on May 19, 2021. Senate Bill 1821 § 3. The new definition of “contingent fee contract” applies “to a contract or contract amendment entered into on or after” May 19, 2021. *Id.* § 2 (referring to the effective date of the bill).

With this background in mind, we address your question of whether a contract amendment occurring on or after September 1, 2019, that changes the scope of work of a contract existing prior to that date must comply with the contingency fee contract provisions of chapter 2254. *See* Request Letter at 2 (asking specifically whether failure to adhere to requirements regarding the governmental approval process, Attorney General approval, and a cap on fees would render the amendments void). As an example scenario, you ask whether a political subdivision that contracted with attorneys “before September 1, 2019 to pursue a multimillion-dollar lawsuit for alleged defects in the construction of a specified elementary school [may] amend that contract after September 1, 2019 to allow the attorneys to pursue other multimillion-dollar lawsuits for alleged defects in the construction of other school buildings” or whether such an amendment is “void and unenforceable.” *Id.* You do not specify the timing of such an amendment.

For contracts amended on or after May 19, 2021, an expanded definition of “contingent fee contract” applies.

If the contract is amended on or after May 19, 2021, a court would apply the newly-expanded definition of “contingent fee contract,” which includes an amendment that “changes the scope of representation” or which “may result in . . . the filing of an action; or . . . the amending of a petition in an existing action.” Senate Bill 1821 § 1. Given that the scenario you describe would change the scope of representation, a court would likely find that such an amendment is subject to the contingency fee contract provisions of chapter 2254 of the Government Code, including the governmental approval process, Attorney General approval, and a cap on fees. *See* TEX. GOV’T CODE §§ 2254.106 (establishing fee structure), 2254.1036 (requiring prior justification to the public by the governmental body, as well as written findings documenting the justification), 2254.1038 (requiring Attorney General approval of the contract).

³Act of May 19, 2021, 87th Leg., R.S., S.B. 1821, § 1 (to be codified as an amendment to TEX. GOV’T CODE § 2254.101(2)) (“Senate Bill 1821”).

For contracts amended after September 1, 2019, but prior to May 19, 2021, House Bill 2826’s oversight provisions can still apply under certain circumstances.

The Eighty-sixth Legislature in 2019 made the requirements of House Bill 2826 prospectively applicable to contracts “entered into” on or after September 1, 2019, but it did not define what it means to “enter into” a contract for purposes of the bill. House Bill 2826 § 10. Generally, a party enters into an enforceable contract when there is (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party’s consent to the terms, (5) execution and delivery of the contract with the intent that it be mutual and binding, and (6) consideration. *Coleman v. Reich*, 417 S.W.3d 488, 491 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

When a contract is modified, there “is some change in an original agreement that introduces a new or different element into the details of the contract, but [the modification] leaves its general purposes and effect undisturbed.” *In re F.C. Holdings, Inc.*, 349 S.W.3d 811, 815 (Tex. App.—Tyler 2011, orig. proceeding); *see also Enserch Corp. v. Rebich*, 925 S.W.2d 75, 83 (Tex. App.—Tyler 1996, writ dism’d by agr.). A contract modification must likewise satisfy all the essential elements of a contract. *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). A contract modified thus “constitutes a new agreement that takes the place of the original.”⁴ *Miller v. McCarty*, 323 S.W.3d 612, 615 (Tex. App.—Texarkana 2010, no pet.); *see also Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 647 (Tex. App.—Dallas 2015, no pet.) (“A modification to a contract creates a new contract that includes the new modified provisions and the unchanged old provisions.”).

We observe that House Bill 2826 added several provisions to chapter 2254, subchapter C, of the Government Code that focus on the legal services to be provided. For example, subsection 2254.1036(a)(1)(A) requires a political subdivision to notify the public of “the reasons for pursuing the matter that is the subject of the legal services.” TEX. GOV’T CODE § 2254.1036(a)(1)(A). In connection with the approval of a contingent fee contract, a political subdivision must state its findings in writing that “there is a substantial need for the legal services” in question. *Id.* § 2254.1036(b)(1). When it submits the contract to the Attorney General for approval, the political subdivision must include “a description of the matter to be pursued.” *Id.* § 2254.1038(a)(1). And the Attorney General can deny that approval if “the legal matter . . . presents one or more questions of law or fact that are in common with a matter the state has already addressed or is pursuing.” *Id.* § 2254.1038(b)(3)(A). These provisions suggest that the details of the underlying legal services are important elements for the justification of a contingent fee legal arrangement. As such, in a scenario where this element is changed through an amendment, a modified “new” contract results.

Here, the amendment described would expand the scope of work to allow attorneys to pursue additional multimillion-dollar lawsuits for alleged defects in the construction of other school buildings. *See* Request Letter at 2. Thus, a court could find that the amended contract is a new contract “entered into” for purposes of the requirements in House Bill 2826.

⁴Whether a contract has been modified “depends on the parties’ intentions and is a question of fact.” *Med. Imaging Solutions Grp., Inc. v. Westlake Surgical, LP*, 554 S.W.3d 152, 161 (Tex. App.—San Antonio 2018, no pet.).

Under either timing scenario, failure of an amended contingency fee contract subject to oversight provisions to meet those requirements renders the contract void.

If a court finds that an amended contingency fee contract for legal services is subject to chapter 2254's requirements, and the amended contract failed to meet those requirements, it would be void under subsection 2254.110 of the Government Code. TEX. GOV'T CODE § 2254.110 ("A contract entered into or an arrangement made in violation of this subchapter is void as against public policy, and no fees may be paid to any person under the contract or under any theory of recovery for work performed in connection with a void contract.").

S U M M A R Y

House Bill 2826 from the Eighty-sixth Legislature amended subchapter C of chapter 2254 of the Government Code to add certain requirements to contingent fee contracts for legal services entered into on or after September 1, 2019. Senate Bill 1821 from the Eighty-seventh Legislature, effective on May 19, 2021, broadened the reach of those requirements by amending the definition of “contingent fee contract” in subchapter C to include amendments to contingent fee contracts under certain circumstances.

To the extent a contract amendment expands the scope of legal services to encompass a new legal matter, whether made before or after May 19, 2021, a court could find on particular facts that the amended contract is subject to chapter 2254 requirements regarding the governmental approval process, Attorney General approval, and a cap on fees. A contract amendment subject to chapter 2254 of the Government Code but failing to meet the law’s requirements is void under subsection 2254.110.

Very truly yours,



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